



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MALINDI

ELRC CAUSE NO 13 OF 2019

GALGALO JARSO JILLO.....CLAIMANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

JUDGMENT

1. This is a suit by the Claimant against the Respondent alleging unfair suspension and subsequent termination. As a result, the Claimant prays for monetary compensation against the Respondent.
2. The Respondent has opposed the matter. It is the Respondent's position that the Claimant's employment was regularly terminated on account of gross misconduct. Hence, the claim is frivolous and ought to be dismissed with costs to the Respondent.
3. From the pleadings and other documents on record, the Claimant was employed by the Respondent on 18th June 2015. This was in the position of branch manager. The parties signed a contract of service dated the same day.
4. Upon his appointment, the Claimant was posted to the Respondent's Hola branch. This was by a letter dated 21st August 2015.
5. The Claimant served at the branch in the position of branch manager until 30th May 2016 when he was suspended from duty following alleged financial irregularities at the branch. The letter of suspension of even date informed the Claimant that the suspension was to facilitate investigations into the improprieties aforesaid. Meanwhile, the Claimant was required to hand over the operations of the branch to one Wako Wario.
6. On 2nd June 2016, the Respondent wrote to the Claimant requiring him to explain what the Respondent described as massive financial irregularities at the Respondent's Hola branch. These alleged irregularities were supposedly executed under the Claimant's watch as branch manager. They include alleged: failure to account for Ksh. 664,700/= withdrawn from the Respondent's Kenya Commercial Bank loan account (KCB loan account); posting of payments to fictitious accounts; fraudulent imprest claims totaling approximately Ksh. 130,190/=; and presentation of fraudulent Local Purchase Orders (LPOs) totaling Ksh. 13,440/=. The particulars of the improprieties are as follows: -

a) The Respondent, relying on a special audit of the Hola branch, asserted that some Ksh. 939,000/= had been withdrawn from its KCB loan account. This sum was apparently to be held at the Respondent's cash Vault housed at its Hola branch from where it would be disbursed to loan applicants who had supply accounts with the Respondent. That however, at the time of the special audit, only Ksh. 274,300/= of the Ksh. 939,000 could be accounted for. The difference comprising of Ksh. 664,700/= was neither in the Vault nor had it been re-banked into the Respondent's KCB loan account. Yet, there was no record relating to its disbursement.

b) The Respondent's auditors asserted that the Claimant was in charge of the Vault where the loan fund was kept. However, he allegedly could not account for the whereabouts of the cash. That this failure placed responsibility for the loss of the cash on the Claimant.

c) The report and RW1 further asserted that some Ksh. 376,000/= was paid out by the branch to unauthorized beneficiaries. That the purported recipients did not have supply or business accounts with the Respondent to justify their being paid by the Respondent.

d) The Respondent further asserted that between October 2015 and May 2016 when the Claimant was suspended, the Hola branch raised imprest reimbursement claims totaling Ksh. 46,120/=. Yet, only two expenses totaling Ksh. 4,480/= could be authenticated by the audit. Thus, the Respondent allegedly lost Ksh. 41,640/= as a result of these claims.

e) It is the Respondent's position that the Claimant had overall supervisory control over the imprest account. That he either

deliberately or negligently sanctioned the false imprest claims.

f) With regard to fuel, the Respondent asserted that the Claimant presented LPO numbers 238180 and 238181 for fuel purchases allegedly for the Respondent's vehicle registration number KBU 150T. Yet, the fuel was diverted to some other vehicles as motor vehicle registration KBU 150T was at the time in Nairobi.

