



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 385 OF 2018**

**EDWARD OTSIEKA OPIAYO.....CLAIMANT**

**-VERSUS-**

**INSURANCE REGULATORY AUTHORITY.....RESPONDENT**

**JUDGMENT**

1. The Claimant's suit is contained in the Amended Memorandum of Claim filed on 26.9.2018 in which he alleged that he was employed by the respondent as the Chief Manager Finance from 1.8.2008 until 17.1.2018 when he was interdicted on half pay until 3.8.2018 when his employment was terminated by the respondent. He averred that the interdiction and the subsequent separation were unfair and unlawful because they were grounded on an invalid reason and without following fair procedure as set out under the respondent Human Resource Policies and Procedures Manual and the Employment Act. Therefore he prayed for the following reliefs:

- a. A declaration that the interdiction and termination of the Claimant was unfair and unlawful.**
- b. An order lifting the interdiction and termination to pave way for the reinstatement of the Claimant to his employment without loss of benefits.**
- c. An injunction to issue against the Respondent to restrain it from terminating and dismissing the Claimant from its employment or at all.**
- d. Payment to the Claimant of the sums set out in the Claim as accrued.**
- e. Special damages as set out in the claim and proved at the hearing.**
- f. Exemplary damages, costs and interest.**

2. The Respondent also amended her defence on 16.1.2019 in which she averred that she received a complaint on 11.1.2018 that the Claimant had made incendiary remarks towards a member of staff and the Respondent's Board during the Training Committee Meeting held on the same day; that as result, she served the claimant with a show cause letter and after his response, she interdicted on half salary and full benefits on 17.1.2018 to pave way for investigations; that thereafter he was summoned before an investigatory committee and made his representations after which the Board terminated his employment for gross misconduct. Finally, she averred that the dismissal was justified and the disciplinary process complied with the provisions of the Human Resources Management Policies and Procedures Manual ("the HR Manual") and the Employment Act.

3. The suit went to full hearing whereby both parties tendered evidence and thereafter filed written submissions.

**Claimant's case**

4. The Claimant, testified as Cw1 and told the court that he was employed by the Respondent from 1.8.2008 to 5.8.2018 as the Chief Manager, Finance earning a monthly salary of Kshs. 728,250; that on 11.1.2018, he attended a meeting of the respondent's Training Committee and towards the end of a meeting, his colleague introduced the issue of the training of Administration Police Officers which he and other members objected to because it was not an agenda for the said meeting, and it was against the regulations.

5. He further testified that during his objection, he stated that allowing the agenda was similar to behaving like "a rogue board"; that his colleague, Ms. Sawe, who introduced the new issue was annoyed by his statement and she wrote an email to the CEO stating that he had referred to her and the respondent's Board as "rogue". He further testified that the CEO served him with a Show Cause letter dated 12.1.2018 which he responded to denying the alleged offence but on 17.1.2018 he was interdicted pending disciplinary hearing under Clause 16.3 and 16.5 of the HR Policy and Procedures Manual.

6. He contended that he remained on the interdiction until 10.7.2018 when he was invited to attend a disciplinary investigation committee but he wrote a letter requesting for details of the investigation before attending the meeting. The details were never given to him and he attended the meeting where he was asked questions by the Chair of the committee on why he never allowed Ms. Sawe to introduce the new agenda, at the end of the meeting he was not asked to write a statement. He never saw any other witness who was called during the said committee meeting.

7. He further testified that he was again invited to a disciplinary hearing before the HR Committee of the respondent's Board on 31.7.2018 and he attended it despite his request for the Investigations Report having been denied. He contended that although he arrived at the meeting venue on time, he was kept waiting outside until 10.30 am when the CEO came out from the meeting and informed him that it was alright and that he could leave. On 3.8.2018, he was served with a termination letter citing the reason as uttering words which amounted to gross misconduct

8. He contended that his termination was unfair and malicious because he was not accorded any fair hearing. he therefore prayed for the reliefs set out in his amended claim including 46 accrued leave days and half salary for 6 months withheld during his interdiction.

9. On cross-examination, he stated that Ms. Sawe who made a complaint against him was the Corporation Secretary and Legal Affairs Manager with whom he ranked equally at IRA 2. He further stated that the meeting on 11.1.2018 was for head of departments and the agenda on police training was not being introduced by the Board but by Ms. Sawe. He reiterated that his interdiction was against the provisions of the HR Manual which provide that investigations should be conducted before interdiction. In addition, he contended that his HR manual was violated because his interdiction exceeded the maximum 6 months provided for and also because he was not accorded a fair disciplinary hearing as required under Clause 16 of the HR Manual.

10. Finally, he admitted that prior to filing this suit, he had filed a constitutional petition and withdrew it but he clarified that in Petition 3 of 2018, was against the Board while in this suit he is challenging his termination.

### **Respondent's case**

11. Ms. Naomi Wambui Njoroge, Respondent's Human Capital Development testified as Rw1 and she basically adopted her Witness Statement dated 5.2.2020 as her evidence-in-chief. She further produced the bundle of documents filed by the respondent on 16.1.2019 as exhibits. In brief, she stated that a complaint was made against the claimant on 11.1.2018 for making incendiary remarks towards a member of staff and the respondent's Board during a Training Committee meeting on the same day; that a Show cause letter dated 12.1.2018 was addressed to the claimant and he responded to the same on by email dated 15.1.2018 and letter dated 30.1.2018; that on 17.1.2018, he was interdicted on half salary and full benefits to pave the way for investigations; that on 10.7.2018 he appeared before the Disciplinary Investigations Team after which he was dismissed by the Respondent's Board but failed to appeal against the same.

12. Rw1 contended that the disciplinary process against the claimant was commenced and conducted in accordance with the respondent's HR Manual and the Employment Act. In her view the interdiction and the subsequent termination was justified and lawful because the claimant was notified about his offence and thereafter he was given an opportunity to defend himself which he did in writing on 30.1.2018 and verbally before a disciplinary Investigations committee on 10.7.2018.

13. On cross-examination, Rw1 confirmed that Ms. Sawe remained in the office and sent her to testify in this case on behalf of the Respondent. She further confirmed that in 2018 the Claimant was the Chief Manager Finance reporting to the CEO. She stated that she attended the Training Committee meeting on 11.1.2018 as the Human Resource representative since the Senior HR Officer was absent. She admitted that there was an agenda for the meeting but she did not produce the same as an exhibit herein. She contended that during the training committee meeting the Claimant objected to introduction of a new issue of training by Ms. Sawe and told Ms. Sawe that *'the problem of dealing with a rogue board is that one also becomes rogue'*. According to Rw1, the said remarks constituted an insult to both the Board and Ms. Sawe and she protested but the chair of the meeting, Ms. Agnes Ndirangu, gave guidance on new agenda and the meeting was brought to order.

14. She testified that the reason why the Claimant was issued with the show cause letter dated 12.1.2018, was because his utterances were disrespectful amounted to insubordination to the Board. However, she admitted that the Claimant's utterances were not made to the Board.

15. She further admitted that she did not attend the Board meeting held on 1.8.2018 which was to discuss the Claimant. She contended that the Claimant did not attend the meeting despite being invited and a resolution was made against him which led him being served with a termination letter on 3.8.2018.

16. She admitted that the Claimant was issued with the termination letter 7½ months after being placed on interdiction and contended that the HR Manual does not limit length of an interdiction period.

17. She maintained that the Claimant was heard by a disciplinary investigation committee but she admitted that she did not have the minutes of the said disciplinary committee meeting but just a summary of the minutes which does not indicate whether the claimant attended the hearing. Finally, she confirmed that the Claimant had no previous record of misconduct.

### **Claimant's submissions**

18. The Claimant submitted that the respondent has failed to prove that the reason for the termination was valid as required by section 45(2) of the Employment Act. He denied ever uttering the alleged offence words and reiterated that the exact words he uttered did not amount to insult, insubordination or bullying. He maintained that he took time to explain to Ms Sawe what he meant and even apologised to her if she felt offended.

19. He submitted that section 44 (4) (d) of the Employment Act defines insubordination as when an employee uses abusive or insulting language or behaves in a manner insulting to his employer or to a person placed in authority over him. He contended that Ms. Sawe was not his senior and as such his objection to her new agenda at the committee meeting did not amount to insubordination. He contended that a reasonable employer could not have dismissed his employee for alleged misconduct and relied on the case of **Evans Kamadi Misango v Barclays Bank of Kenya Ltd [2015] eKLR** where the Court held that the burden placed on an employer by section 43 is to demonstrate that there was a valid reason which can cause a reasonable employer to terminate employment.

20. As regards the procedure followed, the claimant submitted that hearing before termination is an important procedural requirement which has been made mandatory by the law even in the worst-case scenario. He submitted that the right to a hearing is what amounts to meeting the tenets of natural justice. He submitted that the Respondent has not demonstrated that there were exceptional circumstances that were so severe that he could not be accorded the basic minimum under section 41 of the Employment Act. According to him, the fact that he was not allowed attend the disciplinary hearing is a clear indication that the Respondent had decided to terminate him.

21. He urged the Court to find that his termination was unfair and unlawful and reinstate him to his job and award him damages as prayed in his amended claim. He relied on the case of **Josephine Ngatia v The Executive Director of the Non-Governmental Co-ordination Board & another** where the Court awarded the Claimant 12 months compensation due to her years of service.

22. He also relied on the case of **Henry Musemate v The Public Service Commission and another** where the Court awarded the Claimant KShs. 1.5 million as general damages for premature termination and 1 million as exemplary damages.

### **Respondent's submissions**

23. The Respondent submitted that the disciplinary process against the Claimant was lawfully commenced pursuant to Chapter 16 of the HR Manual and he was informed of his charges via the Show cause letter dated 12.1.2018 and he was afforded an opportunity to respond in writing and thereafter he was invited before an investigations committee where he appeared and presented his case. She submitted that pursuant to paragraphs 16.9 and 16.10 of the HR Manual, the Claimant was afforded the opportunity to appeal against the termination but he elected not to do so. Consequently, she contended that she complied with the provisions and spirit of section 41 of the Employment Act.

24. She argued that contrary to the Claimant's assertion, the Employment Act and the HR Manual do not provide that an employee ought to be notified of his offence and heard before interdiction. She further argued that the HR Manual does not entitle an employee to appear before the Board for hearing as alleged by the Claimant.

25. She relied on the case of **David Githinji Kibuge v New Kenya Co-operative Creameries Ltd (KCC) [2019] eKLR** where the Court held that the legal burden of proving unfair termination remains with the employee who must demonstrate a prima facie case by evidence that the reason was not valid and fair, and fair procedure was not followed under sections 47 (5) of the Employment Act. She further relied on the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** where the Court also held that, according to section 47 (5) of the Employment Act the burden of proving that the dismissal was unfair rests on the employee while the burden of justifying the grounds of wrongful dismissal rests on the employer and that this is a shared burden which amounts to the same thing.

26. As regards the reason for the termination, the respondent submitted that the Claimant was informed that the utterances contravened section 44 (4) (d) of the Employment Act and section 15.22 of the HR Manual and that the summary of statements collected during the investigations point to the Claimant making the alleged utterances. She relied on the Court of Appeal decision in **Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 Others [2019] eKLR** that it does not expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as expected in a criminal trial. She maintained that the reasons for the Claimant's interdiction and subsequent termination are valid and justifiable.

27. With respect to the remedies sought, she submitted that section 49 of the Employment provides for the remedies that the Court can award. She relied on the case of **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** where the Court of Appeal held that the prescribed remedies are discretionary and not mandatory.

28. She urged the court to find that she has demonstrated that the claimant's interdiction and subsequent termination was justified and procedural, proceed to hold that the Claimant is not entitled to any relief sought.

### **Issues for determination and analysis**

29. Having carefully considered the pleadings, evidence and submissions by both parties, it is clear that the claimant was employed by the respondent as the Chief Manager Finance from 1.8.2008 until 17.1.2018 when he was interdicted and thereafter dismissed from service on 3.8.2018. The main issues for determination are: -

- a. Whether the interdiction of the claimant was contrary to the respondent's HR Manual and therefore unlawful.**
- b. Whether the Claimant's termination was unfair and unlawful.**
- c. Whether the Claimant is entitled to the reliefs sought in this suit.**

### **Whether the interdiction was contrary to the HR Manual.**

30. The Claimant's interdiction and termination was as a result of his utterance made at the Training Committee meeting held on 11.1.2018 where he allegedly told Ms. Diana Sawe, the Respondent's Corporation Secretary & Chief Manager, Legal Affairs that: -

***“The problem of dealing with a rogue board is that you also turn out rogue”.***

31. The claimant was served with the Show Cause letter dated 12.1.2018, by the Respondent where it was explained that the said comment insinuated that the Board and the staff member was rogue. The Claimant acknowledged receipt of the show cause letter by the email dated 15.1.2018 and requested for time to make his detailed response. However, he was interdicted on 17.1.2018 on half basic salary with full house allowance and medical benefits to pave the way for investigations.

32. Clause 16.5 of the HR Manual provides –

***“16.5.1 Power to exercise interdiction should be exercised by the Chief Executive Officer or the board as the case may be. An employee may be interdicted to allow investigations to be conducted in the case where proceedings may lead to his dismissal.***

***16.5.2 An employee who is interdicted shall be eligible for half (1/2) of his/her basic salary with full house allowance and medical benefits.***

***16.5.3 An employee on interdiction should report to his supervisor at agreed intervals.***

***16.5.4...”***

33. The above clause does not require that the employer should conduct investigations and hear the employee facing disciplinary process before interdicting him/her. It is a power that is exercisable at the discretion of the CEO or the Board to pave the way for investigations into the matter that may lead to the termination of the employment of the concerned employee. There is no ceiling on the length of the interdiction period provided save that under Clause 16.2.5 of the HR Manual, the general principle is that the proceedings ought to be prompt and finalized within 6 months, though the period is extendable by the Board for a good cause.

34. Applying the said Clause 16.5 above, to the facts of this case, I agree with the respondent that the interdiction of the claimant was commenced in accordance with the HR Manual. The letter dated 17.1.2018 was by the CEO and it interdicted the claimant on half basic salary with full house allowance and medical benefits. He was also to report to his supervisor once per week. Finally, the interdiction was to allow investigations into an allegation which led to his dismissal. In addition, although the extension of the interdiction beyond 6 months from 12.1.2018 when the disciplinary process started would have rendered the interdiction unlawful for violating clause 16.5 as read together with Clause 16.2.5 of the HR Manual, the anomaly is excusable considering the Board's explanation of the cause of delay in concluding the matter within 6 months. According to the Board's minute for the meeting held on 1.8.2018, the term of the board's term expired in January 2018 and considering the rank of the claimant, it was necessary to wait for another board to be constituted which was not done until June 2018.

**Whether the termination was unfair and unlawful.**

35. 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.***

**Was the reason for the termination herein valid and fair?**

36. The reason for the termination herein is that during the meeting of the Training Committee held on 11.1.2018, the claimant made utterances that insinuate that the respondent's Board and a staff member, Ms Sawe were rogue. According to Rw1, the utterances made were that: -

***“...the problem of dealing with a rogue board is that you also turn out rogue”.***

37. The claimant denied making the said utterances and contended that the words he uttered were that: -

***“allowing the agenda was similar to behaving like “a rogue board”.***

38. I have carefully considered the evidence on record and especially the statements recorded by the Disciplinary Investigations Team from

the members of the Trainee Committee on 10.7.2018 which were not objected to by the claimant. It is clear that only Rw1 and the complainant, Ms Sawe, heard the same words while the chairperson, Ms Agnes Ndirangu heard that: -

***“You are being rogue like the Board you deal with.”***

39. Ms. Noella Matunda only picked the word **“rogue”** because she was sitting far but the rest did not hear those utterances for one reason or another. However, they were unanimous that Ms Sawe was angered by the utterances made by the claimant and she protested. They also agreed that the Chairperson was of the view that the utterances by the claimant were not conducive, but he declined to withdraw or apologize to Ms. Sawe. None of the committee members stated that they heard what the claimant alleges to have been his utterances. It follows therefore that the claimant uttered word the word rogue in reference to the respondent’s Board and its Secretary Ms. Sawe while objecting to the introduction of a new agenda during the Training Committee meeting on 11.1.2018.

40. The said comment was construed by the chairperson of the committee to be unconducive while Ms. Sawe and the Board felt that the comment was an insult and/or insubordination. Section 43(1) of the Employment Act requires that in every claim arising out of termination of contract of service, the employer shall prove the reason(s) for the termination while subsection (2) provides that: -

***“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.”***

41. In the termination letter dated 3.8.2018, the Respondent stated that the board’s finding was that the Claimant’s utterances amounted to insult and insubordination and fell within the acts of gross misconduct under section 44 (4) (d) of the Employment Act. They considered the claimants conduct of suing the board for removal from office for being unfit to serve as a corroborating evidence of his disrespect and insult to it. After careful consideration of the evidence and submissions I find that the respondent has proved that the claimant uttered abusive and insulting words to the respondent’s board and Ms. Sawe on the material date. The respondent has proved that after considering the evidence collected by the Investigations Team it genuinely believed that the claimant uttered the abusive/insulting words against her and a senior member of staff. It is not open for the court to substitute the judgment of the employer on whether what the employee did deserved dismissal or not unless it is manifestly clear that no reasonable employer could dismiss his employer in similar circumstances. In this case I am satisfied that a reasonable employer could have dismissed his employee for uttering the said insulting words in similar circumstances. The offending words herein were directed at the respondent’s Board and the Corporation Secretary who ordinarily doubles as the Board’s Secretary. The claimant admitted vide his letter dated 30.1.2018 and also in his testimony herein that the words he uttered offended Ms. Sawe and he apologized to her after the meeting.

42. Section 44 (4) (d) of the Employment Act provides:

***“(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—***

...

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

43. With respect to insubordination, I do not find that the Board was unsubordinated in any way. In **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** Rika J held:

***“Insubordination was defined by the Mississippi Supreme Court in the case of Sims v. the Board of Trustees Holly Springs Municipal Separate District School, 414 SO. 2d 431 [Miss. 1982], as ‘ a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.’”*** *Insubordination may also occur where the Employee engages his Manager or Supervisor in an un-appropriate verbal confrontation.*

***Under the Employment Act 2007, both forms of insubordination are captured under Section 44 [4] [d] and [e]...”***

44. Applying the foregoing authority to the facts of this case this case, I find that the respondent has not proved that the words uttered by the claimant amounted to insubordination of the respondent’s Board since the claimant did not disobey any lawful command from the board.

**Was the procedure followed fair.**

45. Section 41 provides:

***“(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.”***

46. In this case both the Claimant and the Respondent agree that the Claimant appeared before a disciplinary investigation team on 10.7.2018. The Claimant was thereafter invited for Disciplinary hearing by the HR Committee of the respondent’s Board on 31.7.2018, but he was locked out of the meeting until 10.30 am when the CEO emerged from the meeting and told him that it was okay for him to leave.

47. The foregoing evidence was corroborated by paragraph 9C of the Amended Statement of Response, in which the Respondent averred that:

***“In further response [sic] paragraph 11A of the Amended claim, the Respondent avers that there was no need for the Claimant’s presence during the HR Committee meeting having made his presentation before the disciplinary Investigations team On 10<sup>th</sup> July 2018.”***

48. Clause 16.4 of the HR Manual provides:

***“16.4.1 While carrying out investigations, the Chairman of the Board or the Chief Executive as the case may be shall observe the following conditions:***

***Constitute a team of not less than three (3) persons to investigate the matter (where the team is more than three members, the team shall consist of an odd number)***

***The persons conducting the investigation shall be senior to the accused employee and should not have dealt with the case before.***

***(ii)...***

***16.4.2 The report of the investigation shall be submitted to the Human Resource Committee of the Board and shall contain;***

***(i) evidence collected by the team, including any statements by witnesses;***

***(ii) analysis of the evidence and statements;***

***(iii) a statement on whether the charges against the employee have been proved; and***

***(iv) details on any matter that may affect the gravity of the case, if any.***

***16.4.3. The report shall not contain any recommendation on the form of punishment to be inflicted to the accused employee.***

***16.4.4...”***

49. I have considered the foregoing Clause and the mandate of the disciplinary investigations committee above, and compared it with the mandatory provisions of section 41 of the Employment Act and formed the opinion that disciplinary investigations under said clause is not equal to a disciplinary hearing under section 41 of the Act. Under Act, the employee is entitled to attend the hearing in the company of a fellow employee of his choice and both of them are entitled air their representation which must be considered before the termination is decided. Under Clause 16 of the HR Manual, the investigations team collects information and forwards its report to the HR Committee of the Board without any recommendation on the punishment.

50. In my view, it is not correct for the respondent to allege that the claimant was not entitled to be heard by the HR Committee of the Board after he was interrogated by the Investigations Team. It is common sense, in my view, that once an investigator presents his investigations report to the appointing authority, the accused employee has an infallible right of being heard by the appointing authority before any punishment can be inflicted on him/her. It also common sense that, a person ought not to be condemned on the basis of information collected by an investigator without affording him/her an opportunity to see and interrogate the investigations report. In this case the claimant was not shown the investigation report and he was not afforded any opportunity to interrogate the same before the HR committee or the board. Instead, he was locked out of the committees meeting on 31.7.2018 despite having been invited for disciplinary hearing.

51. In **Standard Group Limited v Jenny Luesby [2018]** eKLR the Court of Appeal held:

***“With respect, we think the trial court was on firm ground in such finding. As stated above, the procedure under section 41 of the Act is mandatory. Apart from a mere assertion that there was an attempt made on 14th November, 2013 in a meeting with the HR Director and respondent in the CEO’s office, where the incident was discussed and the respondent is said to have apologized, there was nothing on record to show that the requirements of section 41 were complied with...”***

***It follows that the act of summarily dismissing the respondent without giving her an opportunity to be heard amounted to unfair termination as defined in section 45 of the Act. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure.' See Kenfreight (E. A) Limited vs Benson K. Nguti, [2016] eKLR.”***

52. In my considered view, the respondent was keen on dismissing the claimant hurriedly, without hearing him because he had filed suits in court against her and other persons. The foregoing view is fortified by the following excerpt from the said Committee's Minute 335: -

***“16. The Human Resource Committee held its meeting held on 13<sup>th</sup> July 2018 and received the report of the disciplinary investigation team and resolved that the Authority seeks a legal opinion from the legal counsel appointed by the Authority to deal with the case;***

***The Human Resource Committee held a further meeting on 31<sup>st</sup> July 2018 and analysed the legal opinion provided and made the following observations:***

***i. That the Authority had followed a fair disciplinary procedure provided for by Chapter 16 of the Authority's Human Resource Policies and Procedures Manual and Section 41 of the Employment Act.***

***ii...***

***iv. That based on the evidence presented to the Board Investigations Committee and the submissions he made before the Court in his Affidavit, there could be no doubt that Mr. Opiayo made statements that amounted to insubordination as provided for in the Employment Act Section 44 (4) (d).”***

53. Having found that the claimant was not accorded a hearing by the HR Committee of the Board and the full Board before being dismissed as required under section 41 of the Employment Act, it is my opinion that the respondent has failed to prove on a balance of probability that she followed a fair procedure before dismissing the claimant from service and that rendered the dismissal unfair within the meaning of section 45 of the Act.

#### **Whether the Claimant is entitled to the reliefs sought**

54. Based on my above finding, I make declaration that the termination of the claimant's employment was unfair and unlawful as prayed.

55. However, I decline to reinstate the claimant to his employment because he has not demonstrated any special circumstances to warrant an order for specific performance of the claimant's contract of service nor has demonstrated the practicability of the reinstatement in the face of the acrimonious separation as required under section 49(4) of the Employment Act.

56. However, I award him damages under section 49(1) of the Act as compensation for the unfair termination of his employment. Under Clause 10.3 read with clause 10.2.1 of the HR Manual, I award the claimant 3 months' salary in lieu of notice using the undisputed monthly salary of kshs. 728,250 equalling kshs. 2,184,750. In addition, I award him 10 months' salary equalling kshs. 7,282,500 as compensation for the unfair termination considering his 10 years' service but also the fact that he contributed to the termination through misconduct.

57. The claim for 46 leave days was not disproved by the respondent using leave records. However, I allow 45 days because under Clause 11.2.5 of the HR Manual allows only 15 days leave to be carried forward in a year. and as such award n kshs  $728,250 \times 45/26 =$  kshs. 1,260,432.69

58. Having found that the termination of the claimant's employment was unfair, and there being no dispute that the claimant's half of his basic salary was withheld during the 7 months' suspension, I allow the claim for the sum withheld as prayed being kshs. 1,645,162.

#### **Conclusion and disposition**

59. I have found that the termination of the claimant's employment contract was unfair within the meaning of section 45 of the Employment Act because it was done without following a fair procedure. I have also found that the claimant is entitled to compensation by way of damages. Consequently, I entered judgment for the him in the following terms: -

Notice	kshs. 2,184,750
Compensation	kshs. 7,282,500
Leave	kshs. 1,260,432.69
Withheld half salary	<u>kshs. 1,645,162</u>
<b>Total</b>	<b><u>kshs. 12,372,844.69</u></b>

The above award is subject to statutory deduction but the Claimant will also have costs and interest at court rates from today.

**Dated and delivered at Nairobi this 1<sup>st</sup> Day of October, 2020.**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(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**