



REPUBLIC OF KENYA



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**Kamande v Parliamentary Service Commission (Cause 1558 of 2016)
[2022] KEELRC 13102 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13102 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1558 OF 2016
JK GAKERI, J
NOVEMBER 2, 2022**

BETWEEN

CHARLES KAMANDE CLAIMANT

AND

PARLIAMENTARY SERVICE COMMISSION RESPONDENT

JUDGMENT

1. By an undated Statement of Claim filed on August 5, 2016, the Claimant sued the Respondent alleging unfair termination of employment.
2. The Claimant prays for;
 - i. Salary for December 2015 Kshs 133,826.90
 - ii. Unpaid leave days (44) Kshs 196,278.00
 - iii. Terminal benefits till retirement Kshs 32,118,240.00
 - iv. Severance pay Kshs 250,000.00
 - v. Salary in lieu of notice Kshs 267,652.00
 - vi. Damages for wrongful termination
 - vii. Costs of the suit.

The Claimant's Case is Pleaded as Follows;

3. By letter dated June 1, 2014, the Respondent offered the Claimant the position of Principal Procurement Officer PSC 12 following an interview and the Claimant accepted the offer by letter dated



June 18, 2014, completed his 6 months probationary period and was confirmed as a permanent and pensionable employee by letter dated February 11, 2015.

4. The Claimant avers that on May 19, 2015 while at his place of work, he received a notice to show cause regarding procurement of Public Outreach Material. The letter alleged that he had violated section 41 of the [Public Procurement and Asset Disposal Act, 2015](#) by floating a quotation to M/s E-Solutions Ltd for printing services while aware that the company was not prequalified for 2013/2014/2015 period under Category B of printing services.
5. It is the Claimant's Case that he had included the company on the list to enhance competition pursuant to section 2(b) and 89 (3) (a) of the Act and the company was a prequalified bidder for printing materials.
6. That the response dated May 20, 2015 explained the process of inclusion of M/s E-Solutions Ltd.
7. The Claimant avers that his dismissal from employment was contrary to the provisions of the [Parliamentary Service Commission Act](#), [Employment Act, 2007](#), the [Constitution of Kenya, 2010](#) and [Fair Administrative Action Act](#).
8. That he suffered damages, loss and psychological trauma and had been earmarked for promotion to head the department.
9. Finally, the Claimant avers that the termination of his employment was unlawful and irregular.

Respondent's case

10. The Respondent filed its response to the claim on October 11, 2016.
11. The Respondent admits that the Claimant was its employee serving as a Principal Procurement Officer PSC 12 on permanent and pensionable terms after probation.
12. It is the Respondent's case that on May 19, 2015, the Claimant was issued with a notice to show cause regarding fraud in the procurement of Outreach Public Material and on May 20, 2015, the Chief Security Officer was directed to assist him take an inventory and copies of the documents he deeded to respond to the allegations and he responded by a Memo dated May 29, 2015 admitting that he authorised the inclusion of M/s E-Solutions in the register of quotations for the materials.
13. That the matter was referred to the Staff Disciplinary Committee to investigate and hear the Claimant and make recommendations to the Parliamentary Service Commissions (PSC).
14. It is the Respondent's case that the PSC resolved to dismiss the Claimant on December 4, 2022 and the Claimant was notified by letter dated December 22, 2015.
15. The Respondent further avers that the Claimant was accorded due process and termination of employment was consistent with the provisions of the [Employment Act](#), [Constitution of Kenya, 2010](#), [Fair Administrative Action Act](#) and the [Parliamentary Service Act](#) and denies having caused the Claimant damage, loss and psychological trauma.
16. The Respondent avers that it is a stranger to the allegation on the Claimant's promotion.
17. Finally, the Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

