



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1035 OF 2017

DANIEL MUTUKU NJUGUNA.....CLAIMANT

=VERSUS=

KENYA INSTITUTE OF MASS COMMUNICATION.....RESPONDENT

JUDGMENT

Introduction

1. By its letter of appointment dated 30th September 2015, the Respondent offered to employ and the Claimant accepted to be employed as an administration manager with effect from 1st November 2015. The employer -employee relationship that had been created out of this remained smooth and peaceful until around the 15th September 2016, when it ran into turbulence which never settled. The Claimant's employment was terminated on 9th March 2017. The termination did not settle down well with him, contending his dismissal from employment was illegal and unfair, the Claimant commenced the suit herein against the Respondent. The Respondent denies the claim and contends that his services were terminated on valid and justifiable grounds. It seeks the dismissal of the claim and the reliefs sought therein.

Claimant's case

2. The claim herein was instituted vide the Claimant's Memorandum of Claim dated 6th June 2017. The Claimant prays for judgement against the Respondent for:

a) A declaration that the Respondent's action to terminate the Claimant's employment was illegal, unlawful and unfair and amounted actually to an unlawful summary dismissal and therefore the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded in the statement of claim.

b) An order for the Respondent to pay the Claimant his due terminal benefits, compensatory and exemplary damages totaling to **Kshs. 3,829,183/=**.

c) Interest on (b) above from the date of filing suit till payment in full.

d) Costs of this suit plus interest thereon.

3. The Claimant avers that he was employed by the Respondent at a monthly pay of Kshs. 142,770/= from 1st November 2015. That prior to taking up the employment at the Respondent, he was a career civil servant having worked for the Government of Kenya in different capacities for a period of 20 years.

4. He states that this followed an interview in which he emerged as the best candidate, he was offered the position with the terms and conditions of service being in character reflecting substantively a permanent and pensionable employment. Confirmation to the employment was subject to a successful completion of a 6-month probation period. As a result of the appointment, he resigned from the civil service to take up the new employment.

5. The Claimant avows that he diligently undertook his duties and responsibilities, completed his probation successfully and was appraised positively. He states that in spite of the above, he was shocked when he received a Notice to Show Cause letter on 15th September 2016 from the Respondent through the Director/C.E.O. The letter, he alleges contained malicious allegations of insubordination which the said Director knew well to be false and at best callous and malicious.

6. The Claimant states that the substance of the show cause was that the Director had demanded of him to arrest a hand-cart owner who had presented himself at the Respondent's premises to collect a handcart retained by the security personnel. A hand-cart pusher had prior run

away from the Respondent's security personnel after he was spotted dumping waste outside the institute's perimeter. He states that he found the demand ridiculous owing to the fact that he had no legal mandate and/or capacity to arrest or detain the hand cart owner and that no criminal complaints had been lodged by the Respondent at any police station.

7. The Claimant asserted that however, he had called the County Government officers, seeking for their assistance. But before he would get a response from them, the owner of the hand-cart presented himself to the Respondent's premises, he pleaded for forgiveness and on humanitarian grounds, the Claimant and other officers of the Respondent agreed that he could be released. The owner had undertaken to ensure that the ran-away pusher was brought to book.

8. The show cause letter required the Claimant to in writing answer the charge of insubordination, and show cause why disciplinary action should not be taken against him.

9. The Claimant stated that in the same letter, the Respondent's director/CEO brought to his attention of a letter from the Head Corporate Communications which letter apparently had a complaint to the effect that the Claimant had treated the him in a manner that was considered rude. Too, the Claimant was required to answer to this. As regards the insubordination charge the response was to be made on or before the 19th September 2016, while for the alleged incident of rudeness, on or before the 21st September 2016. The Claimant responded on the 19th September 2016.

10. In a letter dated 22nd September 2016, the Director acknowledged receipt of the response, indicating that the same suffered from deficiency of a sufficient explanation to the two issues. He consequently charged the Claimant with insubordination, and informed that the Management Board was to meet not later than 26th September 2016 to give him a hearing before the matter could be forwarded to the institute's council for disciplinary action.

11. It was the Claimant's evidence that through a letter dated 12th October, 2016 the Director/CEO expressed to him that the council had put his confirmation on hold for a period of three [3] months following the charge of insubordination and that the council's decision on the charge of insubordination was to be communicated in a subsequent correspondence.

12. Through a letter dated 26th January 2017, the Director informed the Claimant that the board had met on the 13th December 2016 and directed that the he be placed on a three-month special probation. The reason being the unconcluded insubordination case. In the letter it was further expressed that at the expiry of the three months i.e. 13th December 2016 to 13th March 2017, he will be appraised and a report made to the Council.

