



Osiru v Rainforest Farmlands Kenya Limited (Employment and Labour Relations Cause E32 of 2021) [2022] KEELRC 12890 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12890 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E32 OF 2021
HS WASILWA, J
OCTOBER 13, 2022**

BETWEEN

DAVID NJITE OTIENO OSIRU CLAIMANT

AND

RAINFOREST FARMLANDS KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed an amended statement of claim on August 17, 2021 alleging that the respondent unfairly terminated his services. He seeks the following reliefs:
 - a. One and a half months' notice as per the handbook of Kshs 204, 900.
 - b. Salary for the month of April, 2021 of Kshs 136,600.
 - c. Annual leave balance for 14 days 2020-2021 of Kshs 63, 746.
 - d. Telephone allowance for the month of April,2021 of Kshs 2,500.
 - e. Balance of off days in 2014 (11 days) of Kshs 50,095.
 - f. Unpaid allowances on public holidays, 2015(5 days) of Kshs 45,540.
 - g. Unpaid allowances on public holidays, 2016(5 days) of Kshs 45,540.
 - h. Unpaid allowances on public holidays, 2017(4 days) of Kshs 36,432.
 - i. Unpaid allowances on public holidays, 2018(2 days) of Kshs 18,216.
 - j. Unpaid allowances on public holidays, 2019(4 days) of Kshs 36,432.
 - k. Unpaid allowances on public holidays, 2020(4 days) of Kshs 36,432.



- l. Accumulated overtime from September 15, 2014 to April 28, 2021(5023hrs) at a rate of Kshs 853 per hour of Kshs 4,284,617.
 - m. Leave travelling allowance for 2021 of Kshs 27, 320.
 - n. Compensation for unfair termination (12 months of Kshs 136,600 per month0 of Kshs 1,639,200.
 - o. Refund covid-19 medical expenses of Kshs 13500.
 - p. Year 2020 bonus at 50% of basic salary of Kshs 68,300.
 - q. Pension at 10% of Kshs 136,00 for the 12 months, 16 years Kshs 2,622,720.
 - r. Any other relief that this court may deem fit to grant.
 - s. Costs of this suit.
2. The respondent filed a defence and counterclaim on the September 23, 2021 alleging that the claimant was dismissed for justified reasons after being subjected to disciplinary hearing which he participated in and calculated his payment including his pension claim, however that the same was not paid because the claimant has not cleared with the respondent. The respondent prayed for the suit to be dismissed with costs. in the counterclaim, the respondent prayed for the claimant to reimburse Kshs 100,572 being cost of a laptop, carriage bag and wireless mouse issued to the claimant and never returned and Kshs 60,000 rent per month, from the date of termination till the date the claimant vacates, being foregone rent of a cottage allocated to the claimant during pendency of his employment, which he has failed to vacate upon termination. In the said counterclaim, the respondent prayed for the following reliefs; -
- a. Special damages of Kshs 100,572 being the cost of the laptop, carriage bag and wireless mouse issued to the claimant by the respondent.
 - b. A declaration be issued that the claimant is liable for the costs of all damaged and misplaced items in the cottage issued to him by the respondent.
 - c. General damages for trespass.
 - d. Foregone rent at the rate of Kshs 60,000 per month since April 28, 2021 until the date when the claimant vacates the premises.
 - e. Costs of the suit and counterclaim.
 - f. Interest at court rates on prayers (a), (b), (c) & (d) from the date such amounts fell due until payment in full.
 - g. Any other relief that this honourable court may deem fir to grant.
3. The suit was heard on May 25, 2022 and July 7, 2022 when the claimant testified as Cw1 while the respondent called her human resource manager, Emma Nyarangi who testified as Rw1. Thereafter, the parties filed their written submissions.

