REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2559 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MICHAEL ODHIAMBO OPIYO...CLAIMANT

VERSUS

BIDCO AFRICA LIMITED...RESPONDENT

JUDGEMENT

Vide his memorandum of claim dated 14th December 2016, the claimant avers that he was procedurally, illegally and unlawfully terminated from his employment and prays for orders against the Respondent as follows: -

1. *Declaration that the summary dismissal of the Claimant was unlawful and illegal*
2. *The Respondent be compelled to pay the claimant's withheld remuneration as tabulated below:*

(i) CBA salary increment (Clause 30)

Year 1-1/06/2014 to 31/05/2015 = 10% increase

Year 2- 1/06/2015 to 31/05/2016 = 9.5 increase

i.e. Kshs (102,000x110%)-102,000 = Kshs. 10,200/=

per month unpaid arrears for Year 1 =Kshs.10,200 x 12= ***Kshs.122,400/=***

Kshs. (112,200 x 109.5%) – 112,200 = Kshs.10,659/= per month

Unpaid arrears for year 2= Kshs.10,659 x 7= ***Kshs.74,613/=***

(ii) ***CBA overtime pay (Clause 5)***

Pre-CBA work 225 hours per month whilst Post CBA work 180 Hours per month. CBA rolled out in August 2015 but effective date 1/06/2014.

Extra 45 hours per month (1/06/2014 to 31/08/2015) was to be compensated via monetary pay to union members at the rate of one and a half times the normal hourly rate:

(1/06/2014-31/05/2015)

(Kshs.112,200/180) hourly rate x 45 hours x 1.5 x 12= Kshs.504,900/=

(1/06/2015-31/08/2015)

Kshs.122,859/180) hourly rate x 45 hours x 1.5 x 3= Kshs.138,216.40/=

Total Unpaid overtime pay= Kshs.643,116.40

(iii) Salary for December, 2015= Kshs.122,589/=

(iv) Acting Allowance (86 months as Plant Engineer (Refrigeration/Air Conditioning and Compressed Air Systems)) at Kshs.15,000/= per month x 86 months = Kshs.1,290,000/=

3. *Compensation for wrongful dismissal amounting to a maximum of twelve months' wages:*

   - *Twelve (12) months' salary as compensation =**Kshs.1,472,308***

4. *Interest on (d) and (e) above as from the date of filing this claim.*

5. *Costs of this cause.*

6. *Any further relief this Court may deem just.*

The Respondent filed a Memorandum of Reply on 29th November 2017 in which, save for the computation set out in the paragraph 10 of the reply, it denies the averments in the memorandum of claim and prays that the same be dismissed with costs.

Facts and Evidence

The Claimant avers that he was employed by the Respondent as a shift engineer on 9th January 2007 at a monthly remuneration consisting of a gross salary of Kshs.55,000. That sometime in November 2008, the Respondent's then Plant (Lead) Engineer (Refrigeration/Air Conditioning and Compressed Air Systems) left employment and the Claimant was verbally promoted to that office with an undertaking that he would be given a formal letter reflecting that position within six (6) months (by May 2009).

This undertaking was not fulfilled which witnessed the Claimant forcefully maintained in an acting capacity in that position for seven (7) years until he was sacked on 21st December 2015. That the Respondent's former Plant (Lead) Engineer was earning a consolidated salary in excess of Kshs.120,000/= by the time of his exit. This salary was by virtue of the office held yet the Claimant's terms of service were not revised to match those of the former employee upon the Claimant's promotion to the subject post.

He avers that he took up the new office with gusto, wanting to reassure the Respondent that it had made the right decision to promote him. Upon the lapse of the six (6) month period in his new station, the claimant requested for the formal letter confirming his promotion but none was forthcoming and was told to either put up with things as they were or leave employment if he so wished. His salary was subjected to annual increments in recognition of his input until the year 2013. The Claimant elected to join the Kenya Chemical and Allied Workers Union in February 2013 upon apprehension that there might be a repeat of the Respondent's refusal to honour its own undertaking.

He avers that this move did not sit well with the Respondent. That he was summoned by one Mr. Gurupad Shivputra Hombal –the Human Resource Team leader who demanded his withdrawal from the said Worker's Union. On refusal to leave the union, the Claimant avers that he was warned by the Team Leader that there would follow *"dire consequences"* for his decision. He contends that his annual salary increments were stopped. The last increment being for the period of 2012/2013 and was effected via the memo dated 20th December 2013 when his monthly remuneration had been revised to a basic salary of Kshs.46,182/=, house rent allowance of Kshs.18,805/=, and a *"special allowance"* of Kshs.31,013/=. The gross monthly pay was thus Kshs.102,000/=.

The reason that the Respondent had given for the failure to award a salary increment for the 2013/2014 – 2014/2015 period was that it was due to his membership of the Worker's Union and that there was an ongoing court case between the two entities and it would therefore have to wait for its conclusion. He avers that in mid-2013, a new team leader was unveiled one Mr. Rajendrasinh Rathod who took it upon himself to persuade or if necessary force the claimant to withdraw his membership of the Workers Union. Upon his refusal to withdraw his membership, the Claimant avers that the Respondent hatched a plot to frustrate him in the execution of his duties in the hope that he would find the going tough and in turn tender his resignation of his own accord.

The claimant avers that the Respondent had employed very junior engineers with little experience in comparison to him and given them similar duties to his yet granted them significantly better remuneration. That Messrs. Jagdish Verma and Davinder Singh are case studies in that regard. Repeated appeals to the Respondent by the claimant to formally regularize his position or alternatively re-deploy him to his former post were ignored.

That despite the above hurdles, the Claimant avers that he carried out his work to the requisite standards and that there is no warning letter on record to suggest the contrary that was served on him during his tenure.

On 3rd December 2015, the Winter Chiller machine broke down. The Claimant worked on it and concluded that it was beyond repair. He relayed his conclusion to the Respondent's relevant officers being: Messrs Rajendrasinh Rathod, Girendranath Singh (Engineering Team Leaders and Venugopal Kandimalla (Production Coordinator). He was therefore taken aback when he was served with a Notice to Show Cause alleging that he had been found idling on the same 3rd December 2015 instead of attending to the *"serious breakdown"* in the Winter Chiller in the refinery. The letter indicated that his acts bordered on sabotage and negligence and thus amounted to gross misconduct for which he had 24 hours to show cause why disciplinary action should not be taken against him. He received the same on 4th December 2015, upon which he prepared a response lest he be deemed to have accepted the accusation against him.

The claimant avers that a disciplinary meeting was held on 18th December 2015 which he deemed to be a sham as the composition of the Disciplinary Committee was suspect as his accusers whom he alleges had purported to investigate him, sat to pass judgement against him. That unsurprisingly, the Respondent served upon him a letter dated 21st December 2015 communicating its decision to dismiss him from employment.

He avers that he was not satisfied that he had been treated fairly as required by the law and wrote to the Respondent outlining his complaints which were ignored. That he is yet to be paid his terminal dues. He therefore avers that the Respondent was in breach of the Collective Bargaining Agreement signed between itself and the Workers Union. That he now realizes that he fell victim to a well-crafted mischievous scheme to ensure his exit from employment with the Respondent, which can be traced to his decision to join the Workers Union.

The Respondent filed a Memorandum of Reply dated 29th November 2017 and a witness statement of Zipporah Mburu Waruguru, the In Charge Lead Industrial Relations and Employee Welfare of the Respondent. The Respondent denies that there was any alleged verbal promotion of the Claimant to Plant (Lead) Engineer (Refrigeration/Air Conditioning and Compressed Air Systems) as alleged by the Claimant. It further denies that it was in receipt of any complaints from the Claimant throughout his employment or that he was victimized due to his membership with the Workers Union. In addition, it avers that the claimant's performance was in question for some time during his employment and despite being asked to improve on the same by his superiors, he never did so.