13. The Claimant contended that if there were to be an extension of his probation period, then the same was to be for a maximum of 3 months upon completion of the 6 months' probation according to the Respondent's Human Resource policy. The 6 months lapsed on 6th April 2016. As at 30th April 2016, he was not notified of any unsatisfactory performance. All through, poor performance was not a subject.

14. Through a letter dated 29th March 2017, the Respondent terminated the Claimant giving him a 7 [seven] days' notice. In the letter ,the Respondent the stated that the Claimant had failed to improve in his performance and conduct, and therefore his appointment could not be confirmed. The reason for termination was completely different from what he had been asked to respond to in the show cause letter, and which he made a representation on.

15. Besides other reliefs, the Claimant seeks for exemplary damages citing that he and his family had been put under a situation deplorable as a result of the manner in which his job was terminated. His kids dropped from Colleges due to lack of school fees.

16. Cross examined by Mr. Malonza for the Respondent, the Claimant stated that his immediate supervisor was the Deputy Director-Peter Wakoli. He was to take instructions from him or the CEO.

17. He reiterated that the subject of the show cause letter was insubordination. That the letter was about two specific items, first the issue of the hand-cart and the owner, and second, the complaint by the Head of Corporate Communications. That the Director had wanted him to arrest the person who was dumping the waste outside the institute's compound.

18. At page 47 of the Respondent's documents it is clear that it is not him who released the hand-cart owner. When the Claimant was referred to page 44, he stated that the contents therein are only on the agreement to release, not the act of releasing. Asked as to whether he responded to both the items that were cited in the show cause letter, he answered in the affirmative.

19. While admitting that he was invited to appear before the board and that indeed he did, the Claimant asserted that he was so invited and appeared to make a representation on a charge of insubordinations.

20. On the issue of entitlement to leave pay, the Claimant contended that his computation gave him 12 days of leave taken.

Claimant's Submissions

21. The Claimant's counsel in their written submissions identifies three issues as issues for determination in this matter. First, whether it was right and just in law and substance to put the Claimant on a purported" special" probation period? Second, was fair procedure applied before dismissing the Claimant? Third is the Claimant entitled to the prayers sought?

22. On the issue of whether it was right and just in law and substance to put the Claimant on a special probationary period, counsel for the

Claimant submitted that the designated probationary period had lapsed on 30th April 2016; 6 months from his date of appointment, and concluded that in the absence of any documentation extending the Claimant's probation at that time, the Claimant's employment was automatically converted into permanent and pensionable terms. That indeed the Pay slip for the Claimant reflected his status of employment as permanent and pensionable.

23. It was further submitted that in fact in September 2016, DW-1 had appraised the Claimant and found him to be suitable for confirmation.

24. Counsel submitted that there was no board resolution filed in court justifying the extension of probation and the further special probation. He added that the act was illegal and unknown both in law and policy. He placed reliance on the decision of Mbaru J. in **Narry Philemons Onaya-Odek vs= Technical University of Kenya (Formerly known as the Kenya Polytechnic University College) (2017) eKLR** to bolster his stance.

25. As for the procedure applied before dismissal, counsel submitted that Section 45 of the Employment Act places an obligation on the employer to not only prove that the reason for termination is valid, factual and fair but also that the employment was terminated in accordance with fair procedure.

26. It was further submitted that an employee should be given an adequate opportunity to respond failure to which the termination is ipso facto unfair. He relied on the cases of **Justine Onwoyo Among'a vs= Mount Kenya University [2016] eKLR** and **Peter Wangai vs Egerton University (2019) eKLR** to support his argument. He further quoted the case of **Walter Ogal Anuro vs= Teachers Service Commission [2013] eKLR** where it was held:

"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."

27. On the final issue of the reliefs sought, counsel submitted that the Claimant, having proved his case ought to be awarded the reliefs sought. He submitted that Section 49 of the Employment Act gives guidance on award of compensatory damages to a maximum of 12 months gross salary when a court finds that the termination was unfair.

28. Regarding exemplary damages, counsel relied on the case of **Dr. Ezekiel Okemwa vs= Kenya Marine and Fisheries research Institute** where Justice Rika placing reliance on other authorities found that general or exemplary damages are awardable to an employee where it is shown that he suffered personal harm, discrimination, mental anguish, defamation and critically that his employability had diminished.

29. Counsel also submitted that the Claimant had suffered unexplained discrimination and mental anguish as a result of the actions of the Director of the Respondent. He urged the court to award Kshs. 20,000,000/= as a reasonable recompense given that the chances of him getting an alternative employment have been completely diminished.