7. On 27th June 2016, the Claimant responded to the Respondent's show cause letter aforesaid. He denied involvement in any financial impropriety at the workplace. He further asserted that all the impugned cash withdrawals were by Mr. Wako Wario and or Mr. Abdullahi Gobu Galano and or Mr. Edward Mwachinja Mwachoki. That of these three, the first two individuals had control of the branch cash Vault. As a result, only they could account for the lost funds.
8. The Claimant denied any role in withdrawing and appropriating the money under inquiry. He contended that the KCB account had four signatories. That any two (2) of the four (4) signatories could sign withdrawal of cash documents and cause successful withdrawals. That he never signed any of the withdrawal documents for the monies in question.
9. The Claimant further asserted that he was not in charge of the imprest account. This account was at all times allegedly controlled and run by Wako Wario and Abdullahi Gobu Galano. That these two processed the impugned imprest reimbursement claims.
10. The Claimant asserted that his only role in respect of the imprest account was to sign off the imprest reimbursement claims from the branch. That this would be after the accountant had presented receipts for supplies in support of the imprest reimbursement. The Claimant asserted that his role was to simply forward the claims to the Respondent's internal audit department for verification and payments.
11. With regard to the fuel claim, the Claimant conceded that indeed the fuel was purchased for vehicles other than the one whose details appear in the LPOs. However, he said that he purchased the fuel for use in two other vehicles in order to enable him travel to attend official business for the Respondent. This was because the Respondent's official motor vehicle was not available for use at the time. That these transactions had the blessings of the branch accountant. The Claimant therefore denied any wrongdoing in this respect. However, he conceded that it was a mistake on his part to have entered wrong motor vehicle registration particulars in the LPOs.
12. The Respondent was not convinced by the Claimant's response. Consequently, it invited the Claimant for a disciplinary session on 27th June 2016. This invite was by the Respondent's letter to the Claimant dated 21st June 2016.
13. After the disciplinary session, the Respondent terminated the Claimant. This was by the Respondent's letter to the Claimant dated 31st October 2016. The Respondent asserts that although the facts entitled it to summarily dismiss the Claimant, it nonetheless issued him with a normal termination.
14. The parties contest what transpired during the disciplinary session. On the part of the Claimant, he asserts that he was not supplied with documents to prepare for the trial. He argues that crucial documents such as the auditors' report were withheld from him. That he was denied a chance to cross examine the Respondent's witnesses and was not allowed to be accompanied by a co-employee of his choice during the disciplinary session as is stipulated in law. He described the session as an ambush.
15. Yet, the Respondent's witnesses assert that the session was conducted in compliance with the law. That the Claimant indeed cross-examined the Respondent's witnesses. That the Claimant was not denied any documents that he wished to access. That he never demanded for the documents he now says he was denied.
16. It is as a result of the foregoing that the Claimant has presented the current claim. In the claim, the Claimant avers that he was wrongfully suspended and terminated. That the allegations by the Respondent against him were unsubstantiated and that he had effectively responded to them in his response to the Respondent's show cause letter. Yet, his response was ignored and the termination unfairly handed down to him. Thus, he contends that the termination was without substantive grounds.
17. As indicated above, the Claimant asserted that he was also denied procedural fairness in the process leading to his termination. He asserted that the suspension that preceded his termination was in contravention of articles 41 and 47 of the Constitution. He further asserts that he was not issued with notice prior to his termination. He was denied his right to be accompanied by a co-employee during the hearing and never cross examined the Respondent's witnesses.
18. The Claimant also asserts that the Respondent did not pay him his terminal dues. The details of the dues which are set out in the Memorandum of Claim include salary for May and November 2016, three (3) months' salary in lieu of notice, compensation for unutilized leave days and unremitted NSSF and NHIF dues.
19. In its defense, the Respondent disputes the Claimant's claim. It asserts that the Claimant was terminated on justified grounds of fraudulent and or negligent misapplication of the Respondent's funds under his watch. That the Claimant was in charge of the branch and therefore was entrusted with the proper running of the activities at the branch. That as the Claimant failed to do this resulting in the alleged loss of funds, there was a justifiable reason to terminate him.
20. In respect of procedure, as pointed out earlier, the Respondent asserts that it gave the Claimant a hearing and only terminated him after due process. That the Claimant's terminal dues were processed but applied to offset part of what the Respondent had lost as a result of the events leading to the termination of the Claimant.
21. At the hearing of the case, the Claimant testified in support of his case. He did not call any other witness. On the other hand, the Respondent called two witnesses. The evidence adduced by the parties sets out their respective positions as set out above.

22. At the close of the case, the parties filed submissions. In my judgment, I have considered the pleadings, exhibits produced, evidence adduced and submissions by the parties.

23. The law on termination of contracts of service in Kenya is now largely governed by the Employment Act, 2007. Of significance in this respect are sections 41, 43, 44, 45 and 47 of the Act.

24. Section 41(1) of the Act provides as follows: -

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

25. Section 43 provides as follows:

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

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

26. Section 45 of the Act provides in part as follows: -

“(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:

- Related to the employees conduct, capacity or compatibility; or

-Based on the operational requirements of the employer; and

-That the employment was terminated in accordance with fair procedure.”

27. Section 47(5) of the Act stipulates as follows: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

28. And section 44 (4) (g) of the Act stipulates as follows: -

“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:-

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”

29. My understanding of these provisions of law is that they seek to substantially regulate termination of contracts of service particularly by an employer. First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the Act are: poor performance; physical incapacity; and gross misconduct. Section 40 of the Act provides redundancy as the other substantive ground for termination but which is unrelated to those set out under section 41.

30. But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.

31. Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the

lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.

32. Section 47(5) of the Employment Act sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination.

33. The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. In *Josephine M. Ndungu & others v Plan International Inc [2019] eKLR*, the court said this of the foregoing: -

“Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”

34. Indeed the overall design of the law is that the employer has the duty to provide evidence to establish the validity of the termination in terms of sections 43 and 45 of the Act absent which a presumption of fact arises in favour of the unlawfulness of the termination. Commenting on the interplay between sections 43 and 47(5) of the Employment Act, the Court of Appeal in *Muthaiga Country Club v Kudheha Workers [2017] eKLR* said the following:

“The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants’ employment, and justify the grounds for the termination of the employment.”

I will come back to this question regarding the burden of proof later on in this judgment.

35. In terms of section 43 of the Employment Act, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.

36. Commenting on this question, the Court of Appeal in *Kenya Revenue Authority v Reuvel Waitaha Gitahi & 2 others [2019] eKLR* said as follows: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.”

The court, relying on an extract from **Halsbury's Laws of England** went further to comment as follows: -

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

37. Under section 44 of the Act, one of the grounds that would justify the finding of gross misconduct against an employee is the commission or suspicion of commission by an employee of a crime against the property or person of the employer. In relation to this ground and as has been rightly pointed out by counsel for the Respondent, it does not require the employer to have watertight evidence of the alleged criminal transgression for the ground to arise. All that is required is for the employer to have justifiable and compelling grounds to suspect that the affected employee has engaged in acts that are criminal in nature and which affect the property or person of the employer.

38. Commenting on the parameters of section 44(4) (g), in *Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR*, the court observed as follows: -

“ The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant’s involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Claimant protested he received such oil.....all gave the Respondent reasonable and sufficient grounds to act against the Claimant.”

39. In the current case, the question I ask is whether the Respondent's purported substantive grounds for terminating the Claimant fit within the meaning of provisions of the Employment Act aforesaid. From the evidence adduced by the Respondent's witnesses, the Respondent lost Ksh. 664,700/= which had been withdrawn from its loan account and kept in the Respondent's cash Vault. At the time of this loss, the Claimant was in charge of the branch where the funds were kept.

40. In his evidence, the Claimant denied involvement in the loss. The Claimant explained that the cash Vault was under the custody of Wario Wako and Abdullahi Gobu Galano. That it is these individuals who were in charge of these funds and only they can explain their loss. The Claimant further asserted that from the bank statements, it was Mr Abdullahi Gabo who did most of the questionable withdrawals from the Respondent's KCB loan account.

41. It was the Claimant's case that the Hola branch of the Respondent's KCB loan account had four (4) authorized signatories and that transactions on it required only two (2) of the four (4) signatories. That all withdrawals were without his approval as he never signed withdrawal documents for the funds.

42. In response, the Respondent's witnesses stated that as the branch manager of Hola branch, the Claimant had overall supervisory control over the Respondent's assets at the branch including the funds that were lost. That as the head of the branch, the Claimant was the principal signatory to the Respondent's Hola branch bank accounts. That if the Claimant did not sanction the misapplication of the funds, he negligently permitted the loss by failing to discharge his supervisory mandate as the branch head.

43. Further, the Respondent's witnesses testified that the audit disclosed that some cash had been remitted to accounts of individuals who had no business relation with the Respondent. That as head of the branch, the Claimant ought to have flagged these malpractices. That this evidence provided further details of financial irregularities at the branch under the Claimant's watch.

44. In cross examination, the Claimant said that he never noticed the loss of the funds in issue as somehow, the Respondent's branch finance records always balanced every time account reconciliations were undertaken by the Claimant and other staff at the branch. That he only realized the loss when the auditors pointed it out after the special audit.