Claimants' Case

4. David Njite Otieno Osiru (Cw1), testified that he was employed by the respondent vide the employment contract of September 2, 2014 as an electrician with effect from September 15, 2014. He was initially placed under three months' probation which lapsed on December 15, 2014 and was



- confirmed on permanent and pensionable terms and issued with a confirmation letter of the same date. Annexed to the employment letter was a job description manual which explained the roles and duties of the claimant.
5. He testified that he performed his duties with diligence until sometimes in April, 2019, when the respondent employed a new regional technical representative whose duties were never explained to the claimant and the other staff. It is averred that the said regional technical representative allocated the claimant duties outside the job description such as management of electric fence and procurement. That he raised a complaint on the new set of duties but the same fell on deaf ears.
 6. That throughout his employment he was issued with one warning letter in the year 2019, which was captioned, last chance, which raised an issue with power room that occurred while he was away on official duties. He appealed the said warning letter and the human resource manager changed it to 1st warning letter.
 7. On April 14, 2021, the employees were issued with an internal memo which directed the employees to return all their tools of trade to the store for safe keeping. That he complied with the said directive. Later on, the regional technical representative conducted a search, without notice, in the claimant's office which they shared with 5 other colleagues and collected some scrap machine and labeled them "tools not returned". That he petitioned against the unprocedural way in the search was done, which petition was never given any audience. That he felt discriminated in that the scrap of machine were allegedly recovered in their office and he was the only one that was held liable when they shared the said office with other 4 colleagues that were not implicated.
 8. While this was going on, he tested positive for covid-19 and took to isolation in April, 2021, for 14 days. That upon getting back he was summoned by Emma who was with Kaulo and served with termination later of April 28, 2021 and in the evening of the same day he was paid Kshs 242,000. The reason for termination as captured in the termination letter was on issues that were outside his job description, which nonetheless had been dutifully executed by the claimant. Prior to receiving the termination letter, the claimant was served with a certificate of service on April 27, 2021 and the said position was immediately advertised before the claimant could even lodge his appeal.
 9. He stated that on July 6, 2020, there was a meeting on agility which was to take place in the morning, however that he arrived at 7.53am in the morning and was informed there was a problem in the cold room. He immediately went to the said room to sought out the issue, as a result he missed the agility meeting but registered his apology on the communication platform, Nevertheless, that the said issue caused the respondent to issue him with a show cause letter via email, followed by a warning letter.
 10. On the counterclaim, the claimant testified that it has not cleared with the respondent for fear of being held in trespass of their property and that he will return the said laptop with the bag and mouse on being paid his dues.
 11. Upon cross examination by Macharia Advocate, the witness testified that he received Kshs 40,854 as April salary. He admitted that he sought to withdraw his pension savings. He testified that according to the respondent's handbook, he was to clear within 24 hours of termination to receive his terminal dues, however he confirmed that he had not cleared with the respondent. He testified that he was a team leader of electrical department which position was not in the management level and that he was required to work for at least 8 hours in a day. He stated that even though he did not fill any overtime forms, he always requested for the same via email.
 12. The claimant admitted to receiving the warning letter of April 12, 2019, the caution letter of July 8, 2020 and the last chance letter of September 22, 2020 which he appealed against. He also admitted to



receiving the show cause letter but denied ever being invited to any disciplinary hearing. He testified that he was reporting to Tariq, the regional technical representative but that they had strained work relationship from day one. He stated that other staff who were not in the management level were housed by the respondent. He avers that he has not vacated from the said house.

13. On re-examination, the claimant testified that he received Kshs 40,000 without any explanation as to why he didn't receive his full salary when the termination letter was for April 28, 2021. He also stated that the reason he has not gone to pick his belonging is for fear of his security and also awaiting the outcome of this case.

Respondent's Case.

14. Emma Nyarangi, the respondent's human resource manager testified as Rw-1. She adopted her witness statement of September 21, 2021 and a further statement of March 15, 2022 which in summary stated as follows; that the claimant was employed as an electrician with effect from September 15, 2014 and after completion of three months' probation, he was confirmed on permanent terms with effect from December 15, 2014. That the claimant was initially paid Kshs 80,000 which was later revised upwards to Kshs 136,000. In addition to this the respondent submitted the claimant's NSSF and NHIF deductions when they fell due. He was also registered in the respondent's pension scheme.
15. It is averred that in the job description, the claimant was to undertake the following duties; be in charge of electrical team department, installing and maintenance of electrical equipment's in the farm, requisitioning and verification of quality electrical spares and accessories, maintenance and servicing of standby generators, monitoring of power fluctuations, installation of internal wiring in the farm, prepare monthly accountability report, in charge of energy management in the farm and perform any other duties delegated to him by production management and general management.
16. The respondent denied the alleged diligence in performance of the claimant's duties and instead avers that the claimant was issued with a first warning letter on the April 12, 2019 for laxity and negligence in handling the farm generator which compromised the safety and health of the employees under his supervision. A caution letter was issued upon him on the July 8, 2020 for failing to attend agility meeting without communicating his absence in good time. A last chance warning letter was served on him on the September 22, 2020 for getting into an altercation with his supervisor, the regional technical representative and failing to carry out duties given to him by the said supervisor. Another caution letter of March 16, 2021 was served upon him for failing to respond to issues raised in a timely manner and poorly executing his duties especially with other department, considering that he was the one in charge of the electrical department. These issues culminated to his termination on April 28, 2021 which was based on negligence in performance of his work, insubordination and failing to follow written policies and procedures as provided under the respondent's handbook.
17. Contrary to the allegation by the claimant, the respondent maintained that all the duties the claimant performed where within his purview and under the job description.
18. She testified that, prior to the termination the respondent issued an internal memo dated March 14, 2021 directed at all personnel working in the maintenance department to surrender all the items in their lockers to the store for safe keeping. Other employees complied, however by March 22, 2021 the claimant had not complied and upon search, several items were recovered in his locker and an inventory prepared and served on him via email on the March 23, 2021 together with a show cause letter, why disciplinary action should not be taken against him. The claimant then petitioned on the said inventory by a letter of March 24, 2021 which was considered before disciplinary proceedings were commenced. The claimant was then invited to disciplinary hearing *vide* a letter of March 25, 2021 and



- another invitation of March 31, 2021 for hearing on April 6, 2021. Though the claimant was to proceed on leave on March 29, 2021, the respondent requested him to postpone his leave in order to attend the disciplinary hearing which he attended and participated in. The explanation given by the claimant was not satisfactory, leading to the termination which the claimant did not appeal against.
19. It is the respondent's case that the claimant was not paid his terminal dues as he is yet to clear with the respondent and return the respondent's properties such as the company laptop, personal protective equipment (PPES) given to him, and vacate from the company's house.
 20. On the reliefs sought, the witness stated that the claimant was a member of the respondent's pension scheme which is the only pension that he is entitled to. on off days, overtime and public holidays pay, Rw-1 states that the claimant was duly paid during the pendency of his employment as such that the claimant is not entitled to any of the reliefs sought.
 21. On the final dues, the witness testified that the same were calculated and captured in the document dated September 21, 2021 at page 69. She added that gratuity was not payable to management level employees both seniors and middle management. The witness herein maintained that the claimant was subjected to disciplinary hearing that was carried out on April 6, 2021. she also stated that the claimant has not been paid his terminal dues because he has not cleared with the respondent to date.
 22. Upon cross examination by Kariuki Advocate, the witness testified that the claimant was the head of electrical section and that the letter of employment did not place him as a manager. She admitted receiving a complaint from the claimant on treatment by the said regional technical representative, Mr Tariq, which she took action and called for a meeting with the general manager and the said Tariq. She admitted that the claimant did not have disciplinary issues before. That the warning and caution letter are the things that caused his termination. On being questioned about the agility meeting, she testified that these meeting were conducted on a daily basis at 8am and if a member is unable to attend, they send their apology via text message or call. She admitted that the claimant apologized for failing to attend the meeting and followed up with a written explanation addressed to Tariq.
 23. On whether disciplinary hearing was conducted, the witness testified that the claimant was invited for disciplinary hearing that took place on April 6, 2021, which he appended his signature on the minutes of the said meeting. On the counterclaim the witness testified that the claimant is yet to clear with the respondent and return the laptop. She also stated that they were charging KShs 60,000 for the house however on asked basis, she testified that the respondent had to source alternative housing for other employee for the said amount. She maintained that no dues were paid to the claimant and the basis is that the claimant has not cleared with them. She affirmed that there is nothing on record to show an exit interview was carried out.

Claimant's Submissions.

24. The claimant submitted on two issues; whether the respondent unfairly terminated the claimant and whether the claimant is entitled to the reliefs sought.
25. On the first issue, it was submitted that for the claimant that he was only issued with one warning letter in the year 2019 which was expired by close of the year. He argued that the said letter was titled, last warning letter, confirming that the claimants fate was already pre-determined as the warning letter intimated that the claimant had been issued with several other warning letters. The reason for termination was based on the said warning letter which had expired as such that the termination was carried out without a proper reason as contemplated under section 43 of the *Employment Act*.



26. On whether due process was followed, it was argued that there was no disciplinary process that was conducted and that he was not subjected to any disciplinary hearing to allow him answer any accusations lodged against him contrary to provisions of section 41 of the *Employment Act*. To support this case the claimant relied on the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited*[2014] eKLR where the court held that ;

“Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”

27. Accordingly, the claimant submitted that any termination of employment must be preceded by the provisions of section 41 of the *Employment Act*, regardless of whether the termination was summary termination.

28. On the reliefs sought, it was submitted that since the claimant was unfairly terminated, the reliefs sought ought to issue.

Respondent’s Submissions.

29. The respondent submitted on three issues; whether the reason for termination was valid, whether fair procedure was followed before termination and whether the claimant is entitled to the reliefs sought.

30. On the first issue it was submitted that the claimant was terminated for justified reason as contemplated under section 43 of the *Employment Act*. It is the respondent’s argument that the claimant failed to perform his duties to the satisfaction of the respondent informing the issuance of the first warning of May 12, 2019 and several caution letter thereafter. It was argued that the reason for termination was failing to manage the electric fence, failing to respond to emails, delay on writing to KPLC over power outage that delayed for 2 weeks, failing to store company tools in the safe after an internal memo was issued, delay in generating an LPO for temperature display in the cold room, failing to attend to agility meeting for several weeks, failing to generate the generator repair report as requested by the general manager among others.

31. It was argued that the claimant was subjected to disciplinary hearing, where he was granted ample opportunity to defend himself, however that the explanation given for the various mishaps was not satisfactory and therefore the respondent terminated his services. The respondent maintained that the claimant was subjected to due process as stated under the *Employment Act* and reiterated in the case of *Galgalo Jarso Jillo v Agricultural Finance corporation*[2021] eKLR, where the court held that ;

“In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is



whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.”

32. It was submitted that the issues raised concerning the claimant’s employment was addressed in the show cause letter of March 23, 2021. The claimant made a response *vide* his letter of March 24, 2021. He was then invited to a disciplinary hearing which was scheduled for April 6, 2021 where the claimant was heard however the decision to terminate his services was communicated on April 28, 2021, giving a detailed reason for the said termination.
33. On reliefs sought, it was submitted that the claimant was terminated for justified reason and after subjecting him to due process as such the reliefs sought are on warranted.
34. On April pay, the respondent submitted that it paid the claimant his April salary as evidence by pays lip attached at page 5 of the respondent’s bundle of documents. The annual leave pay was not disputed. On telephone allowance for April, 2021, the respondent submitted that the same is not due as the claimant was not working for it during such time. On public holidays pay, it was argued that the claimant was fully compensated for the days served and the balance was on one off day pay of Kshs 5,253.85 which is due.
35. On accumulated overtime pay, it was submitted that the claimant being at the management level had several benefits including company house, medical cover under APA Insurance, pension benefits under jubilee insurance and flexible hours which is not available for the other employees, these benefits disentitles the management level employees from overtime claim. Furthermore, that clause 9.3 of the respondent’s handbook provides for overtime to be recorded on a weekly basis and claimed on a monthly basis as such in absence of such claim form, the said overtime pay is not due. Also that the claimant unlike other employees did not work on most Saturday and was not surcharged for that because he was a management level employee.
36. On leave allowance pay, the respondent argued that employees on the management level were indeed entitled to Kshs 27,320 as leave allowance but since the claimant was terminated at the end of his leave he was only entitled to one way leave allowance of Kshs 13,660.
37. On bonus pay, the respondent argued that the same is discretionary and not payable. On pension the respondent argued that the claimant is entitled to the pension contribution made for the duration of his employment.
38. In conclusion, the respondent submitted that save for the admitted claim, the claim should be dismissed with costs and instead the counterclaim be allowed with costs.
39. I have examined all the evidence and submissions of the parties herein.
40. The issue for this court’s determination are as follows:-
 1. Whether the respondent had valid reasons to terminate the services of the claimant.
 2. Whether the claimant was subjected to a fair disciplinary process before being terminated.
 3. Whether the counter claim is proved.
 4. What remedies to grant in the circumstances of the case.



Issue No. 1

41. The claimant was terminated *vide* a termination letter dated April 28, 2021 which indicated reasons for termination as being:-

“On March 23, 2021 the regional technical representative maintenance management staff to empty out their lockers of all company tool and equipment in their possession. The point of the clean out was because there was an observed reluctance to share with the RTR a final master file reconciliation of the tools and the equipment in the department.

The issue of the master inventory list not being completed in satisfactory time to a sufficient standard is what led to the opening up of tables/desks/cupboards. Several items were recovered from you and your colleagues as registered by the stores in charge.

In reference to your disciplinary track record for the past several months, there have been several tasks that have been left unattended even after several reminders. These include but are not limited to;

1. Electric fence – D.N did not maintain the electric fence to required standard despite several first aids on the fence in-house T.M. and C.S reached out to 3rd party contractors and we received contractor to assess.
2. Reconciliation of all electrical items sent for repairs – responded to the email but did not list the items at elite tools despite several email reminders by T.M. weeks later.
3. Delayed action on recovering items from repair suppliers – evaporator labs sent end of October 2020, not followed up until 4/3/21. Various motors sent to Rep electric, 1st motor sent on October 26, 2020 still not collected to date. Shredding machine to Ndume in Gilgil in approximately late 2019 or early 2020 not collected.
4. Email to KPLC on power outage – took about 2 weeks from date of request for D.N to action and write to KPLC.
5. Return of all tools, items and equipment to the company stores – 18th February T.M emailed for all maintenance HODs to return all company tools and equipment. 15th March an email by D.N with a small list of items submitted to the stores. March 31, 2021 D.N finally sent an exhaustive list of items submitted to stores from his team after the search exercise.
6. Defoliator machines – defoliator machines taken to Rep electric not collected despite several email reminders by T.M since before end of 2020 (November 2020).
7. Borehole 13 – October 2020 an email request for details of borehole 13 requested by T.M and well responded by DN. T.M did an email follow up and D.N confirmed to have noted the request on 30th March. D.N emailed T.M to say he was not involved in the borehole drilling but he did not notify compliance team that the borehole had an issue and was collapsing.
8. Temperature display in the post harvest cold rooms – February 9, 2021 D.N confirmed to be following up on temperature display items. D.N generates



an I.P.O on March 30, 2021 as a follow up to the request 2 months earlier and service quotes received late March. There were several emails by T.M as follow up for the temperature control before 30th March when the quotes were received and I.P.O processed.

9. Electric insect kill lights. March 5, 2021 T.M placed an email request to D.N to check on installation of insect kill lights. A reminder by T.M on the same was sent on 15th March. The general manager also reiterated on the same email on 15th March with a list of pending electrical tasks for update but there was no response by D.N. before the Easter holiday there was a raised concern on Thursday about defective kill lights and the issue had not been repaired by Tuesday morning, despite his team being on call through holidays and weekends at premium rates.
10. Going mute during agility meetings for several weeks now. D.N has resorted to attending agility meetings but does not respond to any queries raised while in session negatively affecting the communication and efficacy of the meeting.
11. Generator repairs – an email request for details on the generator reports requested by the general manager in December 2020 has had no clear follow up to date.”