In response to the events that led to the dismissal of the Claimant,

the Respondent avers that on 1st December 2015, the Claimant was informed that the refinery department intended to use the Winter Chiller and that the machine having broken down, he was instructed to started the machine on the said date. The claimant advised his superiors that the machine required Ammonia which was availed to him on 2nd December 2015 at 4:30 pm. That instead of starting out on the machine immediately, he delegated the responsibility to another employee who was at the time working on another machine and did not perform that duty.

On 3rd December 2015, the Respondent avers that the Claimant did not bother to check on the status of the machine. He was instead found idling around the engineering office at 10:15 am. That when summoned to the Sales and Production meeting, which was ongoing at the time, he declined to attend it insisting he should first be told why he was being summoned. The machine in question was never started by the Claimant which was at the expense of the Respondent losing production and yet this was the peak season for the Respondent who needed all the machines running in order to meet consumer demands.

Regarding the disciplinary meeting, the Respondent denied that it was a sham and stated that the Claimant never raised any of the alleged issues he claimed that he had raised either during or after the meeting. It counters that the claimant was only raising in the suit because he was aggrieved by the outcome of the proceedings. That the committee was properly constituted and that there was no bias against the Claimant as alleged. The Respondent also denied being in breach of the provisions of the CBA as alleged by the Claimant.

In conclusion, the Respondent denied the computation of the claimant's claim and computed the same as follows:

i) Salary for December, 2015 (28 days worked) less statutory deductions – **Kshs. 54,911.01**

ii) CBA salary increment (2014 and 2015) arrears- **Kshs.94,026.55**

iii) CBA overtime payment (2014 and 2015) arrears – **Kshs.99,225.95**

TOTAL- **Kshs. 248,163.51**

The Claimant responded to the Respondent's Memorandum of Reply dated 4th December 2017 where he countered that there was a procedure for dealing with employees whose performance was unsatisfactory. It included the drafting and service of formal warning letters, copies of which are retained in the employee's file. Copies of these warning letters that would support the Respondent's averments were not availed.

He countered that the computation for final dues owed to him amounting to **Kshs.54,911.01** was an afterthought drafted in haste after his indication that he was moving to court.

Evidence

At the hearing the claimant testified on his behalf as CW1 reiterating the position in the Memorandum of Claim, witness statement and the Reply to the Memorandum of Reply. He also clarified that he attended the disciplinary hearing with two union officials.

He testified that following the Respondent's computation of his dues at Kshs.248,163.50, he went to collect the cheque for the above amount but was instead issued with one for Kshs.50,000 which he declined to pick. He added that after registration of the CBA, some of his colleagues had received salary increments twice but he had not gotten any.

The Respondent called upon ZIPPORAH MBURU WARUGURU, as RW1 who testified on its behalf. She adopted her witness statement as her evidence.

She testified that the Respondent's computation of the Claimant's increment was based on his basic minimum wage that was Ksh.46,182 as

per his pay slip of October 2016. That before his departure, he had worked for 28 days and the pay cycle began on the 21st day of the month to the 20th day of the next month. That the difference between the Claimant's computation and their computation is that the Claimant's was based on gross pay while theirs was based on his basic pay and that he did not net off the payments already received.

She testified further that when she joined the Respondent in June 2013, there was no Engineer in the Refrigeration and Air Conditioning, the position the claimant stated he was promoted to. That the Lead Plant Engineer Jagdish was Head of different sections as he was mandated to oversee different sections. She stated that his job description was not brought to court. She also stated that the implementation of the first CBA was on 1st June 2014 and that before this, all employees were in management. The reason why the Claimant was not included in this was because he was in the union.

RW1 testified that the disciplinary committee was properly constituted because it was composed of independent persons as per the company's disciplinary manual and the CBA. The manual has not been provided to this court for reference. On being questioned as to the presence of one John Muiruri who had been marked as present, RW1 testified that he was present during the committee hearing and had not been hospitalized and that he unfortunately passed away in 2017. A signed attendance list of the present members was not presented to this court.

She testified that the minutes of the disciplinary meeting was signed by two people and that the claimant had not raised any issue on the composition of the disciplinary committee during the hearing date or any day afterwards. She noted that the only issue he raised was about Rajendrasinh Rathod despite which, she maintained the decision of the committee as being above board.

On inquiry from the court on the implementation of the CBA, she responded that she was not certain of the date but sometime in 2015.

Submissions

On the issue of whether the Claimant was promoted to Plant (Lead) Engineer, the claimant submitted that the Respondent was in breach of Sections 8, 9 and 10 of the Employment Act, 2007 which requires that every employee be issued with a contract of service stating the terms and conditions of such employment. He relied on the case of **Martin Ireri Ndwiga v Olerai Management Company (2017) eKLR,** where the Court found that *"where the employer fails to issue an employee with a written contract of service, the word of the employee is to be believed."*

He submitted that the Respondent is tasked with keeping records of attendance and work issues. He relied on the provisions of Section 10(1), (6) and (7) of the Employment Act which places the burden on the employer to keep written particulars of the employment for a period of five years after the termination of employment. That in any legal proceedings if an employer fails to produce a written contract or the written particulars, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. This position was also upheld in the **Martin Ireri case (supra).** He therefore submitted that having failed to discharge the burden of disproving the Claimant's assertion that he was promoted to Plant (Lead) Engineer (Refrigeration/Air Conditioning and Compressed Air Systems), the court must find in his favour.

On whether the termination was fair, the claimant relied on the provisions of Section 41 of the Employment Act on fair procedure. Further reliance was placed on the case of **Alphonse Maghanga Mwachanya v Operation 680 Limited (2013) eKLR** where the court duly outlined the legal requirements of procedural fairness that the employer must show as a matter of factual evidence that it:

> *(i) Explained to the employee in a language the employee understood the reasons why it was considering the termination.*
>
> *(ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.*
>
> *(iii) Heard and considered any explanations by employee or his representative.*
>
> *(iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules."*

The court in this matter found that the employer had not adhered to the law and found that the dismissal was procedurally unfair.

Regarding the disciplinary meeting, the Claimant submitted that based on his testimony, he was not furnished with a letter of invitation to the disciplinary committee a result of which, he lacked prior notice of the date and time when it would be held. He therefore submitted that he had not been accorded sufficient time to prepare for the hearing. He relied on the case of **Margaret Auma Ingwe v Kenya Power and Lighting Co. Limited (2015) eKLR,** where the court held that it is good human resource practice to notify an employee of an impending disciplinary hearing the day before with the charges being very clear. That the employee must also be afforded sufficient time to prepare their defence and call witnesses to buttress their defence.

On the composition of the committee and his issue with one of the members of the committee, the claimant relied on the case of **Jones Okero Momanyi v Public Service Commission (2016) eKLR** where the court found that there was no independent and impartial consideration of the appeal and review where the person who made recommendations for rejection of the Claimant's appeal and review also sat in the Ministerial Human Resource Management Committee meeting that made the decision on his summary dismissal.

The claimant submitted that the Respondent's conduct while terminating the Claimant's employment was unlawful and constituted a violation of Articles 41(1) and 2(c), 47 and 50 of the Constitution of Kenya, 2010; sections 3 and 4(3) of the Fair Administrative Actions

Act, 2015; and the Collective Bargaining Agreement signed. He finally submitted that the Claimant is indeed deserving of the compensation claim.

The Respondent did not file submissions.

Analysis and Determination

Having carefully considered the claim, the parties' evidence together with the submissions, and the authorities cited; the issues for determination before this Court are:

1. Whether the Claimant was promoted to the position of Plant (Lead) Engineer (Refrigeration/Air Conditioning and Compressed Air Systems);

2. Whether the termination of the Claimant's employment was fair and lawful;

3. Whether the Claimant is entitled to the prayers sought.

Whether the Claimant was promoted to the position of Plant (Lead) Engineer (Refrigeration/Air Conditioning and Compressed Air Systems)

It is not in doubt that the Claimant herein was employed by the Respondent on 9th January 2007 as a shift engineer on a fixed term employment while earning a consolidated salary of Kshs. Fifty-Five Thousand Only (Kshs.55,000/=). This payment comprised of a basic salary, House rent allowance and a special allowance. This amount was subject to revision based on subsequent annual increments. He ceased to be in employment on 21st December 2015 vide a summary dismissal letter on grounds of neglect of duties and non-performance.

The issue that this court needs to address is the aspect of promotion. When the claimant started employment, he was contracted to work as a shift engineer. He testified that this position changed when he was promoted to Plant (Lead) Engineer (Refrigeration/Air Conditioning and Compressed Air Systems).

While the Claimant has stated that the promotion was made orally and also followed up for official communication on the same, the Respondent has denied this. On record is a letter written by the Claimant dated 20th August 2010 in which he requested for responsibility and phone airtime allowances as he was in charge of the Refrigeration Section. In this letter, he brings it out that he had discussed the matter with his team leader in the past and had not received any communication.

The Employment Act under Section 10 places responsibility on an employer on keeping of records of employees.

This court aligns itself with the decision of Mbaru J. in **Martin Ireri Ndwiga v Olerai Management Company [2017] eKLR** where the court held that:

> "*In employment and labour relations, the duty is placed upon the employer to keep all work records with regard to each employee. Where there are proceedings such as these, the duty is on the employer to submit the same before the court as stipulated under section 10(6) and (7) of the Employment Act, 2007 as follows;*
>
> > ***(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.***
> >
> > ***(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer***
>
> *In this regard, where the claimant took his annual leave as alleged by the respondent, the duty is vested upon the respondent to produce such records of him taking annual leave."*

In this case, the Claimant has stated that he was promoted. On a number of occasions he asked for a letter to confirm the said promotion through the letter dated 20th August 2010 or and during his performance review for the 2013/2014 period.

It is also worth to note that in the Respondent's summary dismissal letter dated 21st December 2015, it is stated:

> "… *In view thereof, the Committee found that you wilfully neglected to perform your work, which was also a sabotage on your end.* ***As a head of department it came out that you did not take the best of the company seriously****. You lacked commitment, and demonstrated a don't care attitude ..."*
>
> [Emphasis ours]

While the respondent has denied the promotion allegation, this court finds that from its own admission above, the Claimant had been serving as a head of department despite the lack of a letter to prove the same. The Respondent ought to have corrected this position as soon as it came

up in December 2010 but decided to ignore the issue. For these reasons, this court cannot be called upon to protect it from its laxity.

Whether the termination of the Claimant's employment was fair and lawful

Summary dismissal is provided for under Section 44 of the Employment Act as follows: -

44. Summary dismissal

(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

c. an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

d. an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

f. …

g. …"

Unfair termination on the other hand is provided for under section 45 of the Employment Act as follows:

45. Unfair Termination

(1) ……………

(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

(3) …..

(4) ……

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any pervious warning letters issued

to the employee.

Further, Section 12 of the Act requires an employer who has more than 50 employees in its employment to document internal disciplinary rules for use in handling disciplinary cases.

The letter of dismissal reads as following:

"*Our Reference: BAL/HRD/2343/15*

Date: Monday 21st December 2015

Place: Thika

MR. MICHAEL OPIYO, IDNO.0669137,

CO Box 17242 – 00510,

NAIROBI.

This letter is with reference to the incident that took place on 3/12/2015, previous performance issues highlighted to you through various correspondences via e-mails and your response to the notice to show cause dated 4th December 2015.

We also refer to the disciplinary hearing meeting which was held on the 18th day of December 2015, wherein you attended the hearing. You were given sufficient time to defend yourself with regard to the notice to show cause. You were heard by a panel of nine committee members who were sitting for the purpose of the said hearing. Two (2) of your representatives (Shop stewards) were also present at the hearing.

The committee noted with a lot of concern that you neglected your duties as a senior employee whose core duty was to ensure that you supported the overall goals of the company by being effective in your line of duty. During the hearing, several incidences of non-performance in the year 2015 were highlighted to you and as a leader you failed and/or refused to acknowledge the gaps. One of your major responses and defences thereto that your superior: one Mr. Rathod had always wanted to suck you and even then you did not have any evidence to substantiate your allegations. Be that as it may, the panel refused to accede to hearsay which you so much relied upon and which you so much wanted the panel to believe to be true. Also, by way of passing, hiring and terminating the employment of an employee lies squarely within the office of the Human Resources Department and not with the said Mr. Rathod and therefore your allegations were found to be wanting. The said reliance on hearsay with respect to Mr. Rathod blinded you from understanding and convincingly addressing the gaps thus unable to rectify your wrongs. For example, on 1st December 2015, you were informed that the Refinery department intended to use Winter Chiller and you were required to start the machine on the said date. You advised your superiors that the machine required Ammonia which you confirmed at the hearing to have received the same on 2nd December 2015 at 4.30 pm and instead of you making sure that the machine started immediately the ammonia was received, you delegated the responsibility to your team member who was working on another machine. In 3rd December 2015, you did not bother to check on the status and only to be found idling around the Engineering office at 10.15 am during sales and production meeting. As it is the peak season, you were asked on the progress and time inquired to complete the task and you blatantly refused to give the conclusion time. To make matters worse, during the hearing, it came out that the machine had not started at the expense of the company losing production, again you did not see any failure on your end forgetting that during the peak season all machines were required to function so as to satisfy the customers demand.

In view thereof, the committee found that you wilfully neglected to perform your work which was also a sabotage on your end. As a head of department it came out that you did not take the best interests of the company seriously. You lacked commitment, and demonstrated a don't care attitude. The panel also noted that, you were not a team player and you kicked proper follow-ups. It was also the panel's finding that you kept no records and no reports were availed by you to your superiors. The upshot of the foregoing is that the management has Summarily Dismissed you from your employment With Immediate Effect. Your last working day will be deemed to have been 18th December 2015.

You are therefore requested to handover any company property in your possession as soon as possible and also if there Is any query please contact Human resource Department. Please note that, you will be paid your terminal dues as soon as the Finance team

finalizes the computation.

Yours Faithfully

BIDCO AFRICA LIMITED

SIGNED

Authorised Signatory

TEAM LEADER - HRD"

In this case, the Claimant avers that his dismissal was the final nail on the coffin with treatment and victimization that had begun as soon as he joined the Worker's union in February 2013. The Respondent denies this allegation and states that termination was as a result of his negligence of duty.

The right to join a union of one's preference is protected under the Constitution in Articles 36 which provides for freedom of association and Article 41(2)(c). No employee is to face any kind of victimization for exercising his/her rights. In this case, I do not find sufficient evidence by the Claimant to prove that victimization did take place due to the Claimant's joining of the Worker's Union.

I will now consider the dismissal of the Claimant. The Show Cause notice was issued to the Claimant on 3rd December 2015. He was given 24 hours to respond and show cause why disciplinary action should not be taken against him. During the hearing, what this court gathered was that the Claimant was not informed when the disciplinary hearing would be held. From the testimony of the Respondent's witness, the Claimant was approached during lunch hour with two shop stewards asking him to proceed for hearing. The Claimant had raised an issue about what transpired during the hearing on the composition of the committee and also the conduct of the committee members during the hearing.