45. In a nutshell, this evidence is an admission by the Claimant that the Respondent lost the money in question only that the Claimant was not involved. The court finds the account given by the Claimant quite startling. As the branch head of the Hola branch, it surely must have been clear to the Claimant that the said branch was under his watch. That he was to ensure the sound management of the branch. Therefore, to attempt to steer clear of mismanagement of the Respondent's finances at the branch by other employees allegedly on the ground that he was not in charge of the finances is to abdicate his role as head of the branch. This is particularly so because even though the branch account signatories may have been four (4), the Claimant was the principal signatory to them. Thus, he was reasonably expected to oversee what was going on with respect to the said accounts.

46. The same argument applies to the irregular imprest claims. The Claimant asserted in evidence that one Abdullahi Gabo and one Wario Wako were in charge of this account. That they would raise the imprest reimbursement claims and all that the Claimant would do is to sign them off to the internal audit department for settlement. In other words, the Claimant by this evidence admits that he was fairly reckless in the manner he handled this account. By his actions, the Claimant simply failed to ensure financial probity at the branch by failing to ensure that the imprest account was properly managed at the branch.

47. What is more is that RW1 confirmed that although claims for imprest refund for office items like water and milk had been lodged, the auditors confirmed that the branch did not have these items during the period of the audit. That during this period, the branch could neither provide water nor tea yet these items had been presented as purchased. This evidence further demonstrates that the Claimant was either complicit to the irregular financial dealings regarding imprest or he was just reckless about them.

48. The Respondent commissioned an internal audit which confirmed the losses aforesaid. It also confirmed that the losses happened under the watch of the Claimant. The Claimant did not deny that he was the branch manager of Hola when these activities took place. So what was his role as branch manager, if he could not oversee the overall wellness of the branch by ensuring that its finances were not misapplied?

49. It is the audit report aforesaid that the Respondent acted on to suspend the Claimant, subject him to a disciplinary session and ultimately terminate him. I think that this events and the audit report provided the Respondent with a credible basis to genuinely believe that the Claimant had engaged in financial impropriety at the branch. This provided a sound ground to terminate the Claimant in terms of sections 43 (2) and 44(4) (g) of the Employment Act. I therefore find that the Respondent has proved this ground to the standard contemplated in law.

50. But even if I were wrong on the foregoing, there was also the issue of the Claimant fueling vehicles that were not the Respondent's but knowingly inserting in the LPOs the registration number of the Respondent's vehicle. The Claimant says he did this because he needed to go on official duty but the official car for this purpose was not available at the time. Apparently, the actions by the Claimant to fuel private vehicles using the Respondent's funds disguised as fuel expended on the Respondent's vehicle were unknown to and had no approval of the Respondent.

51. One must wonder what informed the Claimant's decision to deliberately insert the wrong vehicle registration details in the LPOs. Was the Claimant not just trying to beat the system through this action? Would a reasonable man on the street hold the view that the Respondent's management were wrong to arrive at such conclusion?

52. It is noteworthy that the Claimant conceded in his response to the notice to show cause that this action was a mistake on his part. And through it, the Respondent perhaps lost over Ksh. 13,000/=. This to my mind provides a ground for gross misconduct which entitled the Respondent to terminate the Claimant.

53. I therefore find that the Respondent had valid reasons to terminate the Claimant. However, as I have observed earlier in the judgment,

the law is not just concerned about ascertaining the validity of the reason for termination. It is also concerned with ensuring that the employer processes the separation in a manner that is procedurally fair to the Claimant. Indeed, this position has now been made clear by the court in several pronouncements. For instance, in *National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR* the Court of Appeal (referring to its previous decisions) said that in determining whether a decision by the employer to terminate is just and equitable, **“the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee.”** I will therefore consider whether the Respondent met this second requirement.

54. Just as is the case with proving the validity of the reason for termination, section 45 of the Employment Act also requires the employer to prove that **“the employment was terminated in accordance with fair procedure”**. It is therefore not sufficient for purposes of determining the lawfulness of termination of employment for the employer to only show that he/she had valid reasons to support her decision. He/she must demonstrate that he/she complied with the procedural strictures set out under section 41 of the Act.

55. In the current case, the Respondent asserts that it complied with the procedural requirements of the law in processing the Claimant’s termination. It supplied the Claimant with the formal charge and held a disciplinary session where the Claimant was given a chance to defend himself before a decision to terminate was taken.

56. However, the Claimant asserts that he was denied access to documents that were critical to his defense. For instance, he mentions that he was not furnished with the audit report which was central to the dispute.

57. The Claimant further asserts that he was denied a chance to cross examine the Respondent’s witnesses. He testified that he was neither informed of his right to have a colleague attend the proceedings with him nor was he allowed to come in with one.

58. The Respondent’s witnesses dismissed this evidence by the Claimant. It was the Respondent’s evidence that the Claimant was informed to carry any documents relevant to the matter and he was free to request for whatever documents he may have wanted from the Respondent. He never did this.

59. As mentioned earlier, the burden of proving the lawfulness of a termination lies with the employer. And this includes the employer demonstrating that he/she complied with the procedural dictates of section 41 of the Employment Act as read with sections 43 and 45 of the Act.

60. From the very outset, the Respondent was on notice that part of the Claimant’s complaints in the matter was that the procedure leading to his termination was flawed. The Respondent was therefore on notice that it would be required to prove that it complied with the procedure set out in law in terminating the Claimant. It was therefore surprising that the Respondent opted to withhold from the court the minutes of the disciplinary committee proceedings. In cross examination, the Respondent’s witnesses confirmed that these minutes were not produced as exhibit.

61. How was the Respondent to prove that the Claimant was afforded a chance to attend the proceedings with a witness of his choice or that he was allowed a chance to cross examine witnesses or that he was supplied with the documents he is complaining about without producing the minutes of the disciplinary session that would ordinarily contain a record addressing such issues? And on what basis would the court declare that the Respondent has discharged the burden under sections 43 and 45 of the Employment Act in the absence of this record?

62. The failure by the Respondent to file these minutes certainly deprives the court of evidence that the Respondent complied with the procedural strictures set out in law. Accordingly, I find that the Respondent has failed to prove that the procedure adopted to release the Claimant was fair.

63. Apart from attacking the decision to terminate his contract of service, the Claimant has also questioned the validity of the suspension that preceded it. He asserts that he was not allowed to show cause before the suspension was handed down to him. That this contravened his right to fair administrative action.

64. However, to the extent that the suspension was merely to allow for further investigations into the alleged financial irregularities, I cannot fault it. This was only a precursor to the disciplinary events that were to follow. I think that an employer is entitled to suspend an employee from duty in order to facilitate investigations on a matter that affects the relationship between the parties so long as the employee is eventually and within reasonable time afforded a chance to respond to whatever accusations that may have been raised against him/her.

65. An administrative suspension is not intended to be punitive. It is merely a temporary but justified disruption of the contract of service pending finalization of the proposed investigations and or disciplinary process.

66. If we are to consider an administrative suspension as only temporarily disrupting and or suspending some of the obligations of the parties under a contract of service, then the critical question that arises is whether an employer is entitled to lawfully withhold the entire of an employee’s remuneration during the suspension period. The law is silent on this matter. However, it is to be understood that employment contracts are, like any other contract, also regulated by the general law on contracts.

67. Under the general principles of the law of contract, remuneration certainly constitutes one of the fundamental terms in a contract of service. Consequently, breach of such term would result in the collapse of the contract. Indeed, Part IV of the Employment Act recognizes remuneration as a protected right of an employee.

68. Being a fundamental term of the contract of service and a protected right, an employer can only withhold the entire of an employee’s salary either with the consent of the employee or where the law permits it. For instance, section 63 of the Anti Corruption and Economic Crimes Act, 2003, permits suspension without pay of public officers who have been pronounced guilty of crimes under the Act but have elected to appeal the decisions. This is to remain until such appeals are determined.

69. Therefore, it does appear to me that to unilaterally withhold the entire pay of an employee merely because his is on suspension would be in breach of the contract of service unless sanctioned by law. What appears to be a reasonable middle ground to ensure the contract remains alive during the disciplinary process is the practice of withholding a portion of the pay even as the other is released. I have made these comments in my decision because part of the claims by the Claimant relate to the period during which he was on suspension.

70. Going back to the question of whether the Respondent had substantive grounds to terminate the Claimant and whether the Respondent processed the separation procedurally, I have indicated that the Respondent has indeed proved the reasons for termination. However, there is evidence that the Respondent failed to prove that it accorded the Claimant procedural fairness during the process. Therefore, and on this basis, the termination is declared as unfair.

71. The next question that the court must then consider is what remedies the Claimant is entitled to if at all. In the Memorandum of Claim, the Claimant has sought a number of reliefs. These include the following: -

a) A declaration that his suspension was unfair and unlawful. The Claimant sought for orders that half of his salary and allowances withheld from June 2016 to October 2016 totaling Ksh 376,875 be paid.

b) That he be paid damages for breach of contract and his constitutional rights following his suspension.

c) That he be paid full salary for May 2016 and November 2016 totaling Ksh. 301,500/=.

d) That he be paid three months' salary in lieu of notice totaling Ksh. 452,250/=.

e) That he be paid annual leave dues for one month quantified at Ksh. 150,750/=.

f) That he be paid NSSF and NHIF contributions of Ksh. 2,800/= and 23,800/= respectively.

g) That he be paid damages for breach of contract and denial of the right to fair labour practice on account of his summary dismissal.

h) That he be issued with Certificate of Service.

i) That he be paid costs of the Claim and interest.

72. As I have observed earlier on in the judgment, the Respondent had reasonable grounds to terminate the Claimant. The only reason why the termination has been declared unfair is because the Respondent did not prove that it upheld procedural fairness in processing the termination. However, it must be appreciated that notwithstanding the flaws in handling the disciplinary process, the Respondent complied with some of the procedural requirements demanded by law. For instance, it issued the Claimant with a notice to show cause, issued him with a formal charge sheet, convened a disciplinary session and finally rendered a decision.

73. I must ask whether it is equitable to appear to reward a Claimant who appears to have engaged in and or turned a blind eye to acts which directly contributed to his misfortune by ordering full compensation in his favour. The Court of Appeal in **Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike [2017] eKLR** reminds us that justice is a two way highway and the court must endeavour to render just decisions to employees in much the same way as it must to employers.

74. Section 49 of the Employment Act which is the principle guide on the reliefs to be granted in cases of unfair termination obligates courts to take into account the extent, if any, to which an employee caused or contributed to the termination of his contract of service while addressing the kind and quantum of relief it will award in a cause. I keep this requirement in mind as I address the question of reliefs in this cause.

75. The Claimant has prayed for several heads of damages as set out earlier in this judgment. Some of these reliefs relate to the period when the Claimant was under suspension.

76. It is to be noted that in the witness statement by RW2 which was adopted as part of RW2's testimony in chief, he states that the Claimant's termination was reduced to normal termination and his dues were worked out. These included his salary withheld from June 2016 to October 2016 (Ksh. 486,250/=), May 2016 net salary (Ksh. 94,553/=), and pay in lieu of notice equivalent to the Claimant's two months' pay (Ksh. 233,000/=). The RW1 and RW2 produced as exhibit the summary of workings of these terminal dues. It was the RW2's evidence that these amounts were then applied to reduce the loss suffered by the Respondent as a result of the events at the Hola branch while it was under the eye of the Claimant.

77. It is noteworthy that this evidence was not challenged in cross examination of RW2. The court therefore believes that the amount in paragraph 76 above was indeed credited to the Claimant but applied as suggested by RW2.

78. From the summary of the Claimant's entitlements as presented by RW2, the Claimant was to get the balance of his monthly salary of Ksh. 94,553/= from June 2016 to October 2016. The difference from the Claimant's gross salary of Ksh. 150,750/= had been proportionally released to him on monthly basis during the duration of the suspension. Indeed, although the Claimant had initially disputed this fact in his pleadings, I note that he indirectly admits these payments through his prayers in the Memorandum of Claim when he prays for an order that he be paid the remaining half of his salary for the period in question.

79. Further, I note that the amounts covered the salary the Claimant stated was unpaid during the time he was on suspension. Accordingly, I find that the Claimant continued to receive part of his salary while on suspension. I further find that the balance of such salary is as set out in the summary of his final dues as presented by RW2. The Claimant is therefore not entitled to pursue the claims for outstanding salary as he has purported to do in the Memorandum of Claim.

80. I note that the Respondent opted to reduce the Claimant's termination from summary dismissal to normal termination and paid him two months' salary in lieu of notice. I think that now that the Respondent opted to pay this item, it ought to have done so in line with the contract of service between the parties.

81. Clause seven (7) of the contract of service dated 18th June 2015 provides that either party who opts to terminate the contract pays the other damages equivalent to three (3) months basic salary. By virtue of this clause, the Respondent ought to have paid the Claimant three (3) and not two (2) months' basic salary (Ksh. 233,500/=) as it did. Accordingly, I order that the Respondent pays the Claimant the deficit equivalent to Ksh. 116,500/= being equal to the Claimant's one (1) month's basic salary.

82. Similarly, at the time of his termination (which the Respondent in its own evidence opted to treat as a normal release), the Claimant had rendered one (1) year of service to the Respondent. Having been engaged in June 2015, the Claimant was by virtue of section 28 of the Employment Act, due for his annual leave when he was terminated in October 2016. As this right was not taken and in view of the Respondent's election to treat the termination as normal, the Claimant was entitled to be paid one (1) month's salary as leave commutation. This was not done. I therefore award the Claimant Ksh. 150,750/= to cover his leave entitlement.

83. Having regard to the impugned conduct of the Claimant, I am minded to award him nominal damages equivalent to one (1) month's gross salary of Ksh.150, 750/= as compensation against the Respondent's failure to fully observe procedural strictures leading to the termination.

84. Section 51 of the Employment Act obligates every employer to issue a departing employee with a Certificate of Service. As was stated by Radido J in *Transport Workers Union v African Safari Diani Adventure [2013] eKLR*, this certificate is, by law, the right of every employee leaving employment irrespective of the circumstances under which he has left. If not for anything else, the instrument is critical to the employee because it signifies closure of the employment relation between the parties.

85. However and as is provided under the law, the employer is not obligated to give the departing employee either a testimonial or a reference. All that the employer must include in the instrument is as provided for under section 51 aforesaid. It is thus ordered that the Respondent complies with this provision of law by issuing the Claimant with the requisite certificate.

86. I decline to make any other awards prayed for by the Claimant in the Statement of Claim. In taking this position, I am guided by the principle that the award of reliefs under section 49 of the Employment Act is discretionary. However, this discretion must be exercised judiciously having regard to the guidelines that are inbuilt in the aforesaid section (see *National Bank of Kenya v Anthony Njue John [2019] eKLR*).

87. The sum awarded in this judgment shall attract interest at court rates from the date of judgment till payment in full.

88. Having regard to the fact that each of the parties to the suit was at fault in some way in relation to the events resulting in this claim, I exercise my discretion to order that each party shall bear their own costs.

89. The award is subject to the applicable statutory deductions as required by section 49 of the Employment Act.

Summary of the Award

- a) The termination of the Claimant's contract of service is declared unfair only to the extent of the failure by the Respondent to prove that it afforded the Claimant procedural fairness in processing his release.*
- b) Since the Respondent elected to convert the summary dismissal into a normal termination, it ought to have paid the Claimant salary in lieu of notice equivalent to three (3) months of the Claimant's basic pay in terms of clause 7 of the letter of appointment dated 18th June 2016. The Respondent only paid Ksh. 233,000/= the equivalent of two (2) months. The Respondent is therefore to pay the Claimant an additional of Ksh. 116,500/= under this head being the equivalent of one month's basic salary.*
- c) As the Claimant already accrued leave days for one year when he was terminated in October 2016, the Respondent to pay the Claimant Ksh. 150,750/= being equivalent to one month's salary in lieu of leave.*
- d) The Respondent to pay the Claimant Ksh. 150,750/= as nominal damages for failure to accord the Claimant procedural fairness in the process leading to his termination.*
- e) The Respondent to pay interest on the sums so awarded from the date of judgment till payment in full.*
- f) The award is subject to the applicable statutory deductions as required by section 49 of the Employment Act.*
- g) The Respondent to issue the Claimant with a Certificate of Service.*
- h) Each party to bear their costs of the Claim.*

i) All other reliefs sought by the Claimant are hereby declined.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF NOVEMBER, 2021

B O M MANANI

JUDGE

IN THE PRESENCE OF:

MR. MULWA FOR THE CLAIMANT

MR. MUGENYA FOR THE RESPONDENT

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE