



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1659 OF 2014

WILSON REUBEN SIBIYA CLAIMANT

VERSUS

THE KENYA NATIONAL EXAMINATIONS COUNCILRESPONDENT

JUDGEMENT

1.The issues in dispute – the unlawful interdiction of the claimant; unfair treatment during and after interdiction; unlawful dismissal from employment; unlawful withholding of Kshs.163, 375; and failure of the Respondent to reinstate the Claimant to his employment.

2.The Claimant was employed by the Respondent as the Printing Machine Operator on 1st May 2006 and later promoted to the position of Packaging Machine Technician scale EC 6 at a salary of Kshs.63, 350.00 per month. On 17th February 2014 the Claimant received memo requiring him to respond to allegations that he had used the CPT computer and a flash disk for personal work. The Claimant responded and denied the allegations against him noting that he used the computer to communicate information required by human resource office with regard to change of his marital status and an update to the Nomination of beneficiary Form. On 10th April 2014 the Claimant received another memo inviting him to appear before management committee to clarify issues associated with his docket. On 20th May 2014 the Claimant got letter that he had been redeployed from his department of Reprographics and Manuscript located at South C to the Examination Administration Business and Technical department at Mitihani House.

3.The Claimant reported to his new station as directed but after 10 days he was interdicted on allegations that he had committed serious acts of gross misconduct in a letter dated 28th May 2014. While on interdiction a letter of show cause was issued and he filed his responses thereto.

4.The Claimant was invited to a disciplinary hearing on 20th June 2014 and 12th August 2014. Subsequently the interdiction was lifted and the Claimant was to be paid due salaries not paid during the interdiction. The interdiction was unlawful and malicious in that the same was arbitrary and without due cause; there was no justifiable cause or criminal offence that the Claimant had committed; due process was never followed; due salaries were not paid; despite lifting the interdiction the Claimant was recalled to appear before the disciplinary committee on 29th August 2014 but despite attendance he was kept outside without being invited to the meeting; and on the same date the Claimant was issued with letter of dismissal which was wrongful and unfair.

5.The summary dismissal was wrongful un that there was no proof of any misconduct; the Claimant was never given a hearing; there was no specific information provided to warrant the summary dismissal; there was no notice before summary dismissal; there were no reasons given or terminal dues paid; and as a result the Claimant suffered injury to hi person and reputation and was deprived of a means of

livelihood in terms of his salary and other benefits. The dues are;

- a) *One month notice at Kshs.65, 350.00;*
- b) *Salary arrears from May to August 2014 Kshs.163, 375.00;*
- c) *Severance pay for 8 years Kshs.7, 842,000.00;*
- d) *Leave arrears kshs.108, 916.67;*
- e) *Compensation kshs.784, 200.00*
- f) *Remainder of term contract Kshs.16, 468,200.00*

6.The Claimant is seeking for a declaration that his suspension was unlawful; the letter of dismissal as a nullity and should be expunged from his records; payment of full salary from May 2014 to date; an order of reinstatement; damages for loss suffered; terminal dues with costs.

7.In support of his case, the Claimant testified that he commenced work with the Respondent as a casual clerk at KCPE section in 1996 and when a vacancy arose he got a printing job. He rose through the ranks. He was based at the Dark room where he did printing work for examinations. While in this department he was able to handle security work; raw examination were printed into plates for mass circulation. He got security work from manuscripts section and while on this nature of work, no other work was allowed in the section. General work was taken when security work was complete. To access the dark room one had to use biometrics and only for allowed officers. One had to use a finger and a physical key to gain access. The Claimant could only access the room in the company of his supervisor and had to remain in such company. The supervisor kept the access codes during security work all the 3 officers were to be present – the manuscripts officer, the supervisor and the claimant. once inside the room, the supervisor had to call the head office for password in order to open the date required. There were checks at every step and stage of security work. All work was secured and the Claimant could not work alone before the supervisor allocated such work. There were CCTV monitoring all work in the department.

8.On 29th August 2014 the Claimant was called to a meeting, a disciplinary hearing but he remained outside the meeting all day and when he was called, he was issued with a termination letter. The senior department secretary called him at 6.30pm and a letter of summary dismissal was issued. The Claimant was accused of two (2) counts;

1. That he had typed a personal letter at the security computer; and
2. That he configured Bluetooth on his computer.

9.The Claimant was alleged to have committed the offences on 15th November 2013. He replied to the human resource officer noting that he did a letter changing his spouse details, a human resource requirement and the department secretary had allowed him to do so from her computer. There were investigations done on this letter and he was informed that the letter was personal but the letter had been part of his formal work records available with the personnel office.

10.The other charge was that he configured Bluetooth to his phone and moved information. The Claimant explained that he had worked on one computer from 2006 when it was installed. He had assigned work on his computer and any changes would only be done by the ICT department as he had no passwords to change the configurations. When the Claimant was redeployed from his station at South C to Mitihani House on 20th May 2014, after 2 weeks he was called by Matenzawa, an officer in security department who came with 2 police officers who detained him. He was taken to the dark room, where the police officers demanded to know if telephone No.0733 256 975 was in his name, which he confirmed to be his line. The Claimant was then accused of leaking 2014 national examinations but at this time, the Claimant had never been near the Examinations room. There were 2 technicians – the Claimant was in guillotine

section. The Claimant was forced to admit that he had used his phone and line to get information and that his line had details traced via Bluetooth but in defence he stated that the machine allegedly used had stopped working in July 2013 – an apple machine that was not functional. The Claimant did not have the administration password required to do anything on the computer. The ICT department had secured all computers. Apart from technicians, all other section staff had access to computer using their biometrics and the Claimant could only access security work and the dark room in the presence of his supervisor. There procedures had not been breached for allegations of using his phone to be levelled against him.

11. Before the Claimant was dismissed he was on suspension of the same reasons. On 20th August 2014 the interdiction was lifted and he was to be paid his dues. But on 27th August 2014 the Claimant was called for another disciplinary hearing on similar grounds. There was no hearing but a letter of summary dismissal was issued.

12. In cross-examination, the Claimant testified that he was redeployed on 20th May 2014 and on 26th May 2014 he was questioned on various allegations and interdicted. The Claimant learnt of Bluetooth allegations when the police officers came to the Respondent premises as he had no such knowledge before. The events that followed;

On 11th June 2014 he was issued with show cause letter;

On 12th June 2014 he sent his responses;

On 20th June 2014 he was invited for disciplinary hearing;

On 6th August 2014 the Claimant collected his letter for disciplinary case;

Hearing was done on 12th August 2014;

On 20th August 2014 the interdiction was lifted;

On 27th August 2014 the Claimant was issued with a disciplinary hearing letter;

On 29th August 2014 the Claimant was dismissed without hearing.

13. The Claimant also testified that he was not allowed to lodge an appeal the applicable procedure was never explained to him.

14. The Claimant also called a witness, Mr Vitalis Omtanyi a Computer programmer and with a degree in computers and an expert in IT. He testified that as an IT expert, the Bluetooth is a method of connecting Radio networks to connect to another device such as video, documents. It comprises of data that can be moved electronically. The report submitted by the defence that there was Bluetooth connection on mobile number 0733 256 975 is not correct and there is no relation between a mobile number and Bluetooth connection as Bluetooth functions on its own. Bluetooth and cell phone numbers are of different technologies, which can be on the same device but not dependent on each other. It is not possible to state that Bluetooth was from a particular number. Their uses are different.

15. The report also suggest that there was pairing of a Mac Computer and phone number but there is no relationship between a computer and No. 0733 256 975. Bluetooth cannot be tied to a number such as 0733 256 975. Bluetooth can start from a phone make such as Nokia or any other phone but the phone number and phone device have no relations. Also Bluetooth does not need an email address to function. To set up Bluetooth one needs a device such as a phone and can move documents once paired with another device that accepts Bluetooth.

16. Mr Omtanyi also testified that Bluetooth was initially figured to 10 metres radius but now can do 100

metres depending on the obstacles. There is therefore no way to tie down an email address message to Bluetooth. Each has different master and slave. Bluetooth cannot technologically be tied to an email.

17. In this case there may be 2 scenarios – a computer may come with Bluetooth and some may not. Those without it requires device to be installed with Bluetooth to be owner of computer as the administrator with rights to install the function. There are administrator privileges which requires a password or a supervisor giving a password. To therefore identify the device, a unique identification and Bluetooth must be there for the computer and Bluetooth attached to that computer. The identification used could have bene from any device. This cannot help map out the logs to a given mobile number as suggested in the report by the respondent. That is impossible.

Defence

18. In defence the Respondent admit that they had employed the Claimant and on 10th April 2014 he was issued with a memo asking him to appear before management committee to clarify issues and on 20th May 2014 he was redeployed to another docket meant to facilitate ongoing investigations. Upon further investigations, the Respondent found it necessary to interdict the Claimant and was placed under terms and conditions set out in a letter dated 28 May 2014. Consequently, a show cause was issued on 11th June 2014 and upon his response, the Respondent sought comments from various officers and the human resource division prepared a report received on 20th June 2014. On these facts the disciplinary committee met 3 times and upon consideration of the responses made by the claimant, a decision was reached to dismiss him with one (1) month pay in lieu of notice. The case was also placed before the Staff Affairs Committee which reviewed the case upon appeal and in its meeting of 30th September 2014 it was dismissed.

19. The defence is also that the termination of the Claimant was lawful for the reasons that during the 2013 KCPE examination it was discovered that examination papers were being accessed by candidates before the day they were due to be sat and the Respondent formed a committee to find out the leakage. The printing computers were analysed and a letter was found on the computer used by the Claimant and he admitted drafting the personal letter on a computer he knew was for security work only. Later an active Bluetooth with Claimant details was found when the computer was being configured which installation was illegal as mobile devices were not allowed into the computer room. The Bluetooth had the name 'Wilson' and a password. This led to security analysis to establish the computer. The Claimant was questioned by CID to establish why he had installed these facilities on a computer that had security work and he admitted to be the owner of mobile number but denied knowledge of the Bluetooth software that had been installed in 2008/2009 when the computers were installed. The CID recommended that the Respondent should handle the matter administratively upon the Claimant refusal to record a statement.

20. The Claimant was redeployed from Reprographics Department to Examinations Administration Department on 20th May 2014. The Claimant was then interdicted as investigations revealed he was involved in serious infringement of rules and regulation sin handling security printing of examinations. The Respondent was forced to lift the interdiction as the investigations process took longer due to the nature of the case as it had to procure the services of an IT expert. This was explained in a letter dated 20th August 2014. It was therefore regular and lawful to summon the Claimant on 29th August 2014 as investigations were still incomplete.

21. Upon the Respondent getting an IT expert, it emerged that there was a pairing of the security computer to a Nokia mobile phone and configured to connect mobile phone number **0733 256 971** which belonged to the claimant. There was evidence that there was Bluetooth connections at numerous instances with the Claimant mobile number; the name Wilson Reuben Sibiya and the address finelitho@yahoo.com were configured as part of the Bluetooth; there was communication between the claimant's mobile number, the Bluetooth ad the email address and a file had been transferred with information back to 2011. There were therefore valid reasons for termination of the claimant's employment by the respondent. Upon investigations, the Respondent applied its terms and conditions of employment and interdiction was lawful.

22.The Respondent acted lawfully in dismissing the Claimant under the provisions of section 44(4) (g) of the Employment Act. The failure to perform allocated duties properly and the dishonesty found following investigations warranted the action taken against the claimant.

23.In evidence the Respondent called two witnesses – Paul Agufa Semenye and Nancy Mwithaga.

24.Paul Semenya testified that he is an expert in computer forensics and certified in fraud investigations. He was sourced the Respondent to find out whether there was a Bluetooth connection with mobile number connections and whether there was transmission of examination files to another computer. He found instances of Bluetooth connection; a mobile number had been configured, a Nokia configured for a Bluetooth with a mobile number and an email address. He also found dialling attempt to establish connection through mobile phone but there was no evidence of any files moved by this connection. He also established that there was Bluetooth connection but there was no file moved by this configurations. He found the Bluetooth configurations with an attempt to connect to a mobile phone software but there was no number or name. He found a document that shared a relationship with a name to be filed and which had a phone number.

25.Mr Semenye also testified that in his conclusions he found there was Bluetooth connection attempt; the connection attempt was to the internet but transmission was not established and did not establish who did these configurations. This however pointed to an intention to establish such connections and configurations. An attempt to establish Bluetooth connection so as to transmit data.

26.In cross-examination, the witness also testified that he works for ISO Solutions to whom he submitted the report on 3rd September 2014. He is also working with Matrix Digital as a private consultant. The Respondent got the report on 26th August 2014. He was asked by the Respondent to search mobile number 0733 256 975 an already knew why he had to search the number – that it had been used to transmit information through Bluetooth; it was a specific search with a key search and only looking for a phone number. There was however no history of any file having been moved from the computer. The search established that the Claimant did not steal any examinations. They did not see any examinations as they were only looking for a phone number and Bluetooth connection where they found the Bluetooth connection attempt but could not establish who installed it. The computer comes with Bluetooth connection and another device can communicate if the computer Bluetooth establishes the connection. To start up Bluetooth connection there must be a start up to allow phone connection. If the computer is protected, a password is needed. The Respondent computer was not password protected. It was a security computer and when it was analysed it was not protected. Anyone could work on it. When the forensic audit was done, the computer had no password.

27.The next witness was Nancy Mwithaga who testified that she is the acting Human Resource Director of the Respondent and with the function of disciplinary process. The Respondent has terms and conditions of service that guide heads and supervisors in disciplinary matters which are all reported to the human resource office. All disciplinary matters must be reported in writing and where there is good basis a show cause is issued to the employee who is required to respond. A committee must then meet and prepare a report after hearing the employee. A decision is made for the CEO to review and give directions.

28.Ms Mwithaga also testified that in the claimant's case, she sat in the disciplinary committee hearing as the human resource manager. The case was of examination leakage and the Claimant had been interdicted. This was a security matter case and not for human resource. The normal procedure was not followed as there were ongoing investigations and the Claimant was required to step aside while investigations were ongoing. When she got the matter as the human resource officer the Claimant had been deployed. At the security leave the claimant's case had been addressed. The human resource office was to process the disciplinary process and the Claimant was called to the committee for hearing. Recommendations were then made.

29.That the claimant's case was of a security nature. The Claimant was found to have used a security computer to write a personal letter and he admitted to doing so, to update his medical details to add his

wife and submitted the same to human resource office. From Respondent policy, this was not normal practice as the computer was for examinations use only. Due to the security concerns, it took long to finish investigations and therefore the interdiction was lifted. The Claimant was recalled back to work but investigations were still on. The Claimant was called for hearing upon his recall and dismissed. The Board confirmed the dismissal as this was not an ordinary case as it related to security committee report.

30.The reasons for dismissal were set out in the termination letter – typing personal letter on a security computer; phone number configured on the system; and security report found that there was a pairing of Claimant number to a security computer. The Staff Affairs Committee found the Claimant had violated clause 12(2) and section 44(4)(g) of the policy and Employment Act respectively, this was criminal offences against the property of the Respondent hence the dismissal.

31.On cross-examination, the witness testified that the Respondent had a strong feeling that the Claimant used a security computer against set policy. There was no strong evidence and therefore the security department took the decision to source for an IT expert to analyse the computer. The report was received on 26th August 2014 done by IT solutions.

32.Stealing examinations is a serious criminal offences. The dismissal was as a result of suspicions against the claimant. This is allowed under section 44(4) of the Employment Act. Investigations on the linkage between Bluetooth and computers is still ongoing. The suspicions against the Claimant led to his dismissal but there was no evidence that the Claimant leaked examinations. This was a security question that the human resource team was not versed with. She is not versed with such security matters to be able to address the report made.

Submissions

33.The Claimant submit that he was dismissed from employment by the Respondent vide letter dated 29th August 2014 on the reasons that he admitted to typing a personal letter on a KNEC computer which was intended for security work only; that he admitted that mobile number 0733 256 975 which was configured in the Bluetooth was his and the Bluetooth contained his name ‘Wilson’; and that investigations strongly indicated that there was a pairing of his mobile devise to the KNEC computer. The Claimant was also dismissed on the grounds that he had committed a serious breach of KNEC policies and procedures as outlined in the human resource policy and Code of Conduct and Ethics manual. Such was contrary to section 44(4) (g) of the Employment Act and clause 12.21.3(g) of the KNEC terms and Conditions of Service. That such dismissal was without foundation as there was no proof of any breach or misconduct and the resulting termination of employment was unfair. The allegations were not based on any facts; there was no hearing for the Claimant to be able to explain himself as require din law; the Claimant had not been issued with specific information that would help him prepare a defence and the termination was unreasonable, not justified and unfair.

34.The Claimant also submit that the witnesses called by the Respondent did not have concrete evidence as to the reasons for termination. The IT expert was not able to link the Claimant to the analysis he made and he made a finding that there was no pairing of the claimant’s phone number to the security computer and that no examination file had been transferred through any device. Equally Ms Mwithaga testified that she was not involved in the security report that led to the dismissal of the claimant. As such the witnesses were not able to support the dismissal of the claimant.

35.The Claimant has relied on the cases of **R versus Uberete [1983] 5 EACA; Shamsa Wanjiku Njagi versus Supreme Council of Muslims, Cause No.416 of 2011; Yuvenalis Amisi versus Public Service Commission.**

36.The Respondent submit that the Claimant was dismissed following investