



REPUBLIC OF KENYA



**Mutali v Busia Water & Sanitation Company Limited (Cause 5 of 2020)
[2022] KEELRC 13178 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 5 OF 2020
JW KELI, J
NOVEMBER 3, 2022**

BETWEEN

BERTHA NALIAKA MUTALI CLAIMANT

AND

BUSIA WATER & SANITATION COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant following termination of her employment contract by the respondent filed memorandum of claim dated June 5, 2020 and filed in court on 12th June 2020 seeking the following reliefs:-
 - a. A declaration that the termination of the claimant's employment by the Respondent was unlawful and unfair
 - b. Salary up to the end of the term of the contract in the sum of Kshs.5,760,000.00/-.
 - c. House Allowance to the end of the contract to the sum of Ksh. 1,080,000.00/-.
 - d. Commuter Allowance to the end of the contract to the sum of Kshs.288,000.00/-.
 - e. Airtime up to the end of the term of the contract in the sum of kshs.252,000.00.
 - f. Compensation for unfair and unlawful termination amounting to Kshs.2,000,000.00/-.
 - g. Annual leave dues for the period commencing January 2020 and ending in November 2022 in the sum of Kshs.159,000.00/-.
 - h. Gratuity service equivalent of 31% of the basic salary to the end of the contract.
 - i. The certificate of service for the period she served as an employee.
 - j. Costs of this claim.



- k. Interest on (b) ,(d) and (e), (f), (g),(h), and (i) herein above from the date of filing suit until payment in full.
 - l. Any other relief that this Honourable Court may deem fit to grant.
2. Together with the claim on even date, the claimant filed her verifying affidavit sworn on the June 5, 2020, her witness statement dated June 5, 2020, Claimant's list of witnesses, claimant's list of documents dated 5th June 2020 and the bundle of documents.
 3. The claim is opposed . The Respondent entered appearance through the law firm of Omondi & Co. Advocates and filed a Memorandum of Response dated 8th July 2020 and filed in court on 15th July 2020 together with witness statement of Sarah Patrick dated 8th July 2020, and list of witnesses and list of exhibits.
 4. The Claimant further filed reply to Memorandum of Response which was dated 21st August, 2020 and filed in court on 27th August, 2020 together with supplementary list and bundle of documents of 21st August 2020. On the 31st August 2022 the Respondent's new advocates J. O. Juma & Company Advocates filed medical report of Sarah Patrick Akasiba. On 10th May 2022 the Respondent filed further list of documents dated 6th May 2022.
 5. On the 29th June, 2022 the Respondent further filed a list of documents by computation of terminal dues , bank receipt and attendance register.

Hearing and evidence.

6. The Claimant's case was heard on the 10th May, 2022 with the Claimant as the sole witness of fact testifying on oath. The Claimant relied on her witness statement dated 5th June 2022, documents under her list of documents dated 5th June 2020 as exhibits 1-27 for the Claimant and the supplementary list of documents dated 21st August 2020 marked as exhibits 28-29.
7. The Claimant told the court she was not paid housing allowance in December 2019 (payslip Exhibit 27). The Claimant told the court that the employer was unfair. That the Board meeting was on 13th December 2019 and 12th was Jamhuri day. That on morning of 13th her baby was sick . That she had already presented her report to the board that she tried calling the Managing Director. On the Board meeting she had planned to go to Busia having travelled from Nakuru where there was a management meeting but her baby got sick.
8. The Claimant told the court Omondi Advocate was a Board Director and sat in her disciplinary case and came forth to represent the Respondent. He was the former Advocate on record.
9. The Claimant was cross- examined by Counsel for the Respondent Ms Okoth . The Claimant confirmed she was not at work on 13th December 2019 and that she did not sign attendance register. She did not have evidence of having called the Managing Director about her absence on 13th December 2019 on basis of sick child, that the Managing Director did not pick her call and she wrote message on WhatsApp but no response hence no permission was granted. On challenges under her exhibit No. 30, the Claimant relied on email dated 11th December 2019 (exhibit 3). The Claimant told the court that she sent her final report on 12th December before the Board meeting of 13th December to Susan and communicated some figures were missing.
10. Claimant confirmed she wrote an email on 16th December 2019 but did not mention issue of sick child stating it was personal. That they later talked with the Managing Director on call but she had no evidence of the call.