42. The reason No 3 related to poor or non-performance of duties.
43. In relation to reason No 1 above for the termination, the complaint was the claimant declined to empty out his lockers of tools and equipment in their position.
44. That after checking his lockers some items were recovered from the claimant and his colleagues as registered by the stores in charge.
45. The directive to empty lockers was issued on March 23, 2021 at 18.06pm.
46. He responded to the show cause indicating that he had been instructed to surrender the tools to stores which he did on March 21, 2021.
47. He also indicated that the items indicated were found in his office where there are five people and so could not have been attributed to him.
48. He indicated that his drawer measures 40 x 40 x 42cms and so these items couldn't fit in his locker. He further indicated that some of the items were not tools but spare parts out of which some are defunct.
49. Following this feedback, the respondents HR Manager Emma acknowledged receipt and indicated that they would commence a meeting to conclude the matter next week and she would confirm the date and time.
50. In the meantime, the claimant was requested to postpone his leave that was due to start on March 29, 2021 to March 31, 2021.
51. As per the respondent's appendix titled minutes for the hearing meeting on alleged negligence of duties by David Njite April 7, 2021, it appears that the claimant was subjected to some hearing on April 7, 2021.
52. This meeting was a follow-up to a show cause letter which related to not surrendering tools to stores only. However there is no indication that the claimant was issued any notice in relation to any disciplinary hearing.



53. During the hearing however, the claimant explained why he had some tools with him which were important for his day to day duties.
54. The issue of the items being in an office shared by 5 people with claimant was not however considered.
55. Another reason for termination of the claimant as per the termination letter was previous infractions all related to poor performance but ranging to previous years of 2020 to 2021.
56. It is however true from the minutes of the meeting held on April 7, 2021, that the poor performance was not part of the items discussed in the meeting.
57. It is not also clear whether this meeting was a disciplinary meeting or not as one CS indicated at page 3 of the meeting as follows;

“CS recapped that this was a professional discussion and meeting, nothing personal has and will be taken into consideration during the entire process.

There has been lack of follow up on specific issues/tasks which have recurred over time and HODs have raised concerns on execution of electrical teams’ services....”

58. The claimant has submitted that as concern previous mistakes where he had been warned, they could also not be subject to any disciplinary action as the warnings had expired.
59. The respondent referred court to their HR Manual. Clause 6.7 of the HR deal with disciplinary procedures and state as follows;

“Disciplinary procedures

An employee whose service or whose conduct or performance is, in the absolute opinion of the company, unsatisfactory, or who is otherwise guilty of any misconduct which in the opinion of the company does not call for immediate dismissal, shall be warned in writing, and the following procedure shall apply:-

1. First warning shall be entered in the employee’s record and signed by the HOD or any other authorized signatory.
2. If within 365 days an employee commits any other warnable offence, the warning shall be entered in the employee’s file.
3. If an employee who has already received a second warning commits another offence within a period of one year warranting disciplinary action, the employee concerned shall be liable to termination and he/she will subsequently be suspended from service and a report submitted to HR department for review and approval of the termination and or appropriate disciplinary action.
4. All warning letters shall be acknowledged by signing.
5. Subject to the foregoing provision, if an employee shall have completed three hundred and sixty five (365) consecutive days from the date a warning was issued without further misconduct, any warning entered in his records shall be cancelled accordingly. However the warning shall remain in the employee’s personal file as a record.



6. An employee who is dissatisfied with a warning issued to him/her shall institute an appeal against the warning letter in writing through the Human Resources Manager within 7 days from the date the warning letter was issued. Upon receipt of the appeal notice the Human Resource Manager or his/her representative is expected that such a verdict will mark the final stage of the internal disciplinary process.
 7. At all stages, the employee will be notified of the complaint against them and called to a disciplinary meeting by the management where the employee will have an opportunity to give an explanation for the matter complained of during the disciplinary hearings, an employee may if they so wish be accompanied and represented by a fellow employee.”
60. Under clause 6.7.2, warning last for 365 days. It is therefore unfair and uncalled for for the claimant to be subjected to any disciplinary processes in 2021 for warning issued in 2019.
 61. Clause 6.7.7, of the manual also envisage a notice to be issued to an employee before any disciplinary process is instituted.
 62. As indicated herein, no notice of any disciplinary hearing was issued to the claimant detailing out infractions committed.
 63. Section 43 of the [Employment Act](#) 2007 states as follows;-
 - “43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
 64. Indeed the law anticipates that as employer must have valid reasons before terminating an employee’s employment.
 65. The validity of such reasons must be tested through a fair procedure instituted by a valid notice and a fair hearing.
 66. In the case of the claimant herein, the validity of reasons leading to claimant’s termination was never established.
 67. The claimant explained why some items were in his shared office and it is not clear why the blame was placed only on him alone.
 68. The claimant was also subjected to infractions if at all committed in previous years which were not the subject of the show cause letter.
 69. In this court’s view, the validity of the reason for termination was not established and I find that the claimant was terminated for invalid reasons.



2. Due process

70. The process envisaged before termination is one set out under section 41 of the [Employment Act](#) 2007 which states as follows;

“41. grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

71. The respondent’s HR Manual at clause 6.7 cited above also sets out the disciplinary process to be used against an employee.

72. As discussed above, the respondent did not adhere to the stated process. The respondents have not displayed any letter inviting the claimant to a disciplinary process.

73. The emails sent to the claimant just talked of a meeting to be held but there was no indication that it was going to be a disciplinary hearing.

74. That being the position, I find that the claimant was not subjected to any fair disciplinary process.

75. It is my finding therefore that the termination of the claimant was unfair and unjustified as provided for under section 45(2) of the [Employment Act](#) 2007 which states as follows;

“45.

{2} 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 employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

3. Counter-claim

76. The respondent set out a counter claim against the claimant demanding he pays for the laptop and other items not surrendered and also pay rent for the house he has occupied since termination to date.



77. In relation to return of stores in his possession, the claimant has indicated that he is ready and willing to return them but couldn't have done so previously fearing for his security.
78. I will henceforth direct immediate return of the said items through claimant's counsel.
79. As concerns payment of rent, the claimant has explained circumstances under which he was terminated abruptly and unprocedurally.
80. The respondent attempted to pay the claimant his terminal dues but reversed the payment immediately. Indeed it was expected that the claimant would have vacated the respondent's residence upon termination but there remained pertinent issues to be addressed which the respondent never took a step to address or seek an eviction of claimant from their residence.
81. The respondents cannot be expected to benefit from their own laxity or wrong doing.
82. The respondents have also not established that the rent payable to their house was 60,000/= and not any other figure.
83. In the circumstances, I find that the counter claim is not established and I dismiss it accordingly. However the claimant is expected to vacate the respondent's premises forthwith within one month from today.

4. Remedies

84. Having found as above, I enter judgment for the claimant and award him as follows;
 1. 1 month's salary *in lieu* of notice = 143,291/=
 2. Unpaid salary for 7 days of April 2021 = $7/30 \times 143,291 = 33,435/=$
 3. Leave of 14 days of 2020-2021 as pleaded = 63,746/=
 4. Telephone allowance for the month of April 2021 as pleaded = 2,500/=
 5. Compensation of 8 months salary for the unfair and unjustified termination based on the fact that the claimant's career path was cut short by the respondent without due process = $8 \times 143,291 = 1,146,328/=$
 6. Year 2020 bonus at 50% of basic salary of Kshs68,300/=

Total = 1,457,600/=

Less statutory deductions
 7. The claimant be paid his pension dues.
 8. The respondent will issue claimant with a certificate of service.
 9. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF OCTOBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:



Kariuki for claimant – present

Muthuri for respondent – present

Court Assistant – Fred

