



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 38 OF 2013**

(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> October, 2018)

**ANTHONY THUO KANAI ..... CLAIMANT**

**VERSUS**

**CANNON ASSURANCE LIMITED ..... RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. The Claimant herein filed his Memorandum of Claim on the 14<sup>th</sup> February 2013, through the firm of A. Thuo Kanai Advocates alleging unfair dismissal and wrongful termination of his employment by the Respondent and seeking the following orders;-

- i) A declaration that the termination of his employment was wrongful, unlawful, and unfair for being substantially without justification and being procedurally unfair.*
- ii) A declaration that the termination of the Claimant's employment and unlawful conduct of the Respondent through its management infringed his constitutional rights to fair labour practices under Article 41 of the Constitution of Kenya and right to reasonable working conditions.*
- iii) A declaration that the Respondent infringed the Claimant's constitutional right to information relating to his terminal/final dues contrary to Article 35(1)(b) of the Constitution of Kenya by failing to provide the said information in response to the Claimant's request.*
- iv) A declaration that the Respondent infringed the Claimant's fundamental right not to have the privacy of his communication infringed under Article 31 of the Constitution of Kenya in the manner by which the Respondent's management accessed his email account and correspondence after blocking his access.*
- v) A declaration that the Respondent infringed the Claimant's constitutional right to inherent dignity contrary to article 28 of the constitution of Kenya in the manner of terminating the Claimant's employment and communicating the said termination whereby the Respondent sought to humiliate, embarrass and ridicule the Claimant and bring odium to him from other members of staff.*
- vi) A declaration that the Respondent's refusal to approve the Claimant's rightful contractual and statutory leave entitlement without any lawful justification was an infringement of the Claimant's right against being required to perform forced labour contrary to Article 30 of the Constitution of Kenya.*
- vii) A declaration that the Claimant was entitled to assert his statutory right to go on leave pursuant to Section 46(b) of Employment being entitled to the outstanding leave days and having applied for leave.*
- viii) A declaration that the Respondent's conduct towards the Claimant and the purported termination of the Claimant from employment failed to adhere to the threshold to the threshold of fairness as provided for under Section 45 of the employment act and was therefore wrongful, unlawful and unfair.*
- ix) The Claimant be reinstated back to employment with the Respondent forthwith and without loss of benefits and continuity of service.*

x) *The Respondent do pay the Claimant his full salary and benefits during the period of dismissal.*

xi) *In the alternative to (ix) only and without prejudice to the above and below the Claimant be paid in full all his terminal dues and benefits made up as follows:-*

a) *Three months salary in lieu of notice being Kshs. 1,146,421/=.*

b) *The Respondent is ordered to compensate the Claimant for unfair, unlawful and wrongful dismissal at the equivalent of twelve (12) months salary )12 x Kshs. 382,207.00= Kshs. 4,586,484.00).*

c) *Employer's contribution to pension at 7.5% of the Claimant's salary for three months notice period (28,655.525 x 3 =85,996.575) and for the additional 12 months period (28,655.525 x 12= 343,986.3).*

d) *Life insurance for 15 months with benefits payable to the Claimant's next of kin/dependants equivalent to three times annual basic salary at the date of termination.*

e) *Personal Accident Insurance cover for 15 months with benefits of five times the Claimant's annual salary at the date of termination in the event of actual death or permanent disability based on the continental scale benefits and temporary total disablement benefits for maximum of 104 weeks payable to the Claimant and/or next of kin and/or dependants.*

f) *Medical Cover for 15 months with equivalent benefits the Claimant enjoyed at the date of termination.*

xii) *A Declaration that the Claimant is entitled to the payment of damages and compensation for the infringement and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.*

xiii) *General Damages and Aggravated damages on an aggravated scale under Articles 28, 30,31, 35(1) (b) and Article 41 of the Constitution of Kenya for the oppressive, arbitrary and unconstitutional conduct of the Respondent against the Claimant through its management which caused him shock, humiliation, inconvenience, loss of reputation, distress and embarrassment.*

xiv) *Loss of prospective future earnings due to unlawful and unconstitutional termination of the Claimant's employment in contravention with Article 41 of the Constitution of Kenya and article 23 of the Universal Declaration of Human Rights being an infringement of the Claimant's right to protection against unemployment, the right to work and a legitimate expectation to work until retirement without unlawful termination equivalent to current salary for 19 years from the Claimant's current age of 41 years to the age of retirement at 60 years , which is Kshs. 382,207.00 x 12 x 19= Kshs. 87,143,196/=.*

xv) *An Order directing that the Respondent's executive management do issue a written apology to the Claimant copied to all the Respondent's member of staff for the unfair, wrongful and unlawful manner of terminating his employment and maliciously communicating the same to the said members of staff.*

xvi) *An Order directing that the Respondent issues the Claimant with the Certificate of Service.*

xvii) *The Honourable Court do issue such orders as it deems fit and just to grant.*

xviii) *That costs of these proceedings be borne by the Respondent.*

xix) *Interest on the above at Court rates*

2. The brief facts of the claim is that the Claimant was employed by the Respondent on the 1<sup>st</sup> January 2007 initially as the Legal Officer as contained in the letter of appointment dated 1<sup>st</sup> November 2006 and he was subsequently promoted to the position of Manager-Legal Affairs vide a letter dated the 26<sup>th</sup> April 2010.

3. The Claimant avers that in addition to working for the Respondent as head of its legal department, he was authorized by the Respondent to use his law firm to provide legal services in litigation and conveyance matters as an Advocate of the High Court of Kenya as admitted in the Respondent's Defence.

4. It is the Claimant's case that he served the Respondent diligently and competently served over years with a clean record without any single warning letter being issued to him nor being the subject of any disciplinary proceedings and in fact received a long service award on the 22<sup>nd</sup> December 2011.

5. He stated that he also received annual salary increments throughout his employment with the Respondent, so that as at 13<sup>th</sup> November 2012 when his employment was summarily dismissed he was earning a basic monthly pay of Kshs. 318,926/=, house allowance of Kshs. 56,281/= and conveyance of Kshs. 7,000/= to make up total earnings of Kshs. 382,207/= from the starting salary of Kshs. 180,000/= within 5 years.

6. The Claimant avers that, vide the Respondent's letter dated 13<sup>th</sup> November 2012, the Respondent summarily dismissed the Claimant on the allegations of abscondment/unauthorized absence from duty and insubordination.

7. The Claimant avers that he contested the grounds and procedure of his summary dismissal vide his letter dated 4<sup>th</sup> December 2013 to the Respondent and upon the Respondent failing to reverse its unlawful action, he filed the Statement of Claim herein for the unfair and unlawful termination of his employment by the Respondent for the reasons that the purported grounds of dismissing him contained in the Respondent's letter dated 13<sup>th</sup> November 2012 and repeated in the letter dated 13<sup>th</sup> December 2012 are baseless and untenable in law and fact for the reasons that he had been granted a sick-leave from the 12<sup>th</sup> November 2012 to 15<sup>th</sup> November 2012 by a doctor as evidenced by Sick-Leave letter appearing as **Appendix 18 at page 62 of the Statement of Claim** thus rendering the summary dismissal unlawful, unfair and wrongful.

8. The Claimant avers that he send an e-mail dated 13<sup>th</sup> November 2012 to the Respondent's Director by the name of Vishy Talwar informing him that he had been given a sick-off by the doctor and that he was reachable on phone as appearing as **Appendix 33 at page 182 of the Statement of Claim**, which evidence was not controverted by the Respondent.

9. The Claimant contends that the Respondent's Director (Vishy Talwar) responded to the said Claimant's e-mail by requesting the Claimant to "take care and pace yourself" whilst inviting the Claimant for a cup of coffee whilst the Claimant was on leave signifying that the Respondent was aware of the reason of the Claimant's absence from work and in fact encouraged it as evidenced by the e-mail dated 14<sup>th</sup> November 2012 appearing as **Appendix 33 at page 182 of the Statement of Claim**.

10. The Claimant avers that the Respondent is a limited liability Company registered under the Companies Act, Cap 486 of the Law of Kenya and governed by **Part I of Table A as read with Part II of Table A**, that contains the legal provisions for the Regulation for the Management of a Private Company Limited by Shares which **under Regulation 80** provide that "**The business of the company shall be managed by the directors....**" and it is therefore trite law that the management of a company vests in the board of directors. (**He attached a copy of Regulation 80 of the Companies Act**).

11. The Claimant therefore contends that his notification of his sick-off to a director of the Respondent, who was a member of the board of directors, was therefore effective, proper and in accordance with the law as he communicated his absence from work due to illness to a person whom the law vests with management of the company and who was the Claimant's supervisor in relation to his work touching on the investment of property as Vishy Talwar was head of investments for the Respondent and the e-mail dated 13<sup>th</sup> November 2013 clearly shows the Claimant seeking instructions from the said director on work related matters.

12. The Claimant avers that contrary to the Respondent's witness, the Respondent's Managing Director was not his supervisor as clause 2 of his letter of appointment dated 1<sup>st</sup> November 2006 (**appearing as Appendix 1 at page 21**) indicated that the Claimant would report and be directly responsible to the Assistant General Manager-General Business and not the Managing Director.

13. The Claimant also contends that **Section 10 (5) of the Employment Act**, requires that any change in the contract of employment is to be made in consultation with the employee and the changes notified to the employee in writing and the Respondent failed to produce any written evidence of changing clause 2 of the Claimant's letter of appointment, with regard to his supervisor as required under **Section 10 (7) & 13 of the Employment Act**.

14. He contends that as at the 2nd of Oct 2012, he was entitled to 33 days leave and duly put in his leave application to commence on the 9<sup>th</sup> November 2012 and to expire on the 24<sup>th</sup> December 2012. This leave application was forwarded to the Respondent's Managing Director's office on the same day for approval, which is within the two weeks approval period as provided for in the Respondents HR Manual Clause 11.1.6. He however admitted in cross-examination that there was no response about this leave Application. He also admitted that there had to be approval before proceeding on leave.

15. The Claimant also submitted his oral evidence in Court and reiterated the facts made in his pleadings. He stated that an audit was done by Deloitte and Touche as per page 38 of his documents. That some shortcomings were noted including failure by some staff to take their annual leave. He had 33 pending leave days and was flagged out as one who had many pending days. He contends that he could not take his leave and was not allowed to due to lack of capacity in the legal department.

16. The Respondent filed their Statement of Defence dated 28<sup>th</sup> January, 2013 and filed on 29<sup>th</sup> January, 2013, through the firm of Njoroge Regeru and Co. Advocates where they deny the allegations of the Claimant's Statement of Claim *in toto* and further stated that the termination of the Claimant from employment was as a result of absenteeism and insubordination.

17. The Respondent called two witnesses, the Respondent Board Chairman and another who testified to the facts stated in their Statement of Response. The Chairman testified that he chairs the Board of the Respondent and has no role in the day to day management of the Respondent. He stated that he learnt of the Claimants dismissal after the fact made by the management.

18. The RW.2 was the Respondent's Human Resource Manager who gave evidence to the effect that the Claimant was terminated for absenteeism and insubordination. She however stated that the Managing Director had authority to sack the Claimant but she also stated that the Managing Director was dismissed for sacking the Claimant. She also stated that the Claimant's supervisor was the Managing Director. The Respondents denied any wrong doing in their dealings with the Claimant and prayed that the Claimant's suit be dismissed accordingly.

19. I have examined all the evidence and submissions of all the Parties. The issues for determination are as follows:-

**1. Whether there were valid reasons to dismiss the Claimant's services.**

**2. Whether the Claimant was dismissed by an authorised person.**

3. Whether due process was followed before the Claimant's dismissal.

4. Whether the Claimant is entitled to remedies sought.

20. On the first issue, the Claimant was dismissed from the Respondent's employment vide a letter dated 13<sup>th</sup> November, 2012 for reasons of unauthorised absence from duty and insubordination. **The letter is marked as Appendix 20 at page 64 of the Statement of Claim.** The particulars are that the Claimant:-

a) absented himself from office from 9<sup>th</sup> November, 2012 without authorization despite communication exchanged on 8<sup>th</sup> November, 2012 indicating that his application for leave had not been approved as it had been agreed that the time of taking leave needed to be approved on the basis of exigencies of work and upon proper handing over of work assignments. The reason given for handover was that the Claimant was taking a long leave of 33 days;

b) had failed to follow clear lawful instructions not to proceed on leave until discussion on the matters handled by his department had been finalized and proper handing over had been completed.

c) had not communicated for three(3) days of his absence from work and his absence had left the company in a precarious position given the very delicate function he held of handling the legal matters for the Respondent.

d) the Claimant's inclination to work in isolation without accountability to, and with outright contempt and disrespect for his superior was unacceptable. As such, the Claimant's disposition was contrary to the standard of behaviour expected of him as a manager.

e) the act of insubordination was not the first in kind committed by the Claimant as he had in disrespect, walked out of a meeting on 28<sup>th</sup> September, 2012 despite requests that he remains in the meeting to resolve a conflict with another manager. The conduct of the Claimant was grossly inappropriate and could not be tolerated.

1.1. At page 2 of the said letter of 13<sup>th</sup> November, 2012, the Claimant was requested to handover to the Managing Director, the departmental manuals, company files and other company documents in his possession, keys to the related lockers in his office, along with written detailed handover report on the work status handled in the department he was heading. To hand over all ICT equipment including laptop and related accessories to the senior ICT Officer. All office equipment allocated to him to the Administration Manager, the medical card and staff ID to the Human Resource Manager. The Claimant was also requested to collect a Clearance Form from the Human Resource for the purpose of clearance process.

1.2. The termination letter was signed by the same officials of the Respondent who had signed his letter of appointment, that is Mr. Mukoma and Mr. Ng'ang'a. The said officials held the positions held at the time of signing the letter of appointment.

1.3. The Claimant responded to the letter of termination by his letter dated 4<sup>th</sup> December, 2012. The Claimant's letter is marked appendix 21 at page 66 to 69 of the Claimant's documents attached to the Statement of Claim. In his response, the Claimant raised the following issues:-

a) He became aware of his termination when he received the letter terminating his employment on 27<sup>th</sup> November, 2012.

b) He had applied for leave on 2<sup>nd</sup> October, 2012 prior to the commencement date of the leave on 9<sup>th</sup> November, 2012.

c) He had met with the Respondent's Managing Director immediately after submitting his application for leave for discussion on reports to be submitted and how the department would be run in his absence. See paragraph 10 of the Statement of Claim.

d) The Claimant concluded by asking the Respondent to withdraw the letter of termination within 3 days failure to which he would take legal redress.

e) The Claimant also offered to handover his assignments on 15<sup>th</sup> December, 2012. The said date was a Saturday and not suitable for handing over.

f) At page 67 of Claimant's documents and in regard to allegations raised by the Respondent, the Claimant indicated that the reports submitted and discussed on monthly basis were sufficient for the Managing Director to oversee the running of the department.

21. In reply to the Claimant's letter of 4<sup>th</sup> December, 2012, at page 184 of the Claimant's documents, the Respondent raised the following issues:-

a) The Claimant's application for leave had been submitted but was pending approval as at 8<sup>th</sup> November, 2012. The Respondent states that there was specific instruction to handover before proceeding for leave but which instructions the Claimant choose to ignore. From the said letter, the Claimant had been requested to handover to his superior but he chose to delegate to the Legal Officer. The Respondent submitted that the said delegation was a demonstration of the Claimant's disregard to the instructions given by his supervisor.

*b) The Claimant asserted that he did not abscond his duties as he was on sick off as evidenced by the note issued by Nairobi hospital on 9<sup>th</sup> November, 2012 (page 62 of the Claimant's documents). However, communication to the Respondent regarding the said sick off was made on 4<sup>th</sup> December, 2012.*

*c) The Respondent denied refusing to approve the Claimant's application for leave and was not unfair to him. Rather, they submitted that the leave application was under active consideration and certain terms for approval had been communicated to enable the Respondent's Managing Director manage the company's business flawlessly in the absence of the Claimant. However, the Claimant made a unilateral decision delegate to a member of his department and to leave work without notice to the Respondent and regard to the interests of the Respondent's business.*

*d) The issue of walking out of a meeting held on 28<sup>th</sup> September, 2012 without excusing himself was admitted by the Claimant and the same was inappropriate and discourteous.*

*e) According to the Claimant, he did communicate with his employer regarding the sick off and as such, the employer was aware of his illness. The Claimant relies on the communication with Mr. Vishy Talwar, one of the Respondent's Directors at pages 182 to 183 of the Claimant's documents. The emails were exchanged on 13<sup>th</sup> November, 2012 and 14<sup>th</sup> November, 2012. By the email of 13<sup>th</sup> November, 2012, the Claimant informs Mr. Vishy Talwar that "I am currently out of office, as I was given sick off by a doctor on Friday for exhaustion. I have also a pending leave application that was due to commence on 9<sup>th</sup> November, 2012, as I have not gone leave for a long time."*

22. Section 43 of the Employment Act, 2007 requires an employer to prove the reasons for the termination. It is obvious from the evidence in Court during cross-examination that the Claimant was aware that his leave needed to be approved by his supervisor, before taking leave. He however chose to proceed on leave before its approval.

23. As at 13<sup>th</sup> November, 2012, the Claimant had not communicated to his supervisor regarding the doctor's recommendation to take sick off as required under the company policies, in particular clauses 13.1.6 and 13.1.7 of the Respondent's Human Resource Hand book, Appendix 8 of the Claimant's documents attached to his Statement of Claim at page 35. According to Respondent's HR Handbook, the Claimant was required to notify his supervisor as soon as possible when he became aware that he was unable to report to duty. If the immediate supervisor could not be contacted, notice ought to have been given to the next higher supervisor or designee or to the Human Resources department.

24. The Claimant alleges that Mr. Mukoma was not available on 9<sup>th</sup> November, 2012 but no evidence was tendered to demonstrate efforts made to contact him or inform Mr. Ng'ang'a or the Human Resource Manager of his inability to attend office on account of exhaustion diagnosed on 9<sup>th</sup> November, 2012. According to him, the email to Mr. Vishy Talwar is alleged to be notice to the Respondent. It is the Respondent's position that Mr. Vishy Talwar was at no given time involved in the day to day engagement of the Claimant as his supervisor so as to involve him in matters of taking leave or the daily business of the legal department.

25. According to the Respondent, Mr. Talwar as a director of the company was not involved in supervision of the Claimant and as such, the notice to him was not notice to the employer. Indeed, there was no explanation why the email to Mr. Vishy on the alleged sick off was not copied to Mr. Mukoma or Mr. Ng'ang'a. The said Mr. Mukoma and Mr. Ng'ang'a were the Claimant's direct supervisors as demonstrated in the letter of appointment and the performance reviews at pages 1 to 26 of the Respondent's documents. In the individual score cards, the Claimant identifies the Managing Director of the Company as his supervisor. Nowhere do we see Mr. Vishy Talwar engage with the Claimant as his supervisor on matters of day to day employer- employee relationship.

26. At pages 27 to 29 of the Respondent's documents filed on 29<sup>th</sup> April, 2015, there is communication between Mr. Mukoma, Mr. Ng'ang'a and the Claimant regarding the pending leave application approval. According to Mr. Mukoma, it was not possible to oversee the running of the department without handover by the Claimant. The Claimant disputed the necessity of handing over before taking leave and he offered to discuss the departmental matters over phone with the Managing Director. In response to the assertion that hand over was not required when taking leave, the Respondents submit that clause 11 of the Respondent's Human Resource Handbook at page 34 is clear that annual leave ought to be taken at a time agreed upon between the employee and the designated Manager. It follows that the Claimant was obligated to hand over in the manner requested by the Managing Director to enable supervision of the department in the absence of the Claimant.

27. Section 44(4) of the Employment Act 2007 states as follows:-

*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;*

*b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*

*c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

*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;

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;

f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

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

28. In the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR**, the Court considered insubordination and held as follows-

*“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]. The first form described in Sims is defined in Section 44[4] [e] to arise where ‘an Employee knowingly fails, or refuses to obey 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 the Employer.’ Verbal insubordination is described in our law under Section 44 [4] [d] to occur where ‘ 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.’”*

29. In **Linet Akasa Shikoli v Lilian Otundo [2014] eKLR**, the Court held that insubordination amounts to a valid and fair reason for termination of employment by stating as follows:

*“The Respondent had valid reason under Section 44 [4] of the Employment Act 2007. She engaged in insubordination. There was valid and fair reason to justify termination under Section 43 and 45 of the Employment Act 2007.”*

30. It is the Claimant's further allegation that his absenteeism from office between the dates of 9<sup>th</sup> November, 2012 and 12<sup>th</sup> November, 2012 were justified on account of his three-day sick-off as evidenced by a note from The Nairobi Hospital. However, the Claimant failed to notify the management of his illness and only availed the hospital note to the same effect on 4<sup>th</sup> December, 2012 after questioning from his supervisors. Additionally, the Claimant did not resume his office duties after expiry of the sick-off, that is, on 13<sup>th</sup> November, 2012.

31. The Respondent submitted and rightly so that the Claimant's failure to notify the Respondent of his illness and the consequent absence from office invalidates his defence with regard to his absence from office and is in breach of his contract of employment. The same was upheld by the Courts in **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR** where the Honourable Justice M. Mbaru held that:

*“ The aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorisation or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer. In the South Africa Labour Court in SACWU v Dyasi [2001] 7 BLLR 731 (LAC) the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee fails to render service. Failing to contact the respondent constitutes unexplained absence for the period the grievant was away and he cannot compute his sick off days and consolidate them and state he had 51 days that he was entitled to out of the total due of 120 days as these sick off days were to be authorised and or approved by an officer of the respondent. if the grievant needed to utilise his sick off days up to a maximum of 51 days, he had the choice of making an application in compliance with the respondent's operational requirements and failure to do so and continued absence establish the fact of desertion. Absence from work without a justifiable reason or permission and or authorisation and notice to the employer is a subject for summary dismissal under section 44 of the Act.”*

32. Absenteeism and insubordination are some grounds provided in the law that can lead to summary dismissal. In the case of the Claimant, it is my finding from the above analysis that indeed the Claimant proceeded on leave without approval and thus was guilty of absenteeism. He was also asked to hand over to his supervisor before proceeding on leave and he failed to do so which is insubordination. It is therefore my finding that the Respondent had valid reasons in dismissing the Claimants from its services.

33. On the second issue, as to whether the Respondent adhered to the due process of the law, there is no indication that the Claimant was accorded any hearing. The Respondent contended that since the Claimant absconded duty, they could not give him any hearing. This definitely is far from the truth because the Respondents did not demonstrate the efforts they made to trace him. He was still in communication with Respondents and they knew his contacts. They should have given him an opportunity to be heard before dismissing him.

34. In **Godfrey Anjere-Vs-Unique Suppliers Limited[2015]eKLR** the Learned Judge held at page 3 that:-

***“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.”***

35. The Respondent’s Chairman in his letter dated 20<sup>th</sup> August 2013 admits and confirms that one of the grounds for summarily dismissing the Respondent’s former Managing Director was that he unilaterally terminated the Claimant’s services without following due process and failed to provide the Board of Directors the reasons for terminating the Claimant.

36. The Respondent’s Human Resource Manager admitted during cross-examination that the Respondent failed to follow the due process under the Employment Act and the Respondent’s Human Resource Handbook prior to terminating the Claimant’s employment rendering the said termination procedurally unfair and wrongful.

37. In particular I find that the Respondent failed to accord the Claimant the right to a fair hearing as required under **Section 41 (1) & (2) of the Employment Act** prior to summarily dismissing him and there was not even a prior notification of the charges against the Claimant nor was he accorded the right to be accompanied by a fellow to respond to accusations against him.

38. In the case of **Kenya Union of Commercial Food and Allied Workers-Vs-Meru North Farmers Sacco Limited [2014]eKLR** the Learned Judge held at page 4 to 5 that:-

***“In the eventuality that an employee is to face summary dismissal or termination, section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend self.....Section 41 of the Employment Act is couched in mandatory terms .....Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing.....The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair.”***

39. From the foregoing, it is my finding that the dismissal of the Claimant was unfair and unjustified due to lack of following due process.

40. The Claimant submitted that his constitutional rights were infringed upon by the Respondents as the Respondents denied him his annual leave in violation of his right to leave under the Employment Act, Chapter 226 of the Laws of Kenya and Article 41 (2) (b) of the Constitution of Kenya, his right to rest and leisure under Article 24 of the Universal Declaration of Human Rights. On this issue, I agree that leave is an entitlement but the employer has a right to discuss with the employee the right time for taking leave because the employer has a duty under Section 28(5) of Employment Act 2007 to agree on the correct time of taking the leave. This Section provides as follows:-

***“Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days’.***

41. The allegation of infringement of rights would not in the circumstances arise where the Claimant applied for leave but the same had not been approved. This was a matter that had to be discussed and agreed upon by the Respondent and the Claimant. Indeed the Respondent submitted that issue was still under consideration pending certain decisions and handing over. The fact that the leave was under consideration was admitted by the Claimant in his email of 13<sup>th</sup> November, 2012 to Mr. Vishy.

42. On the last issue, considering that the Claimant was unfairly dismissed it is my finding that he is entitled for compensation. Given his own contribution in the matter by proceeding on leave that had not been approved, I find compensation of 8 months’ salary adequate to compensate him which is:-

1.  $8 \times 382,207 = 3,057,656$

2. I also award him 3 month’s salary in lieu of notice= $382,207 \times 3 = 1,146,621/=$

3. 33 leave days admitted by the Respondent= $33/30 \times 382,207 = 420,427.7$

**Total = 4,624,704.7**

4. **Payment of pension dues from pension fund.**

5. **Issuance of certificate of service**

6. **Respondent to pay costs of this suit.**

Dated and delivered in open Court this 15<sup>th</sup> day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

Miss Omondi holding brief for Miss Ngonde for the Respondent – Present

Claimant in Person – Absent