11. The claimant confirmed in email (claimant's exhibit 5) to Managing Director she did not mention issue of sick child on email dated December 19, 2019. That she was embarrassed to say she did not have money to pay for hospital bill hence the request for 2 more days off.
12. On communication of issues affecting her work the claimant relied on exhibit 29 minute 4 where it was reported the scheme managers had not been submitting reports and that the Managing Director made closing remarks at the meeting. The Claimant told the court she was not aware of compassionate leave under the Human Resource Manual which she told the court was availed to her during disciplinary hearing and that she knew of such leave from previous employment.
13. On the lack of sick sheets, the claimant told the court she found someone at Human Resource Desk who could not issue sick sheets. The claimant confirmed she sought 4 days sick leave vide email of 8th January 2020 (exhibit 11) and was to report , resume work the following week. The claimant told the court she was asking for 4 working days to resume on 15th January 2020.
14. The claimant confirmed the Technical Coordinator had requested for a meeting of December 8, 2020 without informing her so she called the coordinator to order. This was response to being accused of meeting disruption. The claimant relied on email (exhibit No. 16) to the Technical Manager, one Mr. Omondi, on claim of failing to give her information.
15. The claimant confirmed she could not recall if she signed the register on December 9, 2019 . The claimant told the court she requested for intervention with Managing Director vide email of June 10, 2020 (exhibit 13) but the request to the Managing Director was not before the court.
16. On evidence of the intimidation, the claimant relied on exhibit 13 having been refused access to join team WhatsApp group and for being not having been paid housing allowance in December, 2019 (payslip). She had no evidence of request for the housing allowance.
17. The Claimant confirmed she submitted incomplete report (Claimant's exhibit 3). The Claimant told the court, according to her the 2 show cause letters were on same issue. The Claimant told the court she was in office on the 2nd December 2022 but did not sign attendance register for lack of induction.
18. The Claimant confirmed she wrote email dated 2nd December, 2019 to the technical coordinator to hold a meeting on 5th December 2019. The Claimant confirmed she was at work on 9th December 2019 and wrote an email. The Claimant confirmed she submitted meeting reports on email.
19. On paragraph 18, of her statement the Claimant explained that the internal memo affected her reputation as she was the technical Manager dealing with entire County and it was put out for all (Claimant's exhibit 23).
20. The Claimant told the court the internal memo implied method of separation by underlying tone. The court noted the internal memo dated 23rd January 2020 was addressed to an employer to effect the Claimant was no longer an employee of BUWASSCO and not allowed to transact any business on behalf of the company or use company property or visit any scheme. Nothing untoward was observed by the court under the said internal memo.
21. The Claimant confirmed she received and responded to 2 show cause letters. Confirmed she was summoned vide letter dated 7th January 2020 to appear before the disciplinary Committee (exhibit 20), that she was informed to prepare for defence and come with witness, that she attended the disciplinary hearing on the 20th January 2020. The Claimant told the court she objected to the disciplinary hearing as she was not comfortable with the proceedings having been given less than 1 week and also she indicated to the Committee she was not conversant with the Human Resource Manual.



22. The Claimant confirmed she was given termination letter dated 23rd January 2020. The Claimant confirmed she was paid terminal dues of salary and lieu of Notice of Kshs.43,113/-. The Claimant confirmed she informed the Committee she considered she was inducted .
23. In closing the Claimant told the court she was intimidated by Dr. Alukwe the Minister of water as he intimidated the Board.
That Dr. Alukwe as the minister attending the meeting then she had no place to appeal. The Claimant told the court she got show cause letter upon asking for her housing allowance. That in the minutes it indicated she was seen around government office meaning her case was done and sealed. That according to the Human Resource Manual there would have been a warning letter. She would have received 7 days to prepare, Omondi was at the disciplinary hearing and filed defence in the case, the Minister appoints the Board hence the Board would not have been fair as they can be fired by the minister.
24. On leave, the Claimant told the court she cannot control sickness, Omondi was her junior, she was not inducted and that she only signed the register if she found others signing and that information was not flowing to her.
25. The Claimant's case was reopened on 4th July, 2022 as the Respondent had been granted leave to produce the attendance register. The Claimant confirmed she signed register on 8th November 2020, 2nd January 2020, 15th January 2020, 21st January 2020 and 22nd January 2020.
26. On email of 16th December, 2019 requesting for 4 days off, the Claimant told the court 13th December 2019 was a holiday and she was away for 3 days.
27. The Claimant told the court on her email asking for extension of 2 days, the Managing Director extended verbally on phone and asked her to follow up on email. On evidence of the said email, the Claimant told the court the Human Resource can confirm. The Claimant confirmed that the Board meeting was to be held on 13th December 2019 and she was absent.
28. The Claimant confirmed she was terminated while on probation.
29. The Claimant in closing told the court that the attendance list read 2nd September 2019, that she received her letter of appointment on 10th September 2019 and reported to work on 4th November 2019 and that she was still under induction by time of dismissal.
30. The Claimant told the court that as a Technical Manager she was also working in the field and would sometimes report there in the morning before coming to work hence the attendance register did not reflect the nature of her work. That on 13th December 2019 she did not report to work as her child was sick and had produced documents.
31. On issue of submitting technical report to Board (exhibit 4) The Claimant indicated that she was missing key data as indicated in the report from Mr. Omondi thus was unable to present final report to the Board. The Claimant told the court the absenteeism was because of nature of her work. That due process was not forwarded in the termination. That she was paid salary in November and December 2019 and that is prove she worked for the company to have paid her. She was 41 years and an engineer by profession and was not issued with certificate of service.

Defence evidence.

32. The defence called one witness of fact Sarah Patrick Akasimba who adopted her witness statement dated 8th July 2020 as her evidence in chief. The witness (RW) produced as evidence of the Respondent list of documents dated 27th June, 2022.



33. RW, told the court she worked in Human Resource Department of Respondent, had worked with Claimant since December 2019. She reported on 9th December, 2019. They have quarterly meetings with 3 committees being Audit, Technical and Finance which informs agenda of the Board.
34. All head of departments present reports to the Board. The Claimant was absent in Board meeting of 13th December 2019 hence did not present technical report. RW told the court she did not receive official communication from the Claimant on leave in December. That the first email copied to her was of January 2020. Official communication on leave is to complete form. That if not in a position to ask for leave before one should get a medical report for processing such leave. That the Claimant did not comply on official report on resuming duty.
35. The Claimant was summoned on 17th January 2020 (exhibit 20) and contract terminated on 23rd January 2020. (exhibit 22) . The Claimant was paid terminal dues (exhibit 3 of defence under further list of documents dated 27th June, 2022).
36. The termination letter referred to unprocedural proceeding on leave in December 2019, chronic absenteeism for she signed the attendance register only 6 times and could have signed register at schemes but did not. On willful neglect of duties RW accused the Claimant for not presenting technical report to Board nor did prepare the report which was her duty, disrespect to management and colleagues, on 8th January 2020 when she had written email that she was sick and same day at 2.00 pm she stormed a meeting called by the technical coordinator shouting at him for calling the meeting in the process scaring the customers and disrespecting the coordinator in front of other employers and employer incurred costs for aborting the meeting as staff had travelled from the schemes. Insubordination on 13th December 2019 for failing to appear making Board wait for 3 hours.
37. That the employer has 7 schemes and only 1 motor vehicle in place hence not possible to have a vehicle designated solely to the Claimant.
38. That salaries were delayed in November and December 2019 and this affected all staff.
39. During cross examination , RW confirmed Babu was the acting Managing Director (MD). That she had met the Claimant at Nakuru and travelled back individually to Busia. That Board meeting was on 13th December 2019. RW could not confirm if the Claimant had discussed her report with Susan.
40. RW could not confirm if the Claimant had been in communication with the Managing Director who was to call the Board meeting. The procedure of officer not able to report to work was to report to any supervisor by any means and thereafter complete forms with Human Resource. That the Secretary to the Managing Director was Ms Chapia.
41. RW told the court that she received the child's discharge documents in response to show cause letter and that was the first time the Claimant had filed the documents. RW told the court they started to share office with the Claimant after the Nakuru meeting.
42. RW told the court that the technical department operates like any other department, they are issued with motor vehicle or are reimbursed on use of own transport and that she did not have pending reimbursement for the Claimant having attended any field work on dates alleged to have gone to field. On emergencies RW told the court they have registers in the schemes.
43. RW told the court orientation was done for Claimant as evidenced in visitors book, the Claimant's name indicating orientation . That the engineer was on leave hence Managing Director must have oriented the Claimant. That there were other officers names in the visitors book.
44. RW told court there is no orientation checklist.



45. RW told the court it was the Claimant's responsibility to source and ensure performance report is obtained.
46. RW told the court if Mr. Omondi did not comply with request on reports the Claimant should have issued notice for disciplinary procedure.
47. RW told the court that the correct procedure under Human Resource Manual was followed in the termination with issue of show cause letter of 4th January 2020 and on 9th January 2020. The Claimant was summoned to appear vide letter of 17th January 2020 (Friday) to appear on 20th January 2020 (Monday).
48. RW could not confirm if Claimant had been oriented on the Human Resource Manual . That it was not fair she was granted 30 minutes to peruse the Human Resource Manual. RW confirmed no record of warning letters.
49. RW confirmed that the Claimant was not at work on 8th January 2020. RW said she reported later in the day at main office having started her work earlier at Amukura. The Claimant stated in her response she could not access sick sheet as Human Resource was not in the office. RW confirmed that it was not in order for the technical coordinator to call for a meeting without informing the Claimant.
50. In closing RW stated the disciplinary procedure was in accordance with the law. The Claimant did not state time for perusal of manual was short, she gave nod to the disciplinary proceedings to proceed, she has not come for her certificate of service or cleared.
51. The Court gave directions on filing of submissions. Both parties complied.
Determination
Issues for determination .
52. The Respondent in submissions identified the following issues for determination:-
 - a. Whether the Claimant was under Probation at the time of dismissal.
 - b. Whether termination of the Claimant's employment was procedurally fair.
 - (c) Whether the termination of the Claimant's employment was substantially firm.
 - d. Was relief (if any) are available to the Claimant in the circumstances of the claim.

(e) Who should bear the costs of this claim.

53. The Claimant in her submissions addressed the question of whether her termination from her employment by the Respondent was lawful and fair in terms of validity of reasons of termination and procedure and submitted that her prayers be allowed.
54. The court having heard the evidence by the Claimant and Respondent and considered issues addressed in the pleadings is of the considered view that the issues placed by the parties for determination of their dispute are as follows:-
 - a. Whether the Claimant was under probation .
 - b. Whether the termination of employment of the Claimant was lawful and fair.
 - c. Whether the Claimant is entitled to reliefs sought .



55. It was not disputed that the Claimant was employed on a 3 year fixed contract effective November 4, 2019. The claimant produced the Human Resource Manual (Exhibit 2) which clause 3 (iii) provides for probation period of not more than 6 months.
56. The Claimant produced her employment contract dated September 10, 2019 and effective November 4, 2019. Clause 31 of the contract indicates the claimant was to serve probation period of 6 months and after successful completion would be issued with a confirmation letter (exhibit 1).
57. The claimant's services were terminated on 23rd January 2020 and in paragraph 4 of the memorandum of claim the claimant admits she was on probation for 6 months which was expected to lapse on May 30, 2020.
58. The respondent relies on the decision in *Benjamin Njambnati Ondiba -vs- Egerton University* (2014) eKLR where the court held that an employer puts an employee on probation so as to be able to assess his performance and capability within the workforce and the essence of section 42 of the *Employment Act*, 2017 is to allow the employer terminate the contract of service in less time where the employees performance should be found wanting.
59. The respondent submits that the claimant was under probation when the contract of service was terminated. the court finds and determines the claimant was serving under probation when her contact of service was terminated and upholds the said decision in *Benjamin Nyambati Ondiba* case.

Whether the termination of employment of the Claimant was lawful and fair.

Relevant law

The relevant law

60. Section 43 of the *Employment Act* addresses proof of termination as follows:-
 - “(a) in any claim arising out of termination of 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.
 - (b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely belief to exist and which caused the employer to terminate the services of the employee.”
61. Section 44 (4) of the *Employment Act* provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-
 - (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
 - (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
 - (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”



62. Section 45 (2) of the *Employment Act* provides that a termination of Employment by an employer is unfair if the employer fails to prove:-
- a. 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.
63. Section 46 of the *Employment Act* provides for reasons that do not constitute fair reasons for dismissal.
64. Section 47(5) of the *Employment Act* provides for burden of proof in claims for wrongful dismissal as follows:
- “(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
65. Thus the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.
66. Section 41 of the *Employment Act* provides for procedural fairness as follows:- ‘41. (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.”
67. In the event the employer is contemplating termination of employment vide summary dismissal under section 44 of the *Employment Act*, the employee is entitled to hearing pursuant to the provisions of section 41(2) to wit: -“(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.” The court finds and determines this was the applicable law in the instant claim.
68. . On the validity of reasons for termination applying section 45 (2) of the *Employment Act* to wit:- “The reason for the termination is a fair reason:-
- (a) related to the employees conduct Capacity or compatibility or
 - (b) based on operational requirements of the employer.
69. The termination of contract of service letter dated 23rd January 2020 (claimant’s exhibit 22) stated the following as the reasons for the termination which employer stated to be gross-misconduct:-
- a. Unprocedurally proceeding on leave in December 2019
 - b. Chronic absenteeism form work
 - c. Wilful neglect of duties
 - d. Disrespect of management and colleagues



- e. Insubordination
 - f. Creating disturbance
 - g. Cancelling meetings called by the technical coordinator.
70. Prior to the termination, the claimant was issued with a show cause letter dated January 4, 2019 on the absence for duty(Board meeting) on 13th December 2019 which employer termed as insubordination, submitting incomplete technical department report and being off duty unprocedurally from 13th to December 23, 2019.
71. The claimant was further issued with a second show cause letter dated January 9, 2020 on disruption of normal office operations on a date she had reported to be unwell and sought for permission to seek medical attention.
72. The claimant responded to the show cause of January 9, 2022 vide her letter dated 16th January 2020 stating she could not get the Human Resource person that morning hence alternative communication to the Managing Director by email. She denied the meeting was cancelled stating it started by prayer and closed by prayer. She complained of the role of the coordinator in her department and failure by the Managing Director to consult her.
73. The letter of summons dated January 17, 2022 to appear before disciplinary hearing of 20th January 2020 refers to the 2 show cause letters.
74. The claimant produced minutes of the disciplinary hearing which the Claimant admitted to have attended on January 20, 2020. The Claimant is recorded to be in attendance. The main Agenda is listed as Disciplinary case, Bertha Naliaka, the Technical Manager. The claimant it is recorded confirmed receipt of invitation to the hearing. The court perused the minutes and found consistency in the issues under the show cause letters, the hearing proceedings and the minutes.
75. On validity of the reasons evidence on cross examination of the claimant was that she only signed the register 6 times the entire period she worked, that there was no evidence she was in the field during days of absence as there was no request for reimbursement and no evidence she signed the scheme registers, the claimant admitted to not complying with procedure of sick off on being absent as she did not notify employer of absence on December 13, 2019, the court was convinced the claimant disrupted a meeting called by the technical coordinator and further she was not remorseful per the minutes produced and also in her response to the show cause letter.
76. Section 44 (a) of the *Employment Act* classifies absence from place appointed for performance of work without leave or lawful cause as a ground for summary dismissal and in 44 (c) wilful neglect to perform any work which it is their duty to perform in this case the submission of incomplete report of the technical department she was heading.
77. While the court empathises with the loss of her baby the claimant only informed employer of child's sickness on receipt of show cause letter. The claimant told the court the sickness of child was personal.
78. The evidence is summarised above. The court finds and determines there existed valid reasons with the employer to terminate the Claimant's contract of service and the reasons were related to the employee's conduct and compatibility and operational requirement of the employer like signing of attendance register and reporting of absence from duty if unable to obtain leave earlier.
79. The court finds and determines that the reasons for the termination of employment were valid and justified.



Whether the procedure followed was fair.

80. In any termination of employment, there has to be compliance with provisions of Section 41 of the Employment Act. The Respondent submits being under probation Section 42 of the Employment Act applies hence compliant with Section 41 is not necessary. But there was a hearing.
81. Evidence was led on the procedure followed and the Claimant produced the minutes of her disciplinary hearing. Prior to the hearing the Claimant was issued with summons to appear. The summons instructed the Claimant to prepare her defence and come along with any material and witnesses (if any) that may be used in her defence.
82. The Claimant faulted the composition of the committee and took issue with the presence of Dr. Isaac Alukwe who was said to be Minister for water in the County alleging he intimidated the committee.
83. Further the Claimant indicated it was not fair she was granted 30 minutes to peruse the manual. The court notes the meeting was adjourned from 3.45 pm to 4.30 pm for claimant to peruse the manual. Under the minutes, the claimant gave nod to the continuance of the meeting despite stating the Human Resource manual was voluminous. When asked if she was prepared to address the matters that may arise from the manual she responded, “ let us continue”.
84. The court having examined the minutes found no apparent biases by the Committee and that the claimant agreed to the proceedings despite stating the Human Resource Manual was voluminous hence may not have read it all.
85. The court then focussed on questions posed by Dr. Alukwe and found nothing untoward about them. The Respondent submits that protection afforded to regular employees is not available to those terminated while on probation and relies on the decision in Caroline Nyambura Twiga -vs Oxfam (2013) eKLR and in Danish Jalang'o & Another -vs- Amicabre Travel Agencies Services Limited (2014) eKLR where Justice Rika held that employees whose contract is subject of probation under section 42 (2) of the Employment Act can be terminated without the Application of the requirement of section 43 and 45 of the Employment Act without regard to procedural and substantiative justification and in John Muthoni Mathiu -vs- Mastermine Tobacco (K) Limited 9 2018) eKLR where the court held probationary part of a contract of employment is the period where an employee is tested and cannot therefore anticipate the same safeguards to be available to him or her like for an employee already confirmed to position.
86. In the instant case the court found the Claimant was issued with show cause letters and was invited to hearing and minutes of the hearing were produced. The Claimant faulted the process for short notice of less than a week and lack of warning letter. Clause 17.4.6 of the Human Resource Manual provides that probationers are subject to same disciplinary standards as longer serving employees. However, only one formal written warning will be given to employee during probation . Evidence was led that no warning letter was issued to the Claimant and this was admitted by RW.
87. Clause 15 of the Claimant’s employment contract provided that the company rules and regulations as issued and amended for time to time applied. The Claimant who was at senior level of management (Technical department Manager) cannot be heard to say she was not aware of the Human Resources Manual. In this case the court finds there was evidence of induction as per evidence on cross-examination of parties summarised in the body of the Judgment. In Heritage Insurance Company Limited -v- Christopher Onyango & 23 others (2018) eKLR court of Appeal (GBM Kariuki v Sichale & S Kantai JJA) held that the fact that the contract of each Respondent contained a clause to the effect that orders or directions issued from time to time through the staff manual or handbook would



be obeyed means that the terms of such staff manual or handbook were incorporated in the contract of employment. That once one is brought on board as an employee whose contract has a general clause requiring obedience of employer's lawful orders and directions contained in or later issued in Human Resource Manual the employee was bound by the order or direction. The court held that the responsibility of the employer is to bring the staff regulation to attention of the employee which in the instant case the Respondent they did under Clause 15 of the employment contract.

- 88 Applying the court of Appeal decision(supra) provisions of the Human Resources Policy of the Respondent were incorporated into the Employment contract terms and parties were bound by the procedural requirements on disciplinary process. In this case the court finds the Respondent failed to adhere to its own manuals on disciplinary procedure for employee on probation for failure to issue the Claimant with a warning at first instance and comply with composition of disciplinary panel of management . The employer was bound by their manual. The court finds that though there were valid and justified reasons the process was flawed for the following reasons:-
- a. No warning was issued to employee on her conduct under Clause 14.4.6 of the Human Resource Manual .
 - b. It was not justified by the Respondent why the County Chief Executive from water (Minister of water) attended and sat at the disciplinary hearing of Claimant as he is not such a person under clause 14.4.5.2.
 - c. The court finds the Minister of Water sitting at disciplinary at 1st instance jeopardised the claimant's right of appeal.
 - d. The Human resource manual provided staff under probation to be treated as long serving employees. Section 41 of the Employment Act applied notwithstanding provision of Section 42. The court finds in the letter of summons to appear, the Claimant's right to be accompanied by another employee or shop floor union representative was not granted or informed. Witness are not same as representatives.
89. The court finds on basis of the foregoing reasons, the procedure at the hearing was flawed hence unfair. Whether the Claimant is entitled to relief sought.
90. The court found that the termination reasons were valid but the procedure flawed hence unfair termination. On claims up to end of contract, the Respondent submits that the Claimant cannot seek for payment upto end of contract as the contract had not been confirmed. The court while agreeing with the Respondents submission states that an employee is only entitled to wages for work done hence claim for reminder of contract is not available and is disallowed.
91. On Housing allowance claim , the Claimant led evidence that she was not paid housing allowance for December 2019 and produced her payslip under her list of documents dated 5th June, 2020. The Respondent did not provide evidence to rebut the claim . The Claimant was paid gross salary of Kshs.176,200 compared to November 2019 payslip of 259,533,30 with housing allowance of kshs.30,000/-.
92. The Respondent relied on evidence of paid terminal dues under list of documents dated 27th June 2022. The court finds that those were wages for January 2020 and lieu notice as also basic pay was paid. The court finds and determines the claimant was not paid housing allowance in December 2019.
93. The court awards the Claimant unpaid December 2019 housing allowance of Kes.30,000/-.
- The claim for compensation for unfair compensation .



94. The court found there was unfair termination. The court considered there were established valid reasons for the termination that the Claimant had served less than 3 months and that she was paid Kes.43,113.00/- in lieu of Notice. It is the opinion of the court that it should not appear to generously reward an employee for unfair compensation when there was valid reasons for the termination as that is tantamount to rewarding misconduct.
95. Under Section 49 (1) of the Employment Act the court is granted many remedies on finding unfair termination. The court finds and determines one-month gross salary compensation under Section 49 (1)(c) of the Employment Act adequate compensation thus as per the computation of terminal benefits Kes.254,313 less the Notice of Kes 48,113/-. Total award of kes.206,200/-.

Certificate of service.

96. The Certificate of service is a statutory right of employee pursuant to section 51 of the Employment Act notwithstanding the reason for termination. The Certificate of service to issue.

Conclusion and disposition

97. The court enters judgment for the claimant against the Respondent as follows:-
- a. Declaration is hereby issued that the termination of the claimant's employment by the Respondent was procedurally unfair.
 - b. Compensation pay equivalent of one month's gross salary of Kes.206,200/-
 - c. Unpaid housing allowance for December 2019 for total sum of Kes.30,000/- .(Above award b&c subject to statutory declaration).
 - d. Interest awarded at court rates from date of judgment until payment in full.
 - e. Claimant to have costs of the suit.
 - f. Certificate of service to issue in 14 days under section 51 of Employment Act.
98. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 3RD NOVEMBER, 2022.

J. W KELI,

JUDGE.

In the presence of :-

Court Assistant : Brenda

Claimant : Present

Respondent : Ms. Okoth

