



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 647 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

DINAH JEMELLY KIRWA.....CLAIMANT

VERSUS

NATIONAL HOSPITAL INSURANCE FUND

BOARD OF MANAGEMENT.....RESPONDENT

CORRIGENDA RULING

1. By a judgment delivered by Hon. Mr. Justice Onesmus Makau on 19th November 2021, judgment was entered for the Claimant against the Respondent as follows –

80. Accordingly, the claimant is awarded damages under section 49 of the Act including three months' salary in lieu of Notice being $Kshs.659,935 \times 3 = Kshs.1,979,805$ as per the contract of service and Compensation for unfair termination of 12 months' salary being $Kshs.7,919,220$. In awarding the said compensation, I have considered that the claimant was dismissed prematurely when she had reasonable expectation to continue working for 22 months before the contract term expired. I have also considered that she did not contribute to the termination through misconduct, and not forgetting that the procedure followed before her dismissal was alien to the respondent's own HR Policy and Procedures Manual which formed part of the claimant's contract of service.

81. The claimant is also awarded Gratuity under clause 15 of her contract of employment being 31% of her basic salary being $Kshs.480,000 \times 14$ months equalling to $Kshs.2,083,200$. Finally, I award the claimant cash in respect 65 unutilized leave days being $Kshs.480,000 \times 65/26$ equalling to $Kshs.1,200,000$.

82. The claim for 22 months' pay being residue period of the claimant contract is declined because the Claimant's contract provided for premature termination with a notice of 3 months or payment of salary in lieu of notice.

Disposition.

83. For the reasons stated above, judgment is hereby entered for the claimant declaring that her dismissal was unfair and unlawful, and further awarding the claimant $Kshs.13,182,225$. The said award is subject to statutory deductions but the claimant is awarded costs of the suit plus interest at court rates from the date of judgment.

2. The Claimant by an application dated 10th January 2022 has moved the Court for the following orders –

i. Spent.

ii. Spent.

iii. THAT the Honourable Court be pleased to Review the Judgment passed on the 19th Day of November 2021 by Hon. Onesmus Makau at paragraphs 81 by replacing the amount of $Kshs.480,000$ with $Kshs.539,935$ that was the Claimants basic pay.

iv. THAT the Honourable Court be pleased to Review the Judgment passed on the 19th Day of November 2021 by Hon. Onesmus Makau at paragraphs 83 by replacing the amount of $Kshs.13,182,225$ with $Kshs.13,592,180$

v. THAT costs of this application be provided for.

3. The grounds in support of the application as stated on the face of the application and the supporting affidavit of JAPHETH CHANGE ESQ, Counsel of the Claimant/Applicant are that –

a. On the 19th Day of November 2021 Judgment was entered in favour of The Claimant by the Hon Justice Onesmus Makau where the learned Judge awarded the Claimant gratuity being 31% of her basic salary at Kshs.480,000 x 14 months amounting to Kshs.2,083,200 and 65 unutilized leave days being Kshs.480,000 x equalling Kshs.1,200,000

b. That the court in granting the above prayers used a figure of Kshs.480,000 as the Claimants basic salary as opposed to the Claimants basis pay of Kshs.539,935 as set out in her last payslip at page 432 of Claimants bundle of document

4. By a consent dated 10th January 2022, the same date as the application, parties agreed as follows –

1. The application dated 10th January 2022 be allowed.

2. Each party to bear their own costs.

5. The consent was adopted by the Court 25th January 2022.

6. The judgment of Mr. Justice O. N. Makau is therefore reviewed and/or amended by consent of parties at paragraphs 81 and 83 to reflect the correct basic salary of the Claimant being the deletion of the sum of Kshs.480,000/- and replacement of the same with the sum of Kshs.539,935/- at paragraphs 81 and 83 of the judgment which will now read as follows –

81. The claimant is also awarded Gratuity under clause 15 of her contract of employment being 31% of her basic salary being Kshs.539,935 x 14 months equalling to Kshs.2,343,317.90. Finally, I award the claimant cash in respect 65 unutilized leave days being Kshs.539,935 x equalling to Kshs.1,349,837.50.

Disposition.

83. For the reasons stated above, judgment is hereby entered for the claimant declaring that her dismissal was unfair and unlawful, and further awarding the claimant Kshs.13,592,180.40 The said award is subject to statutory deductions but the claimant is awarded costs of the suit plus interest at court rates from the date of judgment.

7. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

REPUBLIC OF KENYA

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-VERSUS-

NATIONAL HOSPITAL INSURANCE FUND

BOARD OF MANAGEMENT.....RESPONDENT

JUDGMENT.

Introduction

1. The Claimant brought this suit on 2nd October, 2019 alleging that she was unlawfully and unfairly dismissed from employment by the respondent on 16th September, 2019. The suit seeks the following reliefs: -

i. Declaration that the termination of the claimant's employment as conveyed by the letter dated 16th September 2019 is unlawful, lacks merit and is void ab initio.

ii. An order directed to the Respondent to immediately reinstate the Claimant in the same Position she served before the issuance of the termination Letter.

iii. An order that the Respondent pays the Claimant her entire back salaries, allowances, benefits and any other legal dues from date of termination to the date of her reinstatement.

iv. In the alternative and without prejudice to prayer (ii) & (iii) above, an order that the Respondent pays the Claimant the salary for the residue of her contract period being twenty-two (22) months calculated as Kshs. 659,935.00 x 22 months= Kshs. 14,518,570.00.

v. In the alternative and without prejudice to prayer (ii),(iii) & (iv) above, an order that the Respondent pays under Section 49 of the Employment Act as Compensation for unfair termination being Kshs. 659,935.00 x 12 months = Kshs. 7,919,220.00

vi. An order directed at the Respondent to pay the Claimant sixty five (65) unutilized leave days for the year 1st July 2017 to 30th June 2019 amounting to Kshs. 1,949,807.95.

vii. An order directed at the Respondent to pay the Claimant, Three(3) months' salary in lieu of notice as required under clause 27 of the employment contract being Kshs.659,935.00 x 3 months= Kshs. 1, 979,859.00.

viii. An order that the Respondent pays the Claimant gratuity as stipulated by clause 15 of the Contract of employment dated 5 October 2018 as follows: 31% of (Kshs. 539,935 x14 months) =Kshs. 2,343,317.90

ix. Orders the Respondent to pay Interests at Commercial rates on the above from the date of termination to the date of entry of judgement.

x. Orders the Respondent to pay Interest at court's rate on the above from the date of judgement to the date of payment in full.

xi. Orders that the Respondent be condemned to pay costs of the suit.

2. The Respondent filed a response to the Claim on the 13th May, 2021, admitting that it dismissed the claimants but denying that the dismissal was unlawful. On the contrary, it averred that dismissal was lawfully done for abdicating her role of advising the CEO of the Respondent on all issues pertaining her department, and failure to ensure the respondent adheres to funds budget at all times, which duties if performed diligently could have avoided the loss of the Kshs. 106 million. It further averred that fair procedure was followed before the claimant was dismissed from employment and therefore she does not deserve the reliefs sought.

3. The suit was heard on 17.05.2021 and on 26.5.2021 when the Claimants testified as Cw1 while the Respondent called its Legal officer Janet Boit who testified as Rw1. Thereafter both parties filed written submissions.

Claimants' case

4. The claimant, **Dinah Jemelly Kirwa**, testified as CW1. She told the court that she was employed by the Respondent on 3rd June, 2015 in the position of Director, Corporate Services on a three-year renewable contract earning a monthly salary of Kshs. 600,000. She served the Respondent diligently as is reflected in her appraisal forms for the year 2015 to 2019 and she was in the team that transformed the organization. Before joining the respondent she had served in the public service from 1994 rising from the rank of an officer.

5. She testified further that upon expiry of her contract, she applied for renewal on the 30th December, 2017, which was renewed on the 5th

October, 2018 for a further 3 years commencing 1st July, 2018. Subsequently the claimant position was renamed to Director Human Resource and Administration in line with the new organizational structure of 2018-2022 and her gross salary was revised to Kshs 659,935.

6. Sometime in the middle of 2019, investigations were carried out cutting across all departments at the Respondent. All the senior managers including herself were investigated by the investigators who carried away her laptop, investigated her home and all her bank accounts. After 3 months the Respondent's CEO was arrested together with 12 other officers whose cases are still in Court.

7. Subsequent to the said arrests, the Board approached her and sought for advice on the appropriate persons that would fill the vacancies left by the said officers, and some positions were filled albeit on acting capacities. These position includes the office of the CEO.

8. She further testified that while she was away on official duties she was called back to the office on the 15th July, 2019, and she was served with a letter dated 11th July, 2019 signed by the Chairperson of the Respondent, one Mrs. Hannah Mureithi, and requiring her to show cause why disciplinary action should not be taken against her for irregularly recruiting 87 employees for the Respondent without following due procedure and without informing the Board. The letter also alleged that as a result of the said irregular recruitment the Respondent lost Kshs 106 Million being remuneration paid to the said irregularly hired staff.

9. The letter also sent her on compulsory leave for 30 days to pave way for investigation to the said allegation. While on the said leave, she responded to the show cause letter on 18th July, 2019 denying any wrong doing and explained that the recruitment of the 65 employees between 2017 and 2018 was carried out by the then CEO assisted by the then assistant Human Resource manager. She stated that all the employment letters of the new staff were signed by the then CEO. The recruitment and appointments were done when she was on leave and therefore she was not involved in any of the recruitment exercise.

10. However, admitted that she was involved in the recruitment of the 22 drivers but clarified that she had been given express authority by the CEO to carry out the said recruitment by selecting the drivers from the Respondent data base. She further explained that the recruitment was to replace deceased and retired drivers and also meet the urgent need created expansion and acquisition of new vehicles. She maintained that there was a historical policy which she found in the Corporation of recruiting drivers from the data base of competitively selected candidates.

11. On 18th August, 2019 the Respondent send the claimant another letter extending her leave for a further 30 days. While on the said leave she received a letter from the Respondent acting CEO dated 28th August, 2019 inviting her to a disciplinary hearing scheduled for 5th September, 2019 which was conducted by an Ad-hoc committee of the Board. However, during the hearing her advocate was kicked out of the room and as a result she was denied representation. The disciplinary hearing proceeded regardless and her employment was eventually terminated vide the letter of termination dated 16th September, 2019.

12. In support of her testimony herein, she adopted as exhibits, her Bundle of documents dated 1.10.2019, affidavit sworn on 3.6.2015 and supplementary document filed on 13.5.2021 which were marked exhibit 1-3 respectively.

13. On cross examination, she testified that the 22 drivers recruited by herself were recruited from the data base in line with the previous practice at the Respondent and in accordance with clause 2:3.1-5 of the Human Resource Manual. She stated that she wrote a Memo to the CEO questioning the recruitment of the 65 staff members however that the recruitment was concealed from her having been unilaterally undertaken by the Respondent's CEO. She also testified that Clause 13:8 of the Human Resource manual provide that disciplinary hearing for person of her caliber ought to be conducted by Staff Advisory Committee which is comprised of the members from senior managerial positions and the disciplinary process ought to be initiated by the supervisor who was the CEO.

14. On further cross examination, the claimant told this Court that she was given adequate time to respond to the Notice to show cause however during the hearing, her advocate was send away. She stated that the CEO was absent at the hearing and even some members of the committee left before the hearing ended. She stated that all through, she challenged the entire process of how the disciplinary hearing was convened.

15. On re-examination, she testified that she challenged the process because it was initiated by the chairperson of the Board instead of her supervisor (acting CEO). She further contended that the only recruitment which had issue according to the external Auditor was the recruitment of the 65 staff who were all recruited not by her, but the CEO and the assistant HR Director.

Respondent's case

16. **Janet Boit**, respondent's Legal Officer testified as RW-1, and like the claimant, she also adopted her written statement dated 7.5.2021 together with two bundles of documents filed on the 10.05.2021 and 18.5.2021 which were marked as Respondent's exhibit 1 and 2 respectively. She admitted that the claimant was employed by the respondent as the Director Corporate Services but later the docket was renamed Human Resource management and Administration. The claimant being a director, she was reporting to the CEO of the Respondent.

17. Rw1 further testified that, in 2019 an external Audit was carried out by the Auditor General and issues were raised on the employment of staff without following due process. It was noted that no advertisement, shortlisting, interviewing had been carried out before the said recruitment was conducted. However, she confirmed that the Human Resource department was not implicated by the report although the Auditor General was investigating the Respondents staff on several issues including the recruitment of staff without following due procedure and budgeting. She further stated that EACC also investigated the claimant for abuse of office, alleged nepotism and favoritism.

18. She stated that after the investigation the Claimant was issued with a show cause letter written by the chairperson of the Board, since the CEO was on compulsory leave and his office was being run by an acting CEO. According to Rw1 the Chairperson was the correct person to sign the show Cause Letter. She further explained that the claimant's disciplinary case was heard by an *ad hoc* committee of the Board

because the Staff Advisory Committee (SAC) is made up of managers of Junior rank than the Claimant while the Executive Committee members which is made up of directors and headed by the CEO, was paralyzed by absence of members after being sent on compulsory leave.

19. She stated that due to that gap in the disciplinary process that the Board relied on clause 1.7 of Mwongozo and chapter 9 of the State Corporation Act to established an ad-hoc Committee to conduct the disciplinary hearing. She confirmed that the hearing took place but the claimant was not allowed to take an advocate to the hearing. However, he asked to call a fellow employee but she attended alone.

20. Rw1 went to state that after the disciplinary hearing the committee found that the claimant had breached her contract of employment and thereby caused the Respondent to lose Kshs. 106 Million as remuneration to the 87 staff who were irregularly recruited. According to Rw1, investigations are still ongoing and as such reinstatement of the claimant would interfere with investigation. She maintained the reason why the claimant was dismissed the failure to follow due procedure in recruiting the 87 staff members.

21. On cross examination, she confirmed that she joined the respondent as the Legal officer in October, 2017 and therefore she did not have first-hand information on the issue at hand. She also confirmed that the Board is at the apex of the Respondent and the CEO is the only member of the management staff with direct contact with the Board.

22. She further stated that clause 1.2 of the Human Resource manual provides for separation of powers between the management and the Board and the chairperson of the board and the CEO are headed by different persons. She also told the Court that the role of the Board is articulated under the manual and disciplining staff is not contemplated therein.

23. RW-1 reiterated that the Ad-Hoc committee dealt with the disciplinary hearing of the claimant due to the circumstances facing the Respondent at the time. She admitted that the CEO was the one who should have initiated the disciplinary process. She also admitted that there was an acting CEO in the office who should have initiated the process but argued that the acting CEO was a peer to the claimant.

24. On further cross examination, she testified that SAC is made up of managers who are juniors to the Claimant. She further stated that disciplining of Directors is not contemplated in the disciplinary process in the Human Resource manual. However, she admitted that since the disciplinary hearing was conducted by persons who were also members of the board, the claimant had no option of appealing because the appeal could ordinarily be referred to the Board.

25. She also admitted that the auditor did not make any finding in respect of the alleged funding of the Nanyuki office, nepotism and favoritism in his report. She further admitted that there is no evidence to prove that the claimant was investigated by EACC or any other agency or even the Auditor general.

26. Again she admitted that when an external audit is done, the same need to be presented vide a formal report, and it is at that point that the report is acted upon. However, she confirmed that the claimant was disciplined based on the management letter and not the formal audit report. She further testified that the issues raised with the Respondent were 14 in number and the only issue related to the claimant was on the recruitment of 65 staffs but she confirmed that the recruitment was conducted the claimant as on leave. She also confirmed that the report before the court indicate that a sum of Kshs. 8.7 Million is in issue and not 106 Million. She also confirmed that she did not know whether the Board members were unaware of the recruitment. He admitted that Mudzo Nzili was one of the Board members but she could confirm whether he was related to one of the irregularly recruited staff.

27. As regards the recruitment of 22 drivers, Rw1 admitted that there is no evidence to disprove that the said drivers were not from the data base arising from earlier advertisement. She concluded by reiterating that the dismissal of the claimant was lawful because the right procedure was followed and the reason for the termination was valid.

Claimant's submissions

28. The Claimant submitted on two issues: whether the discipline and termination of the claimant initiated by the Respondent chairperson was void and whether the Court should grant the prayers sought in the claim.

29. On the first issue it was submitted that the procedure in which the disciplinary hearing was conducted was unfair. It was argued that under the Code of Governance for state Corporation (*Mwongozo*), the role of the Respondent's management and that of the Board are separate and distinct. The chairperson of the Respondent is neither a non-executive member of the board nor is she a member of the executive management team and therefore, she cannot carry out executive or operational functions.

30. It was submitted further that, section 13 of the Respondent's Human Resource manual give an elaborate procedure in which disciplinary process of the Respondent's employees is carried out. It involves the preliminary investigation into any issue, the drafting of the show cause letter and interdiction by the Chief Executive Officer. However, in this case, these powers were usurped by the Respondent's chairperson contrary to the Respondent Human Resource Manual.

31. It was further submitted that Clause 13.8. of the Human Resource manual vests the power to conduct disciplinary hearing on the Staff Advisory Committee (SAC) with appeal to Management Executive Appeals Committee (MEAC) and then to the Board. However, the Respondent by-passed that and constituted an AD-Hoc Committee to conduct the disciplinary hearing, which committee was comprised purely of Board Members, whose decision was final.

32. It was also argued that although the Respondent took refuge under clause 1.7 of Mwongozo for establishing the Ad-hoc Committee, the issue of disciplining the claimant was not an Ad-Hoc issue as envisaged under Mwongozo. Accordingly, the claimant argued that the Chairperson acted in excess of her powers and contrary to section 13 of the HR Policy by instituting the disciplinary process against the claimant and finally issuing her with a termination letter.

33. The claimant also took issue with the Respondent's excuse for forming the Ad-Hoc committee claiming that most of the Respondent's SAC members were not in office due to their interdiction, dismissal or being out of the office. The claimant argued that there was an acting CEO throughout the period of her disciplinary process who ought to have initiated the process and further that the SAC and MEAC were all operational. Therefore, it was argued that the Respondent ought to have followed the correct procedure instead of forming the Ad-Hoc committee.

34. For emphasis the claimant relied the case of **Joseph Kiprono Koech –v- County Government of Turkana & Another [2014] eKLR**. She also cited the Court of Appeal case of **Kisumu County Public Service Board & Another v Samuel Okuro & Others [2018] eKLR** where the Governor of Kisumu County usurped the functions of the County Public Service Board and dismissed from service, several county Chief officers, but the Court insisted on the need to follow laid out procedure and dismissed the Governor's argument of public interest.

35. It was further submitted that the claimant was unlawfully dismissed from employment due to alleged irregular recruitment of 87 staff and the subsequent loss of 106 Million on salaries paid to the said employees, which was allegedly caused by the claimant's failure to advise the CEO on the staff need and issue of budgeting thereof. The claimant reiterated that out of the 87 employee, 65 were employed while she was away on leave by the Respondents CEO with the help of Assistant HR Manager and therefore the said recruitment was done without her input whatsoever.

36. As regarding the 22 drivers, it was submitted that the claimant followed the norm at the Respondent and with approval of the CEO she selected the said drivers from the data base of earlier advertisements, to replace vacant positions and therefore there was no wrong doing on her part. It was argued further that the Respondent has failed to explain how the said 106 Million was lost when the investigation report only alluded to loss of Kshs.8.7 Million.

37. The Claimant concluded that the entire process of her termination was un-procedural and the termination was unfair. Therefore she prayed for the claim to be allowed as prayed.

Respondent's Submissions.

38. The Respondent on the other hand submitted on three issues: whether there was a valid reason to terminate the claimant, whether the Respondent followed the correct procedure when terminating the Claimant employment; and whether the Claimant is entitled to the reliefs sought.

39. On the first issue, it was submitted that clause 2.3.1 of the Human Resource Manual articulates the procedure for recruitment of employees. It was argued that the claimant was mandated to competitively recruit employees by internal and external advertisement. It was further argued that in as much as the claimant exonerated herself from the recruitment of the 65 employees, she admitted having employed the 22 drivers through a data base which is not provided for in the current Human Resource manual for the Respondent. Therefore on that ground alone, the Respondent submitted that the claimant abdicated her role as the Director-Human Resource which actions costed the Respondent a colossal sum of Kshs.106 Million as expenditure towards the added staff.

40. On the second issue, it was submitted that the Respondent in compliance with Clause 1.7 of the Mwongozo formed the Ad-Hoc Committee to deal with the Claimants' disciplinary issue. The Respondent reiterated that the Staff Advisory Committee (SAC) consisted of junior manager below the rank of the Claimant, coupled with the fact that some members had been suspended and thereby affecting the functionality of SAC.

41. As a result of the above matters, the respondent submitted that there was need to form the Ad-Hoc Committee which was done in line with section 9 of the State Corporation Act. To fortify the foregoing, the Respondent cited the case of **Henry Muthee Kathurima Vs Commissioner of Lands & Another [2015] eKLR**, where the Court held that there cannot be estoppel against a statute.

42. On the prayers sought, it was submitted that it would not be practical to reinstate the Claimant to employment as there are no exceptional circumstances brought forth by the Claimant to warrant the said relief. To support this view, the respondent cited the case of **Kenya Airways Limited v Alex Wainaina Mbugua [2019] eKLR**.

43. It was also submitted that the Respondent has lost confidence in the work of the Claimant and therefore to reinstate her to employment would create a toll order. Further, the Respondent has restructured its organization and abolished the office previously held by the Claimant, and re-introduced the previous office of Director Corporate service.

44. Accordingly, it was submitted for the respondent that, the only remedy available if the court is inclined to allow the claim is for payment of damages under Section 49(1) of the Employment Act. However, the Respondent submitted that the claimant has not demonstrated that she deserves the reliefs sought and therefore urged this Court to dismiss the claim with costs.

Issues for determination and analysis

45. I have carefully considered the pleadings, evidence and the submission presented by both parties. It is a fact that the claimant was employed by the respondent as Director HR under a 3-years fixed term contract but she was dismissed before time on account of misconduct. The issues that commend themselves for determination in this matter are as follows: -

a) Whether the Claimant's contract of employment was unfairly and unlawfully terminated.

b) Whether the Claimant is entitled to the reliefs sought.

Unfair and unlawful termination

46. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

47. From my reading of section 45 of the Employment Act quoted above, termination of an employee’s contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reasons(s) and upon following a fair procedure.

48. The reason cited by the Respondent for terminating the Employment of the Claimant was for abdication of her duties and in particular breaching sections 12.21.1(d), Sections 12.21.1(j) (v) and Section 12.21.1(n) of the Respondent Human Resource procedure manual. Section 12 of the Respondents Human Resource manual provides for the offences and misconduct. The following section read as follows; -

Section 12.21.1(d) - failure to perform properly and carefully any work that is assigned to him

Sections 12.21.1(j) (v) - deliberately, willfully and negligently intends to cause improper payment Out of, NHIF fund.

Section 12.21.1(n) - breach of any of the provisions of this Manual or any other written laws or regulations for the time being in force in Kenya.

49. In the Show cause letter dated 11th July, 2019, the main issue was based on the recruitment of 87 staff members who were allegedly recruited without due procedure, which recruitment costed the Respondent Kshs 106 Million for payment of salaries of the said staff. The claimant was blamed for failing to advice the CEO on the need to follow due procedure before the said staff were recruited and also failing to inform the CEO of the need to budget for the staff before recruitment.

50. The claimant testified that the recruitment of the 65 staff was conducted by the CEO with assisted by the assistant Human Resource manager when she was away on leave and therefore, the without her involvement. RW-1 admitted in her testimony that the claimant was away on her leave when the recruitment of the 65 staff members was conducted.

51. With regard to the 22 drivers recruited, the claimant testified that she was instructed by her supervisor (the CEO) to carry out the recruitment based on the data base. Since the CEO is the contact person with the Board for purposes of the requisite approvals, the claimant carried out the exercise without question based on the CEO’s authority.

52. In light of the foregoing, I am of the considered view that the Claimant is not to blame for the Recruitment of the 87 employees. I say so because the first batch of 65 employees were recruited in her absence while the second batch of 22 drivers were carried out with instructions and authority from the CEO who was her supervisor and also the person endowed with the delegated power from the Board.

53. The CEO gave approval on 6th October 2017 for recruitment of five drivers after the claimant wrote on 5th October 2017 seeking authority to recruit them. On 6th March 2018, the CEO wrote to the claimant granting authority under Section 1.5 of the respondent’s Terms and Conditions of service, to recruit another five drivers. Finally on 13th September 2018, the CEO wrote to the claimant granting authority to recruit twelve drivers more again citing section 1.5 of the respondent’s Terms and Conditions of service.

54. Clause 1.5 provides for delegation of some of the functions and powers of the Board to the CEO. The said provision is tune with clause 1.2. (k) of Mwongozo which provides that the Board only approves the appointment of the senior management staff. It is obvious that drivers are not among the senior management staff.

55. It has not been denied that there was a need assessment done and a reports prepared accordingly. It has also not been rebutted that there was urgent need for drivers due to expansion and the Universal Health Ccare (UHC) program that led to more vehicle being acquired but just packed due to lack of drivers. Finally it has not been rebutted that there was a firm historical policy of recruiting drivers from data base of previously advertisements and interviews.

56. The upshot of the above analysis is that the Respondent has not proved that there was a valid and fair reason for terminating the Claimant’s employment as required under section 45 of the Employment Act.

The procedure followed

57. Section 41 of the Employment Act provides that:

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

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

58. The Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** held:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

59. In this case, the claimant contended that she was not accorded fair hearing, since the person that initiated the entire disciplinary process did not have the power or locus to initiate and conduct the disciplinary hearing.

60. The claimant further stated that the Chairperson of the Respondent Board had no power to issue her with the Show cause letter, sent her to compulsory leave, to chair her disciplinary hearing and finally to write her termination letter. The claimant argued that disciplinary hearing is ordinarily conducted by Staff Advisory Committee (SAC) in accordance with clause 13 of the Human Resource Manual not an ad-Hoc Committee of the Board.

61. The Respondent contended that the Claimant could not be subjected to disciplinary hearing conducted by SAC for the reason that the members of SAC were junior officers as compared to the Claimant, and also due to lack of quorum in the SAC. The Respondent also stated that the Ad-hoc committee was formed in line with section 9 of the State Corporation Act as read with Clause 1.7 (1) of Mwongozo, to deal with the disciplinary issue of the claimant terming it as an Ad-hoc issue since the Human Resource manual has not provided for how disciplinary hearing should be conducted for officer in senior levels such as the Directors.

62. I have carefully considered the contentions by both parties and also read clause 13 of the Respondent’s Human Resource manual and Clause 1.7 of Mwongozo. Clause 13 of the HR Manual provides for an elaborate procedure through which staff of the respondent are to be disciplined. The said clause provides that disciplinary process ought to be commenced by the employees’ supervisor, thereafter it taken up by SAC which conducts the hearing and makes recommendation to the CEO who in turn Mets out the punishment for the employee.

63. If the employee is dissatisfied, he/she can appeal to the Management Executive Committee and then to Chairperson of the Board of management who shall have the final verdict under Clause 13.10.1 of the HR Policy and Procedure Manual. Consequently, it is clear as the day that the role of the Chairperson and her Board under the said HR Manual is appellate at the tail end of the disciplinary process.

64. In this case the Board Chairperson initiated the disciplinary process and the hearing was done by an Ad-hoc committee comprising member of the Board. As much as I appreciate the reasons given by the Respondent, I regret to say that from the onset that the respondent’s Board played its game on the wrong side of the pitch. The roles of the Board and the management team of the respondent are clearly demarcated and each one of them has his/her side of the field to play from and there is no iota of provision, either in law or Mwongozo, where any of the two players can cross to the others side of the playground.

65. The true mandate of the Board is set out under Clause 1.2 of Mwongozo which includes: exercise their role collectively and not individually; determine the organization’s mission, vision, purpose and core values; set and oversee the overall strategy and approve significant policies of the organization; ensure the strategy is aligned with purpose of the organization and the legitimate interest and expectation of its shareholders and other stakeholders; approve organizational structure; approve the annual budget of the organization; monitor organizational performance and ensure sustainability; enhance the corporate image of the organization ensure availability of adequate resources for organization; hire the CEO and approve appointment of senior management staff; and ensure effective communication with stakeholders.

66. On the other hand, the specific role of the Chairperson of the Board is provided under Clause 1.4.1 of Mwongozo to include among other things, maintain close, but independent working relationship with the CEO and ensure appropriate balance of power between the CEO and the Board. The said provision is very clear. There is no slightest indication that the Chairperson can assume any executive or operational powers over the management of the respondent. Her role, just like the Board are only oversight and policy making powers meaning that any exercise of executive or operational roles by the Board or its Chair would be *ultra vires*.

67. Clause 1.7 of Mwongozo which was the basis for the action taken by the Board against the claimant provides as follows:

“Committees of the Board

1. The Board should

(a) Establish not more than four committees of the Board provided that the Board shall be at liberty to establish such ad-hoc committees as required to deal with any ad-hoc matters requiring focused attention such as the recruitment of the Chief Executive Officer.

(b) Establish an Audit Committee, and a maximum of three other committees (by whatever name called), to discharge the following functions:

i. Governance

ii. Risk

iii. Compliance

iv. Finance

v. Technical matters

vi. Strategy

vii. Human Resources.”

68. After careful reading of the above clause, I find that it did not provide any window for the respondent to exercising original disciplinary power over the claimant. Even Rw1 admitted that disciplinary process is not an ad-hoc matter to warrant formation of an ad-hoc committee as envisaged under the above clause. The said clause does not amend or override clause 1.2 and 1.4 of the Mwongozo which has clearly demarcated the field of play between the CEO (management) and the Board (and its Chairperson).

69. The Respondent Manual expressly provides that the CEO ought to have initiated the disciplinary process and chair the same. The scenario in this case is not a novel one since in the recent past, courts in this country have determined similar cases in which they underscored the need for the proper procedure to be followed before disciplining an employee, and the process to be undertaken by the correct person.

70. In **Joseph Kiprono Koech v County Government of Turkana & another [2014] eKLR**, Ongaya J held as follow:

“The 2nd respondent has not established any authority he invoked within the Commission’s disciplinary provisions that entitled him to suspend the claimant in the manner he pretended to proceed. Accordingly, the court finds that the 2nd respondent was not vested with the power or authority to suspend the claimant.”

71. Again in **County Public Service Board & another v Samuel Okuro & others [2018] eKLR**, the Court of Appeal held as follows:

“We reject this argument for the reason that fundamental rights and freedoms under the Constitution are sacrosanct rights that this Court has the obligation to protect. Moreover, the Court cannot uphold an action of the Governor that is clearly ultra vires his Constitutional and statutory powers.”

72. It follows that the disciplinary process against the claimant herein was unlawful and unfair because it was initiated, conducted and concluded by the wrong person in the name of ad-hoc committee of the respondent’s Board of management. The said proceedings did not fit within the contemplation of section 45 of the Employment Act. A person cannot purport to have acted fairly and lawfully when he/she had no mandate either under the law or the contract of service to have acted as he/she did.

73. Even if the process initiated by the Board Chairperson was allowed to stand, there would still be a serious infringement of the claimant’s right to fair disciplinary process because, it means that her right of appeal was taken away. The reason for the foregoing view is, and I agree with claimant, that her appeal would be going for hearing by same Board management which has acted as the complainant, investigator, prosecutor and the Judge at the same time.

74. Consequently, I am of the considered view that when the Ad-hoc committee conducted the hearing, its verdict was final contrary to the express provision of the Human Resource Manual that provides for the right of appeal. Denying the Claimant the crucial process of appeal, sabotaged the disciplinary process and nullified the entire process. In the circumstances, the Respondent breached the Claimant’s right to appeal and as such the alleged disciplinary hearing was unfair.

75. Having found that the respondent has failed to prove that a fair procedure was followed, and that the reason for the termination was valid, it is my holding that the termination was unfair within the meaning of section 45 of the Employment Act and therefore unlawful.

Is the Claimant entitled to the reliefs sought?

76. The Claimant’s major prayer is reinstatement. It is now trite that Courts should only resort to this remedy in exceptional circumstances. This is so because an order of reinstatement is an order of specific performance which Courts must refrain from granting except in

exceptional circumstances. The basis for exercising the discretion to grant this remedy is provided for under section 49 of the Employment Act.

77. In the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** the Court had this to say:-

"Reinstatement is provided for under Section 49(3) (a) of the Employment Act as one of the remedies that a Court, by virtue of Section 50, shall be guided by. It is couched in Mandatory terms and requires the Court to take into account any of the following matters, which have been set out in Section 49(4)(a) to (m) before it can order reinstatement;

- a) The wishes of the employee;***
- b) The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and***
- c) The practicability of recommending reinstatement or re-engagement;***
- d) The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;***
- e) The employee's length of service with the employer;***
- f) The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;***
- g) The opportunities available to the employee for securing comparable or suitable employment with another employer;***
- h) The value of any severance payable by law;***
- i) The right to press claims or any unpaid wages, expenses or other claims owing to the employee;***
- j) Any expenses reasonably incurred by the employee as a consequence of the termination;***
- k) Any conduct of the employee which to any extent caused or contributed to the termination;***
- l) Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and***
- m) Any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."***

78. The circumstances of the instant case confirm that the Claimant's employment was terminated for no valid reasons. The Claimant cannot be faulted for the termination. I have considered all the above factors including the wishes of the employee to be reinstated, circumstances under which the termination occurred, the practicability of reinstatement, common law principle that specific performance should not be ordered in a contract of service except in exceptional circumstances.

79. However, it obviously clear that reinstatement is not practicable in this case because the contract period has already lapsed. According to the claimant, her contract was for three years starting 1st July 2018 and therefore her last working day was to be on 30th June 2021. Secondly, even if the contract period had not lapsed, the position held by the claimant has since been abolished after an alleged restructuring exercise. Consequently, I agree with the respondent's submission that the ideal remedy in the circumstances of the case is damages under section 49 of the Employment Act.

80. Accordingly, the claimant is awarded damages under section 49 of the Act including three months' salary in lieu of Notice being Kshs 659,935 x3 = Kshs. 1,979,805 as per the contract of service and Compensation for unfair termination of 12 months' salary being Kshs. 7,919,220. In awarding the said compensation, I have considered that the claimant was dismissed prematurely when she had reasonable expectation to continue working for 22 months before the contract term expired. I have also considered that she did not contribute to the termination through misconduct, and not forgetting that the procedure followed before her dismissal was alien to the respondent's own HR Policy and Procedures Manual which formed part of the claimant's contract of service.

81. The claimant is also awarded Gratuity under clause 15 of her contract of employment being 31% of her basic salary being Kshs.480,000 x 14 months equaling to Kshs. 2,083,200. Finally, I award the claimant cash in respect 65 unutilized leave days being Kshs. 480,000 x 65/26 equaling to Kshs. 1,200,000.

82. The claim for 22 months' pay being residue period of the claimant contract is declined because the Claimant's contract provided for premature termination with a notice of 3 months or payment of salary in lieu of notice.

Disposition.

83. For the reasons stated above, judgment is hereby entered for the claimant declaring that her dismissal was unfair and unlawful, and

further awarding the claimant Kshs 13,182,225. The said award is subject to statutory deductions but the claimant is awarded costs of the suit plus interest at court rates from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF NOVEMBER, 2021.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th 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.

ONESMUS N. MAKAU

JUDGE