30. It was submitted in conclusion that the issuance of a certificate of service is a requirement provided for under Section 51 of the Employment Act, the Court should therefore issue an order compelling the Respondent to provide the same.

Respondent's case

31. In response to the claim, the Respondent filed a Statement of Response dated 28th June 2017 and an Institute's Witness Statement dated 3rd August 2018 by Hiram Mucheke, the Institute's Director.

32. In it, the Respondent acknowledged that the Claimant was appointed to serve as an Administration Manager subject to a 6 months successful probationary period. It however denied the allegations that were brought forth by the Claimant and stated that in accepting the appointment, the Claimant was subject to the Human Resource Policies and Procedures Manual for Public Service.

33. The Respondent averred that the manual provided that an employee on probation had to be evaluated to test his suitability for the employment, and that confirmation had to be preceded by a satisfactory evaluation outcome. That the manual also allows the Respondent to extend the probation period by an additional 3 months in the event of an unsatisfactory performance. That it had right to extend the period for a further 3 [three] months if the performance was still unsatisfactory, since the law allows. On an unsatisfactory performance during the extended period the employee's employment gets terminated.

34. In the Claimant's case, the Respondent asserted that upon evaluating his performance during the first 6 months, it noted that the Claimant failed to follow up assignments given by the institute. The claimant was made aware of the evaluation to this effect. Additionally, the Claimant was accused of insubordination. That following the incidents of insubordination, the Respondent issued him with a Notice to Show Cause on 15th September 2016.

35. The Respondent states that it proceeded to extend the probation first for a period of 3 [three] months, and subsequently by an additional 3 months, these to allow investigations on insubordination to be concluded and also to allow the Claimant to improve in his performance.

36. It states that on 20th March 2017, after considering all the facts, it conducted an evaluation and concluded that the Claimant's services were unsatisfactory. On this basis, the Claimant's services were terminated by giving a seven days' notice of termination of employment.

37. The Respondent states that its actions were in line with the procedure set out in its manual and the law. The disciplinary proceedings were conducted procedurally and the allegations of malice and unfair treatment are unfounded. It adds that it makes its decisions through its Council contrary to the Claimant's allegations that the Director acted in his personal capacity.

38. As for the prayers, the Respondent urges the court not to issue any relief owing to the fact that his employment was lawfully terminated. It adds that the Claimant has failed to demonstrate and substantiate the illegality, unfairness and unlawfulness of the Respondent's actions and as such his claim should fail.

39. In his brief oral evidence in court, the Respondent's witness shading more right on the issue of insubordination stated that the Director, directed the Claimant to arrest the person who was dumping waste at the perimeter of the institute and take the cart to the offices of the County government. This never happened. That the Claimant never filed any report to show compliance.

40. He asserted that contrary to the instructions by the director the Claimant decided to hold a meeting with security officers and the owner of the cart, whereby they agreed to release the cart to the owner.

41. On the incident of rudeness, the witness stated that part of the Claimant's duties was that of facilitating transport for other officers of the institute. That he failed to facilitate the same for the Head of Corporate Communications, leading to an altercation. That when this matter was brought to his attention, he advised the Claimant to reach out to the other officer for a reconciliation, but the Claimant did not.

42. Cross examined by Maluku for the Claimant, the witness stated that page 10 off the Respondent's bundle of documents [part of the Human Resource Policies and procedure Manual], relates to probationary period and that according to the manual, evaluation to check on suitability of the Claimant was supposed to be done 2 [two] months before the lapse of the 6 months' probation period. He acceded that the evaluation was not done as provided and that he did not do any report prior to 30th April 2016, the last day of the probation period.

43. Further under cross examination the witness agreed with suggestion by counsel that under the policy and manual, the probation period would only be extended once to a maximum three months. That before extending a probation period, an employee is supposed to be explained to his shortcomings. The Respondent did not do this.

44. That if an extension had to be done after the initial probation period, then the extended period could have ended on 30th July 2016. That prior to this date, the Claimant was not informed of any deficiency in his performance.

45. The witness referred to the evaluation report filed by the Respondent, admitted that he had found and recommended the Claimant as suitable for confirmation.

46. As regards evaluation report of 20th March 2017, the witness stated that he cannot tell whether or not the employee[claimant] was involved, and added that in any event evaluations are done secretly, then the contents thereof brought to the attention of the employee thereafter. The manual requires that an employee be given an opportunity to improve. That 20th March 2021, was the 1st time when the Claimant was appraised negatively. The report formed the basis for the termination.

47. The witness acceded that he had not placed any minutes of the disciplinary proceedings before court to enable it appreciate the happenings in regard thereto. The termination letter is not specific that termination was on account of insubordination.

48. When the court sort clarification from the witness, the witness stated that the show cause letter was not specific as regards charges against him. He further stated that all through poor performance was not one of the charges. That there was no communication to him touching on performance as an aspect that was to be under consideration by the board.

49. As regards the alleged last appraisal for the period 13th December 2016 to March 2017 there was no correspondence notifying the claimant of the appraisal.

Respondent's Submissions

50. Counsel for the Respondent submitted that Clause 2.13 of the of the Respondent's Human Resource and Procedures Manual dated May 2013 confirmation of the Claimant into employment was not automatic. It was subject to a successful 6 months' probation period. The probationary period was extendable depending on the Claimant's performance during the period. He argued that the extensions were justified and by his conduct the Claimant impliedly consented to the said extensions.

51. It was further submitted that whereas the evaluation conducted on the 1st of September 2016 was favorable for the confirmation, the issues the subject matter of the show cause letter arose and the Respondent would not shut its eyes to them. On the delay to evaluate, Counsel submitted that since evaluations have to be done based on certain identifiable and verifiable parameters prescribed by the Respondent, it was not possible to evaluate the Claimant earlier that it was done since the counsel had not be constituted to come up with forms for evaluation.

52. It was noted in the submissions that while Section 42 (2) of the Employment Act requires the agreement of the employee to an extension of probation, it does not specify how such consent should be expressed. That Court can infer consent from the circumstances of the case.

53. Counsel for the Respondent invited this court to infer consent from the circumstances of the case. He placed reliance on the cases of ***Dinah Musindarwezo. =vs= African Women's Development and Communication Network (Femnet) [2012] eKLR and Katunge Kiilu v National Aids Control Council [2019] eKLR*** to support his position.

54. Regarding the issue whether the Claimant's dismissal was procedurally and substantially unfair, counsel submitted that in terminating the Claimant's employment, The Respondent satisfied the dictates of Section 41 of the Employment Act. He also submitted that pursuant to the provisions of Section 45 of the Employment Act, the Claimant's termination was for valid and fair reasons. The Claimant's performance was unsatisfactory. The termination letter flowed from a report that revealed this.

55. It was submitted that the termination was not terminated on an account different from that which was set out in the notice to show cause letter.

56. As a result of the foregoing submissions, counsel stated that the Claimant was not entitled to the reliefs sought. He argued that the given that the Claimant was still under probation at the time of termination, the requisite notice period of seven days was sufficient.

57. On the matter of exemplary damages, counsel submitted that the remedy is not known in employment law. He also stated that the Claimant's counsel had raised an issue of discrimination on the basis of which he made a claim for general damages. Counsel submitted that the same only appears in the Claimant's final submissions and that it was neither pleaded nor proved at the hearing. Counsel stated that it is trite law that parties are bound by their pleadings and urged the court not to give an award on the basis of a matter not pleaded.

Analysis and Determination

58. From the material placed before the Court the issues here below are the issues that emerge for determination in this matter.

- (i) Whether the Claimant was confirmed for the position of administration manager.
- (ii) Whether the termination of the Claimant's employment was procedurally fair.
- (iii) Whether the termination of the Claimant's employment was substantively fair.
- (iv) What reliefs if any are available to the Claimant in the circumstances of this matter.
- (v) Who should bear the costs of this matter.

59. There is no dispute that through its letter dated 30th September 2015, the Respondent appointed the Claimant to the position of Administration manager. The appointment was to take effect, 1st November 2015. Further that the appointment was subject to a successful completion of 6 months' probation period. In part the letter stated;

“You will enter the service at the salary scale Kshs. 81,387 and your incremental date will be 1st November. You will be on probation for six months and your confirmation in appointment will be upon satisfactory performance. Upon confirmation in appointment, you will be eligible for Retirement Benefits in accordance with the Pensions Act.”

60. It is clear therefore that the probationary period of 6 months was to lapse on the 1st May 2016. The Claimant did tender in evidence document No. 13 an extract of the Public Service Commission, Human Resource Policies and procedures manual for the Public Service, May, 2016. Clause B.16 thereof provides;

“(1) Where vacancies exist in pensionable establishment candidates recruited to fill such vacancies shall be appointed on probation for a period of six (6) months.

(2) An officer appointed on probation to the pensionable establishment shall be referred as being on assessment with a view of learning his work and being tested as to for it. It is the duty of the supervisor(s) to ensure that every officer on probation is given adequate opportunities to qualify for confirmation in appointment.

(3) At least one (1) month before the expiry of the probationary period, the authorized officer shall consider, in light of the report(s) on the officer's performance, conduct and capabilities whether or not the officer is suitable for confirmation.

(4) Where an officer's performance is unsatisfactory, he shall be informed in writing and the probation period may be extended for a maximum period of 3 months.”

He contended that it is this document that provided the beacons guiding the Human Resource Management sails in the employment relationship.

61. The Respondent on the other hand placed before the Court a document titled Human Resource Policies and Procedure Manual for The Kenya Institute of Mass Communication by a Taskforce on the Transformation of KIMC Exh.2. Relevant to the probationary period in contestation, Clause 2.9.1 thereof provides;

- (i) Where vacancies exist in the pensionable establishment, candidates recruited to fill such vacancies should with the approval or appropriate authority, be appointed on probation.
- (ii) An officer appointed on probation to the pensionable establishment must be regarded as being on trial with a view to learning his work and being tested as to his suitability for it. It is the duty of the senior officer to ensure that every officer on probation is given sufficient opportunities to qualify for confirmation.
- (iii) At least two months before the expiry of the probationary period, the director should consider in the light of the reports on the officers conduct and capabilities whether or not the officer is suitable for confirmation.

(iv) Where an officer's performance is unsatisfactory, he should be informed in writing and the probation period may be extended to a maximum period of three (3) months.

(v) Should the officer's performance fail to improve on expiry of the extended probation period, his services shall be terminated.

(vi) Permanent appointment applies to employees who on successful completion of their probationary period are eligible to join the institute's Staff Pension Scheme.

62. Imperative to state that Clause 2.9 of the document is titled Categories of appointments and it provides;

“Appointments in the KIMC are divided into the following main categories;

(i) Permanent and pensionable appointment;

(ii) Contracts; and

(iii) Casual, hourly or daily

And that the sub-clause 2.9.1 cited above is titled Appointment on Probation to Pensionable establishment.”

This is the provision that applies to the category under which the claimant was appointed.

63. The premises hereabove are in the nature that require this Court to first determine which of the two documents is to be settled on as applicable in this matter. Outrightly it should be pointed out that the Claimant's document is a document that apply to the Public Service generally. To my mind it becomes of aid in situations where a public entity for example a state corporation does not have a specific Human Resource Manual providing for its day-to-day human resource functions and processes. However, I should hasten to say that such a policy must be established in accord with the statute creating the entity or any statute that is relevant thereto, and be in conformity with the obtaining employment and labour legal regime, the constitutional provisions and relevant international standards.

64. Through legal notice 197 of 30th September 2011, in exercise of the powers conferred by section 3 (1) of the State Corporation Act, His Excellency, President Mwai Kibaki (as he then was), made an order – The Kenya Institute of Mass Communication Order, 2011. Section 3 (1) of the order established a state corporation to be known as the Kenya Institute of Mass Communication, a successor to the Kenya Institute of Mass Communication.

65. Section 5 of the order established a council of the institute, and at section 6, the functions of the council. Section 7 of the Order provides for the Council's power to make statutes generally for the administration of the institute; relevant to this matter is sub-section [e] and (f) thereof which provide thus;

“(e) prescribing the terms and conditions of service, including appointment, discipline, dismissal and retirement benefits of the officers;

[f] Regulations and handbook of the institute”.

66. By reason of the Order, which none of the parties submitted on, I am convinced that the Respondent had its specific Human Resource Policies and Manual. Therefore, for purposes of this matter the document applicable is the one that the Respondent produced as exhibit 2.

67. The provision of the manual cannot be read in isolation from the provisions of section 42 (2) & (3) of the Employment Act, which provides;

“2. Probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”

68. From the onset, let me point out that my understanding of this provision is that where there is an extension of the probationary period, the extended period must commence immediately at the point where the initial probationary period ends. I am of the view that it is by this reason that Human Resource Policies and Procedure manuals provide for evaluation of the performance, conduct and suitability of the employee under probation to be done before the lapse of the initial probation period. This is exemplified in the Respondent's own Human Resource Policy and Procedure Manual – Exh. 2, clause 2.9.1, and the Claimant's Exh. 13, the Public Service Human Resource Manual.

69. It could not have been the intention of the drafters of section 42 of the Employment Act, that it is left to the discretion at large for the employer to determine as and when the extended probation starts.

70. The extension period of 6 months contemplated in section 42 (2) of the Employment Act, can only be taken in a single trench. It cannot be staggered. An employee has no option of asserting that he shall pick an extension of 3 months now and upon completion of the same have another extended period of example of 3 months start at another time of his choice.

71. The Human Resource Policies and Procedure Manual of the Respondent provided that the evaluation of an employee on probation under

the category of employees in which the Claimant was appointed, was to be done two months before the lapse of the six (6) months' probation period. The evaluation was the responsibility of the director. The Council did not have any direct role in the evaluation and recommendation on suitability of the Claimant for confirmation. There is no sufficient reason therefore provided by the Respondent why the evaluation was not done as provided for by the policies and manual. There was a breach of the provision in circumstances that one can see as deliberate.

72. The Claimant's 6 months' probation period lapsed on the 1st May 2016, there was no indication that prior to this lapse or at the lapse, that his performance, conduct and suitability was deficient in any manner. Having hereinabove stated that the initial period of probation must be continuous with the extended probationary period (if any), I find that the purported extension that was done through the letter dated 12th October, 2016, almost five months after the lapse of the initial 6 (six) months' period and a continued work by the Claimant for the Respondent, was devoid of any legal foundation and justification, practice, and reasonableness. To say the least it amounted to an unfair labour practice.

73. Clause 2.9.1 (iv) of the Respondent's Human Resource Policies and Procedure Manual provides: -

“where an officer's performance is unsatisfactory, he shall be informed in writing and the probation period may be extended to a maximum period of three (3) months.”

74. In the letter dated 12th October, 2016, it is not stated to the Claimant that his performance was found to have been below expectation. In any event there had been a successful appraisal that had been done by the director and a recommendation for confirmation given. To me at the appraisal and recommendation for confirmation, the next process was just a formality, to communicate the Claimant's success.

75. An appraisal to weigh the suitability of an employee who is under probation for the job can only be weighed in light of the conduct, performance and demonstrated capability or otherwise, during the specific probation period. Matters arising after a successful completion of the period, and recommendation for confirmation can only be dealt with in a forum that deals with disciplinary issues against employees who have been confirmed as permanent and pensionable and the other categories mentioned above. I do therefore not agree with the submissions by counsel for the Respondent that the alleged incident of insubordination could be used as basis to deprive of the Claimant his success during the contract probationary period.

76. Having found that the policies and procedure manual only provided for an extension of a probation period for a maximum of 3 months, the purported extension of the period for a further 3 months as was done through the Claimant's letter dated January 26th 2017, was without basis, it was null and void.

77. The long and short of the foregoing premises, is that I find that the Claimant's confirmation happened when Claimant passed the 6 (six) months' mark without an immediate extension of the probation (if there was need) to give room for the continuity this Court has expressed hereinabove.

78. Assuming I am wrong in the above-mentioned finding, the confirmation came in when the Claimant was successfully appraised and recommended for confirmation. This in the month of September 2016. This would be the legitimate expectation of any employee and or any reasonable man.

Whether the termination to the employment of Claimant's Employment was substantively fair.

79. Largely premises hereinabove speak to lack of fairness and justification in the termination of employment of the Claimant as though he was on probation, yet in the real sense he had been confirmed. However further to the premises, I make the hereunder observations and findings.

80. Section 45[4][b] of the Employment Act provides that a termination of employment shall be unfair if it is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. Clause 2.9.1 [ii] caught my eye, it provides;

“An officer appointed on probation to the pensionable establishment must be regarded as being on trial with a view of learning his work and being tested as to his suitability for it. It is a duty of the Senior Officer to ensure that every officer on probation is given adequate opportunities to qualify for the confirmation in appointment.”[emphasis mine].

In my view what happened in this matter was not in accord with the obligation underlined. Instead of ensuring that the Claimant gets the confirmation, the Respondent and or its senior officer deprived of him an entitlement to confirmation in employment that he had genuinely earned within the first 6[six] months' probation period. It cannot be said that the Respondent acted with justification and equity here.

81. In utilizing the platform given to court to interrogate whether it was just and equitable for an employee to terminate the employment of an employee, Section 45[5] of the Act directs the court to take into consideration a couple of matters *inter alia* the procedure adopted by the employer in reaching the decision. To hold on the formal confirmation of an employee who has been assessed and recommended for the same, to make a confirmation of an employee subject to consideration of an alleged act of insubordination that is said to have occurred long after the probation period lapsed successfully, to handle an employee who has successfully gone through a probationary period as though he had never succeeded, and to fail to appreciate that the law gives a confirmed employee a more expansive protection, and entitlements, than one under probation, as the Respondent did, is a procedure that is unknown in law, in Human Resource Practice, unjustified and not equitable.

82. Section 43 of the Employment Act, provides;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

83. At paragraph 7 [a] of the Respondent’s statement of response it was asserted that “the Claimant’s performance during his tenure of employment by the Respondent was always unsatisfactory and below expectation as observed and documented by the Respondent’s evaluation reports.” And at paragraph 11 of the Respondent’s witness’s statement which was turned his evidence in chief, the witness contended “the institute on evaluating the claimant’s services rendered during the first 6 months, noted that the Claimant failed to follow up assignments given by the institute which evaluation the claimant was well made aware of.” This was the basis upon which the employment of the Claimant was being terminated.

84. When the witness was subjected to cross examination, and shown the evaluation report that he had conducted on the Claimant on 1st of September 2016, an evaluation that was conducted on the Claimant’s performance for the 1st 6 [six] months of his probation period and the three months after, he admitted that it was a positive report, and the result thereof was a recommendation for his confirmation. This was radically different from what he stated in his testimony in court, his witness statement and, what the respondent pleaded. These two sets of a story make it not difficult for this court to conclude that the Respondent was unable to discharge its burden proof under Section 43 of the Act. The true reason for the termination is unclear. This also is testament of absence of prove of a valid reason for the termination, making the termination unfair under Section 45 of the Act.

85. According to the Respondent’s witness’s testimony, the termination was anchored on the evaluation that he purportedly did on the Claimant on the 20th March, 2017. Herein above I have found that the evaluation was totally unjustified, and was null and void. The finding takes away the validity of the report that was a product of the evaluation, and any act or event that was subsequently upon basis of the report. The reason for the termination having derived from the report, was therefore invalid.

86. A probationary term of employment is best understood as part of a contract of employment where the employee is held to the requirement that for a specific period of time the employee must demonstrate certain suitability requirements set by the employer; and the employee may be dismissed without reasonable notice [subject to the statutory minimum” if he or she does not meet the suitability requirements. If the employee meets the suitability requirements then after the period of probationary assessment the employee contract continues as a contract of employment wherein the requirements of a just cause and reasonable notice apply. -**L vs- British Columbia [interior Health Authority], 2017 BSSC.**

87. Faced with a situation, where court has to determine appropriateness of termination of employment of an employee under probation, I am of the view that the Court shall have to review the employer’s conduct in assessing the employee considering factors such as; whether the employee was made aware of the criteria by which he could be assessed; whether the employee was given a reasonable opportunity to demonstrate his suitability for the position; and whether the employer acted fairly and with reasonable diligence in assessing suitability. Using these considerations, I am of the view that in the purported evaluation of 20th March 2017, the Respondent performed dismally, of that which would be expected of a reasonable employer. For instance, the witness boldly stated that an evaluation exercise has to be conducted secretly, could suggest that all through the Claimant was not kept abreast of the weights that could be used to evaluate him.

88. Counsel for the Respondent submitted that the counts on which the employment of the Claimant was terminated as reflected on the termination letter are equivalent to a termination on account of insubordination. I do not agree with this submission, and I have found hereinabove that the termination was on account of grounds different from insubordination.

89. Assuming the termination was on the alleged insubordination, can one say that in the circumstances of the matter, including the fact that the Claimant is alleged to have failed to arrest a cart pusher or the owner, when really, he does not have authority to do so, a reasonable employer would terminate an employee’s employment? Applying the reasonable employer test as per **British Leyland Uk Ltd vs- Swift [1981]1IRL**, I will say not.

90. In the upshot, I find that the termination was substantively unfair.

Whether the termination of the Claimant’s employment was procedurally fair.

91. Section 41 of the Employment Act dictates that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c), provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair, as this Court stated in the case of **Lydia Mora Obara vs= Tusker Mattresses Limited [2021] eKLR.**

92. Severally judicial attention has been given on the provisions of section 41 of the Employment Act, 2007. The section provides for a mandatory procedure that must be adhered to by an employer whenever he contemplates to summarily dismiss an employee from his employment or terminate a contract of employment. Too the steps that must guide the employer up to the time of effecting the contemplation.

93. The section provides, and I find this to be in sync with the constitutional provisions on the right to a fair hearing, that the employer contemplating as hereinabove stated, must explain to the employee, reason[s] for which he intends to cause the termination, and give the employee an opportunity to make representations on the reasons. In other words, to defend himself against the accusations levelled against him.

94. In this matter, the Respondent through its letter dated 15th September 2016, invited the Claimant to make representations in writing on two accusations the 1st one being of insubordination, and the 2nd being that he had been rude to the Head of Corporate Communication. The Claimant got an opportunity to respond to these accusations. Through its letter dated 23rd September 2016, the Respondent invited the

Claimant to appear before the management board to answer to the charge of insubordination to the Director as well as being rude to a colleague. The Claimant appeared and answered to those specific charges. Up to here the Respondent was in accord with the procedure provided by the Act.

95. However, I find that after here there was a grave deviation from what the procedure would expect. In its termination letter, the Respondent indicated that the employment of the Claimant was being terminated on an account that he had failed to improve on his performance and conduct. These are not the issues that the Claimant was called upon to make a representation on. He testified that his representation was only limited to the two accusations. What happened here is equivalent to a condemnation on the Claimant without giving him a chance to defend himself.

96. The Respondent's witness did admit in his evidence under cross examination, that all through the issue of poor performance was not an issue, that the Claimant was not at any time informed that he was not performing to the expectations of the Respondent, he was not given an opportunity therefore to answer to the issue, yet poor performance formed the basis for the termination.

97. Counsel for the Respondent submits that poor Performance is equal to insubordination in the context of the termination letter, this with due respect makes little sense. It ignores the heavy requirements on an employer by law, in dealing with situations where it thinks of course reasonably that the employee is not performing to its expectations. Poor performance is far much wider than insubordination.

98. The provisions of the Human Resource policy become part and parcel of the employment contract, the promises therein whether procedural or substantive therefore must be adhered to. In this matter the Human Resource Policies and Procedure Manual provided for the procedure to be followed by the Respondent in matters the probation period. I have demonstrated hereinabove that there was no adherence to the same by the Respondent. This combined with the finding above that the termination was anchored on a ground[s] that the Claimant was not invited to defend himself against, I conclude that the termination was not procedurally fair.

What reliefs are available to the Claimant if any in the circumstances of this matter.

99. The Claimant sought for salary for 5 **days** worked in the month of April 2017. The Respondent's witness in cross examination stated that whether or not the Claimant was paid for these days is a matter he would not testify to. It was a matter for their Human Resource Management to. The duty was upon the Respondent to prove payment, it never did. Consequently, I see no reason to decline to grant the **Kshs. 14,573**.

100. Having found as I have hereinabove that at the time the Claimant's employment was being terminated, he was not under probation, he was therefore entitled to a longer termination notice than that contemplated in section 42 of the Act. That the provisions of sections 35[5][c], and 36 of the Act, become applicable, therefore entitling the Claimant to a one month's salary in lieu of notice. I award the Claimant **Kshs. 142,770**.

101. The Claimant was unfairly terminated, this court has been called upon to grant the Compensatory relief envisioned in Section 49[1][c] of the Employment Act. I have said before that a grant of this relief is discretionary, the number of months to be applied in computation of the figure awardable, and the extent of the award are wholly dependent on the peculiar circumstances of each case. In this matter, I have considered that the Respondent did not act with justification and equity, it deliberately flouted its Human Resource policies, there was no valid reason for the termination, there was no care that before joining the Respondent, the Claimant was a career civil servant who resigned from elsewhere to be in the employment of the Respondent, and come to conclusion that a grant of the relief is well merited. Alive of the maximum that is awardable under the law, 12 months gross salary, I hereby award compensation to an extent of 11 months gross salary, **Kshs. 1,625,470**.

102. The Claimant testified that for the period that was in the employment of the Respondent, he only took 12 days leave, he therefore had leave 42 days outstanding. The evidence by the Respondent's witness was not sufficient to unsettle this claim. The Claimant is consequently awarded, **Kshs. 199,360** under this head.

103. As regards the Claimant's Claim for house allowance, and transport allowance, there was no sufficient evidence placed before the Court to stir a grant of the same, the claim was just 'thrown' to this Court. Absent of any justification for the grant, I decline to award the same.

104. The Claimant has sought general and exemplary damages, asserting that he, was discriminated against, he has suffered mental anguish trauma and financial stress, and that he is not likely to get an alternative employment. This Claim was not supported by any evidence, This Court declines to make an award under this head. Counsel for the Respondent submitted that the is relief unknown in Employment. This submission is incorrect, where circumstances of a particular case demand, the damages can be granted.

Who should bear the costs of this suit.

105. It is trite law that costs follow the event, the event here being the success of the Claimant's claim. Costs should and are hereby awarded in favour of him.

106. In the upshot, judgment is hereby entered against the Respondent in the following terms;

[a]. A declaration that the termination of the Claimant's employment was substantively and procedurally unfair.

[b]. That the Respondent shall pay the Claimant, a sum of **Kshs. 14,573**, being salary for the 5 days worked in the month of April 2017.

[c]. That the Respondent shall pay the Claimant one month's salary in lieu of notice, **Kshs, 142,770.**

[d]. That the Respondent shall pay the claimant **Kshs. 1,625,470**, compensation pursuant to Section 49[1][c], of the Employment Act, 2007.

[e]. Compensation for unpaid leave, **Kshs.199,360.**

[f]. A certificate of service to issue pursuant to the provisions of section 51 of the Employment Act, 2007, within thirty days from the date of this judgment.

[g]. Interest on [b], [c], [d]and[e] above at court rates from the date of filing suit, till full payment.

[h]. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF OCTOBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of

Upendo for Claimant.

Malonza for Respondent.