18. The Claimant's written statement which he adopted in court rehashes the contents of the claim in a summarised form.



19. The Claimant testified that on May 19, 2015, he received a notice to show cause and a letter requesting him to proceed on leave and that he handed over to the Director General.
20. He testified that the Notice to Show Cause contained particulars of the allegations made against him. It had three charges or accusations including the inclusion of M/s E-Solutions Ltd as a bidder.
21. The witness explained that the Procurement Department received a requisition from the Printing Department dated November 18, 2014 and initiated the process of procurement.
22. It was his testimony that he relied on the prequalified list of suppliers retained by the Respondent and M/s E-Solutions Ltd was on the list.
23. The Claimant testified that when the Memo on the procurement came to Department, it was acted on by Mr Kisinguh, a Principal Procurement Officer, who issued quotations to 5 bidders.
24. The Claimant testified that he is the one who added the sixth bidder, M/s E-Solutions Ltd on the premise that it was within his duties to do so. The Claimant added that he had added M/s E-Solutions Ltd to the list to enhance competition to ensure that the Respondent got value for money.
25. The witness denied having given two versions of minutes of the Tender Committee Meeting held on November 28, 2014. According to him, one record was the working document while the other was final.
26. The witness testified that he gave the draft minutes to Mr Olucho to raise the LPO and the issue came to light because of the addition of M/s E-Solutions Ltd.
27. That he was invited and appeared before the Disciplinary Committee on November 12, 2015 and explained himself and was dismissed on December 22, 2015.
28. The Claimant denied having seen Mr Arum, Mr Kisinguh or Meshack Ogoma testifying at the hearing nor were their statements forwarded to him.
29. The Claimant testified that he appealed against his dismissal by letter dated January 12, 2016 but no response was forthcoming.
30. On cross-examination, the witness confirmed that M/s E-Solutions was prequalified for Category AI and that Charge I of the notice to show cause related to Category B not A.
31. The witness stated that he had no evidence to show that the list he had provided had been approved by the responsible officer of the Respondent.
32. It was his testimony that he invited M/s E-Solutions Ltd on his own accord and wrote to the Clerk of the Senate on the matter.
33. CWI confirmed that the absence of a quotation number for the M/s E-Solutions Ltd's quotation was irregular.
34. Finally, the witness confirmed that he received a notice to show cause dated May 19, 2015, responded on May 29, 2015 and attended a hearing on November 12, 2015.

Respondent's Evidence

35. The Respondent's advocate informed the court that she would rely on the Replying Affidavit dated March 7, 2022 and would not adduce oral testimony.



36. The affiant Mr Jeremiah Nyegenye depones that after the Claimant responded to the Notice to Show Cause, the matter was referred to the Staff Disciplinary Committee for investigation and hearing of the Claimant.
37. That the Committee met on October 14, 2015 and the Claimant appeared before it on October 21, 2015 and the charges against him were read out to him and was requested to submit his mitigation within 7 days.
38. That the Committee took evidence of Mr Arum George, Keith Kisinguh and Meshack Ogoma on October 23, 2015.
39. The affiant states that in relation to Quotation No PC 089/2014-2015, Mr Keith Kisinguh issued five Quotations and Mr Charles Kamande issued one and on November 24, 2015 only four quotations were opened during the opening session. That the quotation by M/s E-Solutions Ltd was taken to the committee members separately by one, Henry Lwoba to append their signatures after it had been added to the Tender Quotation opening register page after its addition as the sixth quotation.
40. That although the Claimant stated that he had included the company for purposes of competition, the company was registered by the Treasury under the disadvantaged category in June, 2015.
41. That the envelope containing the Quotation of M/s E-Solutions Ltd was unmarked and had neither a tax compliance certificate or pin nor certificate of incorporation and was thus an ineligible quotation and should not have been evaluated.
42. That the Claimant, as secretary to the committee did not bring this information to the committee's attention on November 28, 2017.
43. The affiant stated that a search at the Company registry revealed that there was no company by the name M/s E-Solutions Ltd. However, a company by the name E-Solutions Africa Ltd did exist.
44. That documents relating to the award of quotations for the Outreach Materials were missing in the Tender Committee Files including the Agenda and initial minutes.
45. That Mr Charles Kamande, the Claimant prepared two (2) sets of minutes for the Tender Committee Meeting held on November 28, 2014.
46. That although a total of six quotations were issued, the two sets of minutes taken by the Claimant indicated five quotations were issued.
47. It was deponed that the LPO was issued in March, 2015, 2 months after the materials had been delivered by an unknown entity.
48. Finally, the affiant states that the Claimant included M/s E-Solutions Ltd in the procurement process while aware that the company was not prequalified under Category 7B for the provision of printing services and it participated in the process and supplied 4,000 FAQ Booklets, 4,000 parliamentary booklets, 4,000 newsletters and 4,000 public lecture posters.

Claimant's Submissions

49. As regards the charges made against the Claimant, it was submitted that the 1st charge was wrong to the extent that section 41 of the Act referred to a supplier not an employee.
50. As regards the inclusion of M/s E-Solutions Ltd, it was submitted that whereas the Claimant joined the Respondent in June 2014, the company had been prequalified in 2013 as a service provider.



51. It was urged that the requisition did not contain a directive that only those providers under 7B were eligible to raise bids and the company was listed as a supplier for the period 2013/2014.
52. It was further submitted that Keith Kisinguh listed 2 companies not listed under 7B and ought to have been treated equally and the Claimant's addition enhanced competition.
53. It is the Claimant's argument that 6 companies were invited to submit quotations, not five.
54. That other committees, ie Opening and Evaluation Committees operated independently and not under the Claimant's control or advise and they should have raised the issue of M/s E-Solutions Ltd.
55. As regards the twin minutes, it was submitted that one set was the draft while the other was a final copy. That the draft or working minutes were issued for the purpose of raising the LPO in light of the urgency and the correct minutes were dated January 9, 2015.
56. As regards procedure, it was urged that the Claimant was summoned to a disciplinary hearing from his office and there was no prior notification of the meeting and at the hearing the Human Resource Officer was not present yet the committee asked questions. That the proceedings violated the provisions of section 4 of the *Fair Administrative Action Act*.
57. It was submitted that the Claimant only learnt of the evidence given by his colleagues after the Respondent filed a Replying Affidavit and it was adverse and the Claimant was not given the statements by Mr George Arum, Meshack Ogoma and Keith Kisinguh so as to defend himself.
58. Reliance was made on the decision in *Cargell (K) Ltd V Wilson Onywoki Nyakeruma* in support of the submission.
59. In addition, Section 88 of the *Public Procurement and Asset Disposal Act* was relied upon to urge that the Claimant was victimised for enhancing competition in the process of procurement and his colleague one, Keith Kisinguh was not disciplined and was still in employment.
60. Article 236 (a) of *Constitution of Kenya, 2010* was relied upon to urge that the Claimant was discriminated or victimized.
61. The Claimant contended that the law permitted him to enlist as many bidders as possible for effective competition.
62. It was further urged that the Respondent had no valid reason to terminate the Claimant's employment as provided by section 47 of the *Employment Act, 2007*.
63. As to whether the claim was defended, it was urged that the Respondent rendered no oral evidence to defend the claim which signified malice in the termination of the Claimant.
64. Reliance was made on the decisions in *Netab Njoki Kamau V Eliud Mburu Mwaniki, Edward Muriga through Samuel Muriga V Nathaniel D Schulter* Civil Appeal No 23 of 1997, *Montex Knitwear Ltd V Gopitex Kintwear Mills Ltd* and *CMC Aviation Ltd V Crusair Ltd (No 1)* (1987) KLR 103 among others to urge that averments are not evidence unless admitted.
65. As regards reliefs, the Claimant reiterated the prayers made in the claim.

Respondent's submissions

66. The Respondent submitted that Article 127 (6) (b) of the *Constitution* empowered the PSC to constitute offices in the Parliamentary Service, appoint and dismiss office holders.



67. That Section 36 (2) of the *Parliamentary Service Commissions* empowered the PSC to make regulation on disciplining of employees.
68. That in the instant case, the PSC adhered to the provisions of *Employment Act, 2007* and the *Parliamentary Service Regulations, 2002*.
69. It was further submitted that the Claimant's response to the notice to show cause and hearing was insufficient and did not absolve him from culpability and the matter was investigated by the Staff Disciplinary Committee which reported to the Commission and the Claimant was dismissed from employment.
70. Reliance was made on section 47 (5) of the *Employment Act* to urge that the Respondent has discharged the burden to justify termination of the Claimant's employment who did not deny the actions he allegedly committed.
71. The decision in *Protus Wanjala Mutike V Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR was cited to reinforce the provisions of section 47(5) of the Act on the burden of the Claimant and the Respondent.
72. The Respondent submitted that the Claimant adduced no evidence of malice.
73. As regards the law, it was urged that termination of the Claimant's employment was conducted in accordance with the law in that there was sufficient evidence that the Claimant committed procurement irregularities and was accordingly dismissed from employment.
74. Reliance was also made on the provisions of section 45(2) of the *Employment Act* to urge that termination of the Claimant's employment was procedural.
75. Reliance was also made on Article 232(a) and (c) of the *Constitution of Kenya, 2010* and section 4 of the *Parliamentary Service Act* to urge the values of maintenance of ethical standards, professionalism, discipline, efficiency and impartiality in the Public Service among others.
76. It was submitted that the Respondent had discharged its burden under section 47(5) of the *Employment Act, 2007*.
77. As regards the reliefs sought, it was urged that the Claimant was dismissed from employment effective December 4, 2015, informed of the decision on December 22, 2015 and was paid for the days worked and had no claim for the salary from 4th – December 23, 2015. That he had been paid all his dues.
78. As regards the prayer for payment of salary till retirement, reliance was made on the decision in *DK Njagi Marete V Teachers Service Commission* (2020) eKLR to urge that anticipatory earnings had no anchorage in law and the prayer should be struck out.

Determination

79. After careful consideration of the pleadings, evidence on record, submissions by the parties and the law, the issues for determination are;
 - i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.



80. As to whether termination of the Claimant’s employment by the Respondent was unfair, the starting point are the relevant provisions of the [Employment Act 2007](#), as summarised by the Court of Appeal in [Pius Machafu Isindu V Lavington Security Guards Ltd](#) (2017) eKLR as follows;

“There can be no doubt that the Act, which was enacted in 2007 places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law.

The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), among others provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and Civil Procedure Act/Rules . . .”

81. Other relevant provisions include section 35 on notice before termination and section 44 on summary dismissal. Section 40 is specific on redundancies.

82. Section 45 of the [Employment Act](#) is the bedrock of fair termination of employment.

The section provides;

1. No employer shall terminate the employment of an employee unfairly.
2. A termination of employment by an employer 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.

83. This provision is unambiguous that for a termination of employment to pass muster, there must have been a valid and fair reason for the termination and it must have been conducted in accordance with a fair procedure.

84. The dual requirement was underscored by Linnet Ndolo J in [Walter Ogal Anuro V Teachers Service Commission](#) (2013) eKLR as follows;

“In light of the foregoing, I find that the Respondent had a genuine reason for terminating the Claimant’s employment as required under section 43 of the Employment Act. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness . . .”

85. Similar sentiments were expressed by the Court of Appeal in [Naima Khamis V Oxford University Press \(EA\) Ltd](#) (2017) eKLR.

86. The court is guided by these sentiments.

87. I will now proceed to apply these provisions and propositions of law to the facts of the instant case.



Reason(s) for Termination

88. It is not in dispute that the Claimant was an employee of the Respondent from June 2014 until termination of employment on December 22, 2015 and served as a Principal Procurement Officer PSC 12.
89. Similarly, it is not in dispute that he was served with a notice to show cause dated May 19, 2015 containing three charges with particulars, a fact he admitted on cross-examination and responded by a letter dated May 29, 2015. Charge I was on fraudulent practice in a procurement proceeding contrary to section 41 of the *Public Procurement and Asset Disposal Act*, by authorising the floating of a quotation to M/s E-Solutions Ltd for printing services while aware that the company was not prequalified for 2013/2014/2015 under Category 7B on provision of printing services. The 2nd charge related to the taking of minutes of the Tender Committee Meeting held on November 28, 2015. The 3rd charge accuses the Claimant of lying and misleading persons as regards the Tender Committee Meeting held on November 28, 2015.
90. In his response, the Claimant stated as follows;
- i. That M/s E-Solutions Ltd was one of the six (6) bidders invited in Quotation No. PSC 089/2014/2015 and had included it to enhance competition and at any rate M/s E-Solutions was prequalified as per the list provided by the Claimant.
91. Instructively, the Claimant did not include the category under which M/s E-Solutions was prequalified or why this specific company among many others.
92. Similarly, it is unclear whether the Claimant consulted his colleague Mr. Keith Kisinguh on the issue of adding M/s E-Solutions Ltd to the list ostensibly to enhance competition.
- ii. As regards charge 2, the Claimant stated that one of the twin minutes was a 'draft' which he believed was tempered with without his knowledge by deleting M/s E-Solutions Ltd.
93. Noteworthy, the Claimant did not indicate by whom and how the minutes were tempered with, and why he signed "draft minutes" for action before confirmation.
94. Noteworthy, in the "draft minutes", the names of two companies are added by hand while the others were typed in. It is unclear whose writings it was if not the Claimant who had signed on every page of the minutes for authentication.
95. Similarly, it is unclear whether the Claimant forwarded the correct or "right" minutes to the person(s) he had forwarded the "draft" minutes for action for rectification of the error before the notice to show cause was issued.
96. As regards the last charge, the Claimant stated that he acted diligently and the explanation to charge 2 sufficed.
97. The dismissal letter, which the Claimant collected on December 23, 2015 reproduced the charges set out in the notice to show cause and the reasons for termination as contravention of regulations, dishonesty, falsehood and misuse of the commission and property in contravention of Regulation 24(1) and 25(b)(d)(e) and (i) of the *Parliamentary Commission Regulations, 2002*.
98. Flowing from the foregoing, it is evident that the Claimant did not deny having added M/s E-Solutions Ltd to the list of bidders listed by his colleague Mr Keith Kisinguh.



99. From the evidence on record, it is unclear as to when the Claimant added M/s E-Solutions Ltd to the list.
100. In his evidence-in-chief in court, the Claimant stated that when the memo on the procurement of Outreach Material came to the Procurement Department, it was acted on by his colleague, Mr Keith Kisinguh.
101. That he added the 6th bidder on his own accord to enhance competition. It is unclear what inspired the Claimant to encroach onto his colleague's task bearing in mind that he led no evidence of the optimal number of bidders for a procurement entity to get value for money on account of the competition.
102. A closely related issue is whether M/s E-Solutions Ltd was prequalified for printing services.
103. While the Claimant alleges that M/s E-Solutions Ltd was prequalified to for printing services in 2013, and relies on unauthenticated lists on records, the Respondent in Charge I stated that M/s E-Solutions Ltd was not prequalified under Category B which dealt with provision of printing services and the Claimant admitted as much on cross-examination.
104. The lists provided by the Claimant relate to Category I not B.
105. It is trite that procurement entities prequalify suppliers and service providers under various categories for the supply of specific goods or services.
106. Needless to emphasize, the Claimant's evidence makes no reference to the category under which M/s E-Solutions Ltd was prequalified.
107. The assertion that he was carrying out his duties as a Principal Procurement Officer, at the same level as his colleague, Mr. Keith Kisinguh who acted on the memo yet he was not the supervisor does not explain the inclusion of M/s E-Solutions Ltd.
108. The contention that his colleague included companies not prequalified under Category 7B is of no moment as the claimant did not furnish evidence to that effect.
109. For the foregoing reasons, it is the finding of the court that the Claimant failed to place before the court sufficient material to controvert Charge I of the notice to show cause dated May 19, 2015.
110. As regards the twin minutes dated November 28, 2014 and on record and as adverted to elsewhere in this judgement, the Claimant distinguished them as the "working" minutes and the "real" or "right" minutes.
111. Whereas one set of minutes are signed by the Claimant exclusively and on every page, the "working" minutes identified 4 companies to which quotations were sent and the 4 companies from which quotations were received and M/s E-Solutions Ltd was not among them. The "real" or "right" minutes have M/s E-Solutions Ltd as the last company on the list.
112. The "working" minutes were signed by the Claimant on December 2, 2014 with a handwritten addition as follows:

"Approved for purposes of raising LPOs."
113. This addition would appear to suggest that these were not "working" minutes but actionable minutes.
114. Notably, the twin minutes had a total of 8 minute items (1 – 8) and are strikingly identical but for the addition of M/s E-Solutions Ltd in the "real" or "right" minutes.



115. Similarly, although the Claimant submitted that 5 companies were invited to submit bids, only the “real” or “right” minutes identify the five (5) invitees. The minutes signed on December 22, 2014 have five (5) names while the minutes signed by the Claimant on December 2, 2014 have four (4). Were these inconsistencies inadvertent or calculations by the Claimant? In the court’s view, the Claimant did not place sufficient material before the court to demonstrate that it was an innocent omission.
116. The failure to demonstrate why and how “working” minutes he had prepared found their way to other persons and whether and when the twin minutes were harmonised raises palpable suspicion of the Claimant’s real intentions.
117. For the foregoing reasons, it is the finding of the court that the Claimant did not exculpate himself from the charge that he prepared two sets of minutes for the meeting held on November 28, 2014 to facilitate the inclusion of M/s E-Solutions Ltd.
118. Section 43(2) of the *Employment Act* provides that;
- "The reason or reasons for termination of a contract are 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."
119. For the above-stated reasons, the court is satisfied and finds that the Respondent had a valid and fair reason to terminate the Claimant’s employment when it did so.

Procedure

120. As explained by the Court of Appeal in *Pius Machafu Isundu V Lavington Security Guards Ltd* (*supra*), section 41 of the *Employment Act* provides a mandatory and elaborate process requiring notification and hearing before termination of employment.
121. The law places an onerous obligation on the employer to demonstrate that a termination of employment or dismissal of an employee was conducted in a manner that passes the fairness test as ordained by the provisions of section 41 of the *Employment Act*.
122. The specific precepts to be complied with have been highlighted in several decisions of this court and the Court of Appeal such as *Loice Otieno V Kenya Commercial Bank Ltd* (2013) eKLR and *Postal Corporation of Kenya V Andrew K Tanui* (2019) eKLR among others.
123. In the latter case, the Court of Appeal expressed itself as follows;
- “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 reasons 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.”
124. While the Respondent asserts that termination of the Claimant’s employment was in accord with the law, the Claimant submitted that it was not.



125. The Claimant faulted the procedure employed by the Respondent on the premise that he was not accorded the opportunity to rebut the evidence against him. Specifically, the Claimant submitted that he was neither given the statements made by his colleagues Mr George Arum, Mr Meshack Ouma and Mr Keith Kisinguh who allegedly led evidence before the Staff Disciplinary Committee on October 21, 2015 nor an opportunity to cross-examine them.
126. Although the undated Report entitled PSC Disciplinary Committee on staff issues Report on the Disciplinary Proceedings against Mr Charles Kamande P/No 99004389 alludes to the Claimant having been summoned to appear before the committee on October 21, 2015 when his colleagues allegedly gave evidence, the minutes of the meeting held on October 21, 2015 do not reflect the attendance of Mr George Arum, Meshack Ouma or Keith Kisinguh. On the contrary on this day, the Chairman of the meeting gave the Claimant a letter of interdiction, read the charges against him and requested him to submit his mitigation within 7 days.
127. Noteworthy, the report was not signed by the secretary.
128. More significantly, however, the committee under Minute No 136/10/2015 resolved to invite the following officers as witnesses on Friday October 23rd, 2015 at 8.30 am.
- Mr George Arum – Deputy Director Audit
Mr Keith Kisinguh – Principal Procurement Officer
Mr David Kithua – Principal Finance Officer
Mr Joseph Kamau – Finance Officer III
Mr Meshack Ogoma – Senior Clerical Officer
129. Evidently, the undated Report prepared sometime in November 2015 did not capture the happenings at the meeting of October 21, 2015.
130. The alleged witnesses were not in attendance and although charges were read out to the Claimant, no hearing took place.
131. Similarly, minutes of the meeting held on Friday October 23, 2015 show that Mr George Arum, Keith Kisinguh and Meshack Ogoma attended the meeting and gave evidence. Minute No 140/10/2015 was on hearing of witnesses.
132. The minutes are unambiguous that the Claimant was not in attendance and no reference was made to him by the Disciplinary Committee.
133. Puzzlingly, the meeting made no decision on matters germane to the Claimant's case resolved to be trained in Singapore from 14th – December 19, 2015.
134. The Claimant testified that he was neither invited nor participated in a disciplinary hearing where the alleged witnesses Mr George Arum, Keith Kisinguh and Meshack Ouma testified nor were their statements availed for rebuttal. The Respondent adduced no evidence of any invitation to the meeting of October 23, 2015.
135. The Claimant however admitted that he was invited and attended a disciplinary hearing on November 12, 2015 initially scheduled for 11th November but he was indisposed.
136. The Claimant was invited to and made representations before the Disciplinary Committee on November 12, 2015.



137. It is unclear whether the Claimant had been notified of the right to appear with a colleague.
138. However, it is clear that the committee did not avail to the Claimant evidence adduced by the three witnesses on October 23, 2015.
139. Intriguingly, during its meeting held on October 21, 2015, the Disciplinary Committee gave the Claimant 7 days to submit his mitigation, which typically comes after conviction but before sentence in criminal cases.
140. It would appear to the court that members of the Disciplinary Committee had already made up their minds on October 21, 2015 and the meeting on November 12, 2015 was a mere formality.
141. Relatedly, the observations by the committee under Minute No 150/11/2015 raises issues that were not put to the Claimant for rebuttal.
142. Regulation 33 of the [*Parliamentary Service Commission Regulations 2002*](#), states as follows;
- "An employee in respect of whom disciplinary proceedings are to be held under this part, shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings or to be allowed to access it."
143. Similarly, Regulation 34(4) proves that;
- "The Disciplinary Committee shall inform the employee that on a special day, the charges made against him or her will be investigated and that he or she shall be allowed or if the committee so determines shall be required to appear before it to defend himself or herself."
144. Regulation 34(5) states that;
- "If witnesses are examined by the committee, the employee shall be given an opportunity of being present and of putting questions on his or her own behalf to the witnesses and no documentary evidence shall be used against him or her unless he or she has previously been supplied with a copy thereof or given access thereto."
145. From the evidence on record, it is clear that the Respondent drafted charges against the Claimant in consonance with Regulation 34(1) of the Regulations, 2002 and served the same on the Claimant by letter dated May 19, 2015.
146. It is also evident that a decision was made that the matter be investigated by the committee and the Claimant was invited to appear before committee on October 21, 2015 and responded to the allegations in accordance with Regulation 34(4).
147. However, Regulation 34(5) was not complied with since the committee examined three (3) witnesses on Friday October 23, 2015 in the absence of the Claimant.
148. The Regulation is couched in mandatory terms that "the employee shall be given an opportunity of being present and of putting questions . . . to the witnesses . . ."
149. The Claimant was not afforded the opportunity as ordained by the [*Regulations, 2002*](#) having appeared before it on October 21, 2015.
150. It is not in contest that the three witnesses who testified on October 23, 2015 adduced evidence adverse to the Claimant and he had no opportunity to rebut it as it was not provided either before or during the hearing on November 12, 2015, as the minutes of the meeting attest.



151. More significantly, the evidence led by Mr George Arum and Meshack Ogoma on October 23, 2015 was relied upon by the committee hook, line and sinker yet its veracity had not been tested or contradicted by the Claimant.
152. The evidence of the three witnesses was exclusively on how the process of procurement took place, specifically, the inclusion of M/s E-Solutions Ltd on the list of those invited to submit quotations and opening of the tenders issues central to the disciplinary proceedings.
153. Failing to invite the Claimant when the three witnesses testified as provided by the Regulations, 2002 compromised the process as it denied the Claimant a basic tenet of fair hearing.
154. This position finds support in *Postal Corporation of Kenya v Andrew K Tanui (supra)* where the Court of Appeal had this to say as regards for hearing.

“In this case, the letter inviting the Respondent to appear before the board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted in irregular . . . The board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charge laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictment which could torpedo his entire career and destroy his future . . .”

155. These sentiments apply to the facts of this case on all fours.
156. The Disciplinary Committee withheld the evidence of the three witnesses and relied on it substantially to arrive at its decision.
157. In addition, the Respondent led no evidence to demonstrate that it had notified the Claimant of his entitlement to appear with another employee.
158. Finally, although the Claimant appealed the Respondent’s decision by letter dated January 12, 2016, received by the Respondent on February 9, 2016, the Respondent did not respond.
159. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of probability failed to demonstrate that it conducted termination of the Claimant’s employment in accordance with fair procedure as required by section 45 of the Employment Act, 2007.

Reliefs

160. Having found that termination of the Claimant’s employment was unfair for want of procedural propriety, I will now proceed to assess the appropriate reliefs as follows:
 - i. Salary for December 2015
161. Although the Respondent submitted that the Claimant’s employment was terminated on December 4, 2015, the Claimant received the letter on December 23, 2015. It is unclear why it took so long to deliver the letter to the Claimant.



162. In addition, the Respondent rendered no evidence of the payments if any, made to the Claimant after his employment was terminated.
163. In the circumstances, the Claimant is awarded salary for the days he ought to have worked in December 2015 upto 23rd December when notice of dismissal was communicated.
- ii. Leave dues earned by not paid for 44 days
164. Neither the written nor the Claimant's oral evidence adduced in court make reference to any unpaid or outstanding leave days. Guided by the mantra that he who alleges must prove, the prayer is declined.
- iii. Terminal benefits to the retirement age Kshs 32,118,240/=
165. Similarly, the Claimant led no evidence to establish this claim and laid no legal basis for its award by the court.
166. As submitted by the Respondent, this is a prayer for anticipatory earnings and has no anchorage in law as explained by the Court of Appeal in *DK Njagi Marete V Teachers Service Commission* (*supra*) where the court relied on its decision in *Elizabeth Wakanyi Kibe V Telkom Kenya Ltd* (2014) eKLR and the sentiments of Rika J in *Engineer Francis N Gachuri V Energy Regulatory Commission* (2013) eKLR. The Court was unequivocal that;
- “ Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law . . . ”
167. For the foregoing reasons, the prayer is declined.
- iv. Severance pay
168. Needless to emphasize, severance pay is only payable as a benefit to an employee in circumstances in which a redundancy is conducted in consonance with the provisions of section 40 of the [Employment Act](#). It is not due in other circumstances.
169. The Claimant adduced no evidence that his employment ended on account of redundancy and severance pay was not made.
- The prayer is dismissed.
- v. Salary in lieu of notice
170. Sections 35 and 36 of the [Employment Act](#) provide that a dismissal from employment or termination of services must be preceded by the requisite notice or pay in lieu of notice and none took place in the instant case.
- The prayer for pay in lieu of notice is merited and is awarded.
- vi. Damages for wrongful termination
171. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the Claimant is eligible for the relief provided by section 49(1)(c) of the [Employment Act](#), compensation upto a maximum of 12 months gross monthly wage or salary.
172. As enjoined by section 49(4) of the Act, the court has taken the following into consideration.
- i. The Claimant was employed by the Respondent from June 2014 and his employment was terminated on December 23, 2015, a duration of about 1 year 6 months which is fairly short.



- ii. The Claimant substantially contributed to the termination of his services in the manner in which he handled the procurement of the PSC Public Outreach Publicity Material, Quotation No PSC/089/2014 – 2015.
- iii. The Claimant's appeal dated January 12, 2016 demonstrate his wish to continue serving as an employee of the Respondent.
- iv. The Claimant was in permanent and pensionable and expected to serve the Respondent until attaining retirement age.
- v. The Claimant had no previous record of misconduct.

173. In light of the foregoing, the court is satisfied that the equivalent of two (2) month's salary is fair.

174. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms:

- a. Payment for the days worked in December 2015 till 23rd.
- b. Salary in lieu of notice.
- c. Equivalent of two (2) month's salary.
- d. Costs of this suit.

175. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the 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.

DR. JACOB GAKERI

JUDGE