The disciplinary process must be governed by the principles of natural justice which require that, any employee charged with any offence is given an opportunity to defend himself or herself. Fair hearing encompasses notification of the date, venue, time and charges in good time to enable the employee prepare for the hearing. Further, Section 41 of the Employment Act requires that the employee attend the meeting with either a fellow employee or union officials of his choice, not those chosen by the employer.

It is worthy to note that the Respondent during the hearing testified that the dismissal was in accordance with its internal procedure. This court has not been furnished with the said internal procedure to allow it an opportunity to review whether the internal procedure was actually adhered to.

Was the 24-hour notice period sufficient to allow a proper defence to be mounted? I believe not. Was the above process in line with the rules of natural justice? I find that it was not. The decision to terminate an employee is not one to be taken lightly, as such the entire process should not be marred with irregularities as an employer will be in a difficult position when the matter is reviewed by a court of law as is the case now. Courts do not take away the right to terminate an employee who is found guilty of misconduct. However, the employer has to exercise a lot of caution during the steps that lead up to the said termination so that the process does not appear cosmetic. Specifically, an employer must not ambush the employee. The employee must be given adequate time prepare his defence, gather his evidence, and consult with the colleague or union official whom he chooses to accompany him during the disciplinary hearing.

I align myself with the view of the court in **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where the court held:

> "*I agree with Counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence."*

In addition, the claimant raises an issue that the people who complained against him Messrs. Rajendrasinh Rathod and Mr. Jagdish Verma were also present during his disciplinary hearing and he had voiced his concern over the same. This was not controverted by the Respondent. I find this in contravention of the rules of natural justice. I am also guided by this court's decision in **Jones Okero Momanyi v Public Service Commission [2016] eKLR.**

> "*It is also worth noting here that although the ministerial Human Resource Management Advisory Committee held on 31st October, 2012 found the Claimant guilty of only the first charge of encashment of VAT cheques, the letter of dismissal included the four other charges for which the Claimant was not found culpable. I further note that the person who made recommendations for rejection of the Claimants appeal and review was K A Odhiambo who also sat in the ministerial Human Resource Management Committee Meeting that made the decision for his summary dismissal. This means therefore that there was no independent and impartial consideration of the appeal and the review. The Respondent therefore did not comply with its own procedure as it failed to independently and impartially consider the appeal and review filed by the Claimant. Both the appeal and the review were a sham."*

I find that the dismissal was both substantively and procedurally unfair. Having found the dismissal unfair, I reduce the same to normal termination.

Whether the Claimant is entitled to the prayers sought

Based on my findings in the above issues, the Claimant is entitled to the following reliefs:

a... Gross Salary for December, 2015 – **Kshs.122,589.00**

b... Pay in lieu of notice based on gross pay as per Section 49(1) of Employment Act – **Kshs.122,589.00**

c.. Compensation

Taking into account the claimant's length of service, the circumstances under which his employment was terminated the conduct of the Respondent both before and after the termination of the claimant's employment as well as the manner in which the disciplinary process was conducted,, the respondent's refusal to pay the claimant his normal pay and attempting to pay him at a reduced rate, I will award him maximum compensation in the sum of **Kshs.1,474,308.00**

d..**The claimant is entitled to overtime and salary increment arising from CBA** as awarded by the Respondent and admitted in the Respondent's computation of CBA arrears and CBA overtime, **but calculated on the basis of the Claimant's actual basic salary earned as per payslip**.

e... The prayer for Acting Allowance is rejected as the claimant's payslip reflects that he was paid a special allowance of Kshs.31,013 and additional allowance of Kshs.6,000 per month.

f...The Respondent shall pay Claimant's costs of the suit.

g. **Interest shall accrue at court rates from date of filing suit for items (a), (b) and (d) above and from date of judgment in respect of the rest of the award until payment in full.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF APRIL 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE