



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT KERICHO**  
**CAUSE NO.61 OF 2018**

**ANTHONY KORIR.....CLAIMANT**

**VERSUS**

**IMARISHA SACCO SOCIETY LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant is seeking the following remedies;

- a. A declaration that the dismissal of the claimant by the respondent was unlawful, unprocedural and unfair in the circumstances;*
- b. An order of reinstatement to the position of Senior Internal Auditor without loss or salaries and/or remuneration, allowances, arrears deductions or apportionment benefits from the time of dismissal;*
- c. In the alternative, payment of the following;*
  - i. Salary for the remainder of the contract period.*
  - ii. Payment of 12 months compensation for wrongful, unfair termination/summary dismissal.*
  - iii. Three (3) months' pay in lieu of notice;*
  - iv. Gratuity at the rate of 28% for the term of the years contract period;*
  - v. Interest at court rates.*
- d. The respondent be ordered to issue a certificate of service within 14 days.*
- e. Spent.*
- f. Costs of the suit.*
- g. Any other relief the court may deem fit and just to grant.*

**Claim**

The claimant is an adult male. The respondent is a co-operative society incorporated under the Co-operative Societies Act and is a body corporate.

The claimant was employed by the respondent on 27<sup>th</sup> September, 1999 as accounts assistant and rose through the ranks to senior internal auditor where he served until 21<sup>st</sup> July, 2016 when he was transferred to Molot Branch in a demotion.

The claimant protested against the transfer and a meeting was held on 10<sup>th</sup> November, 2016 where the board of management accused him of not protecting their interests based on an external audit done by Langat & Associates who made unfavourable statement to KRA

investigations officer an alleged payment of KRA arrears on 19<sup>th</sup> June, 2019.

By letter of 4<sup>th</sup> October, 2017 and following reorganisation of the respondent the claimant was appointed the Risk and Compliance Manager which was a demotion as his responsibility allowances was to be 15% per the 2017/2020 CBA.

On 10<sup>th</sup> July, 2017 the respondent entered into a CBA which materially altered the terms and conditions of employment of all employees.

During the tenure of employment several incidents occurred which put him into direct conflict with the board of directors of the respondent. There were misappropriation of funds by the directors where 3 members Jeffrey Kirui, Paul Langat and Julius Tum wrote to KRA complaining the withdrawal of Ksh.11 million to pay taxes to KRA. There was an investigation which established that KRA was paid Ksh.1.5 million and Ksh.5,534,777 transferred to KRA account n 16<sup>th</sup> May and 4<sup>th</sup> September, 2015 from Imarisha account;

The Deputy Commissioner, Ethics and Integrity of KRA noted the respondent did not pay taxes in cash as these are paid by RTGS or EFT. These members filed a dispute at Co-operative Tribunal No.130 of 2018 on 16<sup>th</sup> April, 2018;

On 16<sup>th</sup> May, 2015 the chief officer of the respondent directed the claimant to withdraw and pay ksh.3.5 million to the treasurer for tax matters but he objected but this was paid;

While the claimant was on leave on 3<sup>rd</sup> September, 2015 a sum of Ksh.7.5 million was withdrawn to be paid to KRA but this was not paid;

When KRA came for investigation following the complaint by 3 members the claimant recorded his statement and replied to the external auditor attaching documents;

There was irregular payments made to County Co-op officers Mr Otti, Moray & Oloo for entertainment on 16<sup>th</sup> April, 2015 under the guise of an allowance for the year 2014;

From the external auditor Langat & Associates dated 18<sup>th</sup> February, 2016 there was an irregular withdrawal of ksh.11 million by the treasurer;

The claimant was demoted with a transfer to Mulot Branch o 21<sup>st</sup> July, 2016 and changing his designation to branch manager aimed at getting rid of him following KRA investigations prompting him to file ELRC No.159 of 2016, Kericho. This case was later compromised by way of consent with a reinstatement back to his position and due allowances at 20% and stoppage of harassment;

The respondent promoted a junior officer to take over the claimant's duties as senior auditor and when he protested a new post was created of Risk & Compliance manager on 4<sup>th</sup> October, 2017;

On 11<sup>th</sup> October, 2017 the claimant wrote to the respondent noting he had no skill or training for his new appointment, he was called for a meeting on 10<sup>th</sup> November, 2017

The respondent refused to pay the claimant salary arrears allowed under the CBA; following contempt of orders issued in ELRC No.159 of 2018 on 29<sup>th</sup> March, 2018 the claimant filed contempt proceedings; and following the contempt proceedings one director Mr Peter Nyigei started to harass him.

On the above matters the claimant was issued with a notice to show cause why his employment should not be terminated vide notice dated 18<sup>th</sup> May, 2018 over alleged absenteeism from work, lateness, taking allowances on 29<sup>th</sup> annual delegates meeting held on 20<sup>th</sup> April, 2018 and alleged insubordination to his superiors. The claimant respondent thereto seeking details and particulars on the allegations made and noting the salaries were processed by a different department and not him; other employees with salary problems were addressed but the claimant was discriminated against; he attended the annual delegates meeting but was subjected to disciplinary process and at the end of the meeting he was paid by the cashier.

The claimant also replied that from 1<sup>st</sup> to 2<sup>nd</sup> March, 2018 he had attended a seminar on Taxation & Tax Compliance with Charles Rono upon the directions of the chief officer.

By letter dated 24<sup>th</sup> May, 2018 the claimant was summoned to attend a disciplinary hearing at the respondent's head officer in Kericho and on 31<sup>st</sup> May, 2018 his employment was unfairly, unlawfully and wrongfully terminated by summary dismissal on the grounds that his responses to the show cause notice was unsatisfactory. The summary dismissal was meant to punish the claimant for doing him job ad refusing to shield directors from investigations from KRA and external auditor.

The claimant has hence suffered loss and damage and seek remedies that there is unlawful and unfair termination of employment, there be a reinstatement to the position of Senior Internal Auditor without loss of benefits and in the alternative the payment of his terminal dues.

The claimant has filed his witness statement and lists of documents dated 22<sup>nd</sup> June, 2018 and 23<sup>rd</sup> July, 2018 the lists dated equal dates respectively.

The claimant also testified that the leave application form within the respondent were manual until March, 2018 and the allegations made that

he failed to attend work or was absent without permission is only meant to frustrate his claims. He requested to be issued with the leave application forms and clocking registers by the respondent but there was no compliance. When absent from duty he had a good reason and permitted by the respondent. The records filed by the respondent to show he did not attend work are not signed.

There are 7 employees who took leave.

2<sup>nd</sup> April, 2018 the date he is alleged to have absconded duty was a public holiday.

There was no work.

On 20<sup>th</sup> April, 2018 the claimant attended the annual general meeting with his work colleagues. He did not sign in and was paid Kshs. 14,000 for auditing the AGM.

He applied for his annual leave electronically to start in April, 2018 but was recalled from leave on 9<sup>th</sup> April, 2018 but requested to report on 11<sup>th</sup> April, 2018 through the phone.

On 31<sup>st</sup> May, 2018 he was issued with letter of summary dismissal with the right of appeal and to be issued with Certificate of Service upon clearance.

The claimant also testified that his employment was for the position of Senior Internal Auditor and seek to be reinstated as such.

## **Defence**

The respondent has denied all the claims made by the claimant and that his work transfer was done in accordance with the rules and regulations in place and his appointment as the Risk and Compliance officer was as a result of change in organisational structure of the respondent which necessitated such changes. These changes affected all the employees of the respondent and not de targeting the claimant.

The claims made are with the intent to taint the image of the respondent and for him to advance his personal interests. The claimant was issued with notice to show cause as a result of his behaviour elicited at his place of work including failing to abide with the terms of his contract and absconding duty and unilaterally increasing his salary without the consent or knowledge of the respondent.

Any action taken against the claimant were as a result of his indiscipline which included misuse of confidential information that came to his possession in the course of his work. The actions taken by the respondent were in accordance with the human resource policy as well as the CBA and there was no unfair termination of employment as alleged.

The defence is also that the termination of employment followed gross misconduct, insubordination, absenteeism, lateness and complete disregard of the rules and regulations of the respondent.

The parties held several meeting to iron out matters raised. The claimant filed Kericho ELRC No.159 of 2018 which raises similar facts herein and proceedings herein are in abuse of court process and claims should be dismissed with costs.

Kiplagat Koech David testified that he is director of the respondent, honorary secretary, and secretary to the audit committee which is a subcommittee of the board which follow the audit trails in financial and human resource matters and hence was in close contact with the claimant.

Mr Kiplagat also testified that the claimant was summarily dismissed from his employment for non-performance and misconduct of lateness, absenteeism, insubordination and increment of his salary without approval. The respondent has a logging in by biometric from January, 2018 which records lateness. The claimant was found culpable and twice was found insubordinate. He refused a recall in April on 9<sup>th</sup> and 10<sup>th</sup> April, 2019. He refused to come to the AGM.

The claimant was issued with a notice to show cause letter on 18<sup>th</sup> February, 2018 and then attended disciplinary hearing when he became arrogant and disorderly and was subsequently dismissed. He was given 20 days to appeal but opted to file suit.

Mr Kiplagat also testified that the claimant rose through the ranks to Risk and Compliance manager where he did badly and was dismissed.

The witness attended the claimant's disciplinary hearing and it was established he had changed designations in the year 2017. He took charge of the payroll in the year 2014.

Any salary increment must be approved. The payroll section, this is controlled with a password and the respondent as an ICT manager in charge of ICT operations.

On 9<sup>th</sup> and 10<sup>th</sup> April, 2017 all staff were recalled from leave. This was by the ICT but the claimant did not reply until 9<sup>th</sup> April, at 20:00 hours and was hence not present at the AGM.

The clocking records are evidence of the claimant being late for work or not reporting on duty. On the show cause notice the claimant failed to give satisfactory responses.

Franklin Kiplimo Korir testified that he is head and human resource manager for the respondent. He testified that the claimant was summarily dismissed for absenteeism and lateness for work. Employees are required to report to work at 8am to 5pm on Monday to Friday and 8.30am to 12.30pm on Saturday. The claimant was also found insubordinate. There was also unlawful salary increment and failure to attend the AGM.

Mr Korir also testified that the claimant was issued with notice to reply to the allegations made against him and then invited to the disciplinary hearing but the respondent found him culpable and dismissed him from employment. He squandered the right of appeal.

The documents the claimant has produced to show he had applied for leave on Easter Monday a public holiday is a fabrication. The persons referred to as witnesses are not in court and Caroline Rop is not an employee of the respondent. The respondent does not allow leave overlap. The person called Faith Tanui does is a casual employee and the claimant cannot hand over to a casual employee.

There was attendance sheet for the Annual Delegates Meeting and all senior officers signed save for the claimant.

The claimant had unlawful salary increment for himself. This arose and the audit committee addressed the matter. This arose in the pay slip for 2015 and thus called for investigations. There was salary increase by ksh.10, 000 while the claimant was the internal auditor and in charge of salaries and the human resource department did not exist then.

Mr Korir also testified that the position of branch manager is not inferior to that of internal auditor, the benefits are the same. There is a responsibility allowance.

The claimant filed **Kericho, ELRC 159 of 2016** following his transfer from Kericho to Mulot and the subject matter related to alleged demotion of the claimant. A consent order was recorded to compromise the case. This is not sufficient reason to claim for a reinstatement.

There was change of job description and re-designation.

Where an employee required taking leave this was done through self-service. The employees were trained in this regard. Other employees made complaints against the claimant.

During the Annual Delegates Meeting employees were paid allowances. The claimant was not at the venue. He was paid an allowance. His name appears on the HOD attendance register. The claimant did not sign and it was to be signed at the venue.

Benson Kiprono testified he is the Cash Office Assistant for the respondent and the claimant was his work colleague.

On 20<sup>th</sup> April, 2018 the witness was asked to issue allowances to the HODs for attendance during the Annual Delegates Meeting at Kericho primary school. This was at 9.00am to 3.30pm. The claimant reported in the morning, took his allowance and tea then left. The attendance list has 21 names, 20 signed. The claimant did not.

This was signed towards the close of the meeting. By this time the claimant was absent. It was mandatory for those in attendance to sign.

Mr Kiprono also testified that he was not a delegate at the Annual Delegates Meeting save to attend and pay the participants their allowances. He paid the claimant and cannot recall the amount. He paid the claimant and did not give him the list to sign at the time.

Abel Ngetich testified he is at the document management centre for the respondent. He worked with the claimant who was dismissed for absenteeism and lateness and there is evidence to this extent.

Mr Ngetich also testified that he has done BSC (Computer Science) including IT. The biometric time attendance system is based on employee finger prints. One punches as need arises reporting and departure. Monday to Friday at 8am with an allowance of 10 minutes. The system takes care of lunch breaks, reporting back and departure.

The claimant would report late or entirely abscond duty. The time when the data is retrieved does not make a difference. This is a derivation of data system which is authentic.

At the close of the hearing both parties agreed to file written submissions.

Only the claimant filed written submissions.

The claimant submitted that his employment was unfair terminated. He was issued with a notice to show cause why his employment should not be terminated and required to respond on the same day without being issued with all the necessary documents. He was then subjected to a disciplinary hearing without time to prepare his defence or being issued with material evidence.

The claimant submitted that on the alleged absence from duty, the CEO would send him for official duty on some of the days he is said to have been absent. The CEO and other witness called in court were part of the disciplinary hearing as panellists which was contrary to the due process.

The alleged data of biometric records was printed in June, 2018 after the claimant had left his employment with the respondent.

By circular dated 2<sup>nd</sup> January, 2018 the employees were informed to apply for annual leave through the self-service system denying the claimant leave copies despite having applied and submitted hard copies. The employees were only trained on the self-service system in March, 2018. The alleged absenteeism records were not available during the disciplinary hearing.

The claimant also submitted he was discriminated against when he was removed from employee forums. All heads of departments were members of a phone whatsapp group where he was removed. On 1<sup>st</sup> May, 2018 he was denied telephone data bundles and allowances for May, 2018. He was not invited to a staff party on 6<sup>th</sup> May, 2018. His systems access expired daily for a month before employment was terminated unlike all other employee who had uninterrupted access.

The claimant also submitted that he responded to all allegation outlined in the notice to show cause;

- The claimant confirmed he attended the Annual Delegates Meeting on 20<sup>th</sup> April, 2018 and the cash assistant confirmed this fact in his evidence and several other participants saw him;

- On alleged absenteeism and lateness there were details of his whereabouts on each day. For some days the claimant was attending a workshop with a colleague Charles Rono the finance manager and there is a certificate of attendance. There is a CBA which allowed an employee 2 days off duty and the days of absence were actually on the duly applied and approved rest days for January to March, 2018;

- On the alleged lateness and failure to clock in and out the claimant had applied for permission and the supervisor approved and who should have kept the records and the biometric approvals were not put in the system;

- There was no insubordination. The clock in and out system/records were not available to the claimant. The failure by the claimant to clock in and out on some days was explained as the claimant was out on official duty with the supervisor's authority;

- The claimant did not attend on 9<sup>th</sup> April, 2018 as he received the notice very late and in the rural area and far from Kericho and he requested the CEO to allow him to report on 11<sup>th</sup> April, 2018 and there was approval; and

- On the alleged adjustment of salary, the claimant was not in control of the ICT department to be able to change the salaries to his advantage. He had no salary processing password. The salary adjustments were rightfully made together with those of other employee but he has been singled out and discriminated against by the respondent. The claimant was denied salary increase per the CBA.

The claimant also submitted that the respondent failed to comply with the terms of the CBA, there was no compliance with sections 43, 45 (5), 47(5) and 44 of the Employment Act, 2007 and has relied on the following cases – **Walter Ogal Anuro versus Teachers Service Commission [2013] eKLR; Nicholas Muasya Kyula versus Farmchem Limited [2012] eKLR; Donald Odeke versus Fidelity Security Limited [2012] eKLR; Frederick Kariuki Kamau versus Bank of India [2015] eKLR; Ivetta Mkala versus Nation Media Group Cause No.237 of 2012.**

On the pleadings, evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there was unlawful, unprocedural and unfair termination of employment;

Whether an order of reinstatement to the position of Senior Internal Auditor without loss of salaries and/or remuneration, allowances, arrears deductions or apportionment benefits should issue;

Whether the alternative remedies are due

The claimant was *summarily dismissed from his employment on grounds of gross misconduct* under Section 44(d) of the Employment Act, 2007. It is the claimant's case that his employment was unfairly terminated as the respondent failed to observe statutory provisions as provided for under section 35, 41, 43 and 44 of the Employment Act, 2007. There was no due process, he was victimised for raising questionable cash transactions done by the respondent officers with KRA and external auditor and hence the summary dismissal amounted to unfair dismissal. The claimant is seeking reinstatement back to his position as senior internal auditor and in the alternative payment of his terminal dues.

The burden of justifying the ground of summary dismissal lies upon an employer. The respondent as the employer in defence set out that the claimant was of gross misconduct, for absenting himself from work without permission, being of habitual lateness at work, taking allowances while he did not attend the Annual Delegates Meeting, was insubordinate and that he increased his salaries without authority of the respondent.

Summary dismissal of an employee is allowed pursuant to section 44 (4) (a) of the Employment Act, 2007. To justify the same the employer must prove that;

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

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

The due process required where there is alleged gross misconduct is that the employer must issue notice to the employee however short and allow the employee to give his defence pursuant to section 41(2) of the Act as held in **Moses Ochieng versus Unilever Kenya Limited [2018] eKLR**.

In the case of **George Onyango Akuti Versus Security Services Kenya Limited (2013) eKLR**, where the court held that;

*An unfair termination could be because no notice was given as required by Section 35 (1); no reasons were given or because the employee was not afforded a hearing as required by Section 41 of the Employment Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract*

By letter and notice dated 31<sup>st</sup> May, 2018 the respondent summarily dismissed the claimant from his employment on the grounds that;

#### SUMMARY DISMISSAL

*Pursuant to a show cause letter dated 18<sup>th</sup> May, 2018 and your reply dated 18<sup>th</sup> May, 2018 a disciplinary hearing on 28<sup>th</sup> May, 2018 and investigations conducted in relation to the following grounds;*

- i. Frequent absenteeism from work. It is noted you have been openly absenting yourself with gross impunity between January, 2018 to date.*
- ii. Rampant lateness in reporting to work on various dates between January, 2018 to date.*
- iii. Taking allowances for attending to our Annual Delegates Meeting held on 20<sup>th</sup> April, 2018 and failing to attend the Annual Delegates Meeting.*
- iv. Increasing your salary unlawfully and without authority of the Board this is criminal offence that requires interrogation and possible prosecution that may lead to conviction and imprisonment i.e. February, 2015 pay slip.*
- v. Behaving in a manner insubordination to your superiors.*

*You appeared before a disciplinary select Board on 28<sup>th</sup> May, 2018 and it was noted that you lacked respect towards your superiors and rampant insubordination.*

*The Board of Directors carefully considered your defence but it was found to be unsustainable and resolved that your actions in line with section 44(4) a, b, c, d and e of the Employment Act 2007, the management Collective Bargaining Agreement 2017-2020 and the Society's HR Policy amounted to gross misconduct and you are hereby summarily dismissed. ....*

The claimant has responded to the same matters set out in the notice to show cause why his employment should not be terminated dated 18<sup>th</sup> May, 2018 by his letter dated 21<sup>st</sup> May, 2018.

On the alleged lateness, the claimant defended himself and noted that he applied for 25 days of his annual leave from 3<sup>rd</sup> April, 2018 but after 6 days he was recalled while in his rural home and was only able to return on 11<sup>th</sup> April, 2018. After the Annual Delegates Meetings held on 20<sup>th</sup> April, 2018 he received a text message that he should proceed on his annual leave with 19 days ending on 18<sup>th</sup> May, 2018.

With regard to the alleged lateness the claimant responded that he is punctual at work unless he has work out of the office. On the 20<sup>th</sup> April, 2018 during the Annual Delegates Meeting he was in attendance at Kericho Primary School and met several delegates and staff members. He assisted a Sacco member inquiring about a loan application and at 13.23 hours went to the office to check and give feedback and then returned to the meeting and got his allowance as part of the last open to be paid.

With regard to increasing his salary the claimant responded that salaries are processed by a different department and he has no access and had requested for a corrective action.

With regard to alleged insubordination the claimant sought for clarification as there were no details.

On the responses by the claimant to the show cause notice the respondent did not find the same satisfactory and hence he was invited to the disciplinary hearing on 28<sup>th</sup> May, 2018. The select committee filed its report on the proceedings therefrom;

...

*(a) On 20/4/18, during the ADM he [claimant] was assigned to be at Kericho primary the venue of the meeting.*

*Records/ reports show that Anthony Korir appeared very briefly in the morning and was not seen again.*

*He was reminded that he was not there during introductions of the staff.*

*He collected allowances for the day and left.*

*The BOD [board of directors] tried to share with him about the proceedings of the ADM and he did not know much showing he was not there.*

*He even missed by saying the CS [C Keter] was welcomed (to give his speech) by the MD KPLC which was not true.*

*....*

*(b) On 9/4/2018, 10/4/2018 all staff who were on leave (including him) were recalled by the CEO for some duty.*

*The message to them all was sent at 5.25pm on 8/4/2018.*

*Anthony Korir chose not to come. He wrote a message (SMS) to CEO on 9/4/2018 at 20.18 hours requesting not to turn up. He did not get an approval of the request and still chose not to turn up.*

*This is insubordination. It is not good.*

*(c) there was/is unprocedural/wrong annual increment of his salary as seen in his Feb. 2015 payslip. Two annual increments of 2014, 2015.*

*There are no minutes. No authorisation for the said increments.*

*Anthony Korir could not explain this issue saying he would consult/find out. In his reply he had said he was not in charge of payroll/salaries. ...*

*(c) Biometric records shows that Anthony Korir had habitual lateness. He clocked in late on 2/1/18 late for 24 minutes*

*He was absent or clocked out early on;*

*13/1/18 - late for 10 minutes*

*3/1/18 - late for 27 minutes*

*20/ 1/18 - late for 3 hours 3 minutes*

*24/1/18 - late for 15 minutes*

*28/1/18 - late for 6 minutes*

*24/3/18 - late for 2 minutes*

*31/3/18 - late for 21 minutes*

*14/4/18 - late for 2 minutes*

*On 3/1/18 – clocked out at 10.07am. worked for only 1 hour 30min.*

*On 15/1/18 – no clock out. Was absent*

*22/1/18 – was absent*

*23/1/18 – was absent*

*25/1/18 – no clock out*

*27/1/18 – early clock out – at 10.55am worked for 2 hrs 9min.*

*31/1/18 – no clock out*

*1/2/18 – no clock out*

3-2-18 – early clock out at 11.27am worked for 2 hours and 49 min.

10/2/18 – no clock out

20/2/18 – early clock out at 9.10am worked for 59 minutes.

26/2/18 – absent

27/2/18 – absent

10/3/18 – absent

12/3/18 – no clock out

13/3/18 – no clock out

16/3/18 = early clock out at 2.47pm worked for 7 hrs 1 min.

19/3/18 – absent

20/3/18 – absent

31/3/18 – no clock out.

9-4-18 absent – recalled but did not turn up

10/4/2018 absent – recalled but did not turn up.

17-4-18 – no clock out

18-4-18 - ,,

19-4-18- ,,

20-4-18 - ,,

2/5/18 – clocked in at 9.09am while he was on leave. Did not clock out

25/5/18 – no clock out.

...

#### *Recommendation*

*Anthony Korir was seen to have contravened section 44(4) a, c, d, e of the Employment Act 2007 and therefore recommends that he be summarily dismissed. ...*

The show cause notice and the responses therefore thus put into context, these do not paint a good record for the claimant.

Whereas the claimant had taken his annual leave from 3<sup>rd</sup> April, 2018 a recall back to work by the employer is permissible. Taking of annual leave is not an end to employment. Where annual leave is interrupted for good cause, the employer is allowed to compensate the same but the employer cannot refuse a recall to work on the basis he had the annual leave approved.

Upon reasonable notice the claimant should be attended work as directed. To refuse lawful instructions by the employer amounts to gross misconduct under the provisions of section 44(4)(e) of the Employment Act, 2007 that;

*[the following matters] constitute justifiable or lawful grounds for the dismissal if—*

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

with regard to lateness for work or leaving early or not attending work at all, the respondent called several witness and particularly the ICT officer and his testimony is not challenged in any material way. At the disciplinary hearing the claimant was taken through the record of his work attendance as reproduced above.

Failure to attend work or deny the employer his labours by reporting late, leaving work early or not being at work at all without permission of the employer amounts to gross misconduct. save for the 20<sup>th</sup> April, 2018 where the claimant asserts that he attended the annual delegates meeting and left to attend to other matters, the daily work logs give a picture of his work attendance. To deny the employer an average of 15 minutes of absence, cumulatively this amounts to abandonment of work over time the claimant received a salary.

These records of poor work attendance by reporting late, living early or being absent were addressed with the claimant during the disciplinary hearing. He had nothing to show he had permission from his supervisor or any officer of the respondent allowing such conduct.

On the days the claimant alleges to have attended a conference and obtained a certificate of attendance, there is no corresponding letter permitting him to be away from his duty station. Such amounts to gross misconduct under the provisions of section 44(4) (a) of the Employment Act, 2007.

On 20<sup>th</sup> April, 2018 the claimant testified that he reported at Kericho Primary School for the Annual delegates meeting and spoke to several persons and later left to attend to a member in the office. In his evidence the claimant admitted to not signing the attendance register for the annual delegates meeting. He however received and was paid the allowance.

The explanations given by the claimant with regard to his alleged attendance at the annual delegates meeting were analysed by the select committee hearing his disciplinary case and found wanting. The paying accountant for the allowances testified in court to the fact that the claimant was paid his allowances but was not in attendance at the meeting. This evidence is supported by the claimant where he alleges that at some point he left the meeting to assist a member who required his loan details.

I take it the annual delegates meeting is a big deal to the respondent. employees re recalled from leave to attend to this meeting. Various section heads including the claimant were required to be in attendance. For the claimant to therefore allege he attended then fail to have his attendance recorded and even where he attended he took time to go back to the office to attend to other business other than the annual delegates meeting, such absence being without approval, this amounted to gross misconduct.

On the alleged increase of salary that was not approved, the claimant defended himself that he was not in charge of the payroll. He however failed to address the substantive issue as to how his salary was increased without the approval of the employer. On the other hand, the respondent as the employer is equally to blame as where an employee receives a wage/salary/payment wrongfully, under the provisions of section 19(c ) and (e ) of the Employment Act, 2007 that;

*(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;*

*(d) ...*

*(c) any amount paid to the employee in error as wages in excess of the amount of wages due to him;*

By operation of the law, the employer is allowed to effect a salary deduction for every day the employee is absent from work without permissions and for any salary/wage paid in excess of what is lawfully due.

Even where the CBA allowed an employee to be absent for 2 days, such absence if not with permission of the employer had to be regularised upon return as otherwise, every employee would take off and then explain the absence by pushing the CBA to the face of the employer. Such would lead to anarchy and avoid responsibility contrary to work ethics where absence from duty should be with permission. The subject CBA must be put in the right context of section 444(4) (a) of the Employment Act, 2007.

The claimant was also said to be insubordinate. The claimant asserted that he was not given particulars of these allegations.

In **Standard Group Limited versus Jenny Luesby [2018] eKLR** the Court of Appeal in analysing a case of insubordination held that;

*We have examined the proceedings and have noted that one of the editors, who was present at the meeting, gave lengthy evidence on how the respondent happened in the meeting uninvited and how, in the course of his PowerPoint presentation, the respondent made numerous interjections and interruptions of the proceedings, and eventually stormed out before the meeting ended. The Managing Editor, ... gave similar evidence, adding that the respondent 'was unsettled and kept on mattering and fiddling in her chair' and the meeting had to stop at each interruption. The last witness was the HR Director, ... , who was tasked by the CEO to investigate the incident and proceeded to interview some of those present at the meeting as well as the respondent. The cross examination of these witnesses did not break them down.*

From the disciplinary proceedings cited above, it is apparent to this court that the claimant was found disrespectful of the CEO, the member's present made efforts to calm him down to no avail. Such conduct and failure to abide lawful instructions of the employer stands out true. The claimant was insubordinate.

Though the term 'insubordination' or 'being insubordinate' is not defined in our law, several authorities and case law has done so in our jurisdiction and outside. In the **Labour Appeal Court of South Africa, TMT Services & Supplies (PTY) Ltd versus Samwu Obo Felicia Lungile, Case no: JA32/2017** it was held that;

*As to "insubordination" as a class of misconduct, it has been advanced ... that the enquiry into the gravity of the specific insubordination considers three aspects: the action of the employer prior to the deed, the reasonableness of the instruction, and the*

*presence of wilfulness by the employee ... the idea that an employee must be warned three times before disciplinary action can be taken. [where there is persistence of misconduct] means an absence of capitulation to the employer's instructions. ...*

*Therefore, defiance of authority can be proven by a single act of defiance. There is no necessity for high drama and physical posturing to be present. The employer prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled "insubordination" and addresses operational requirements of the organisation that ensure that managerial paralysis does not occur.*

Whatever grievances the claimant may have had following the KRA and external auditor findings against the respondent and its officers, members of the board of the CEO his conduct and gross misconduct cannot be used to justify the grievances. The court finds there were valid and genuine grounds existing and leading to termination of employment. The summary dismissal from employment is hereby found justified.

With regard to alleged insubordination the claimant sought for clarification as there were no details.

On the remedies sought, termination of employment was justified as analysed above pursuant of section 45 of the Employment Act, 2007. Hence an order of reinstatement cannot issue as the remedy available under section 49(4) of the Act must be on the basis that termination of employment is unfair which is not the case here.

On the alternative remedies sought for the payment of salaries for the remainder of the contract term, the employment contract provided for termination of employment for good cause or by issuance of notice or payment in lieu thereof. In this case, termination of employment is for good cause. The remedy of compensation, notice pay, gratuity or interests therefor is not due.

Under section 12(4) of the Employment and Labour Relations Court Act, 2011 the award of costs is discretionary. The court where satisfied that an instant case warrants the award of costs can make a direct award; refer for assessment or as the case may be. Costs do not follow the cause under the constitutive law for the court.

Each party shall be its own costs in this case.

**Accordingly, the suit is hereby found without merit and is hereby dismissed.**

**Each party shall bear own costs.**

**Delivered at Kericho this 2<sup>nd</sup> day of March, 2020.**

**M. MBAR?**

**JUDGE**

In the presence of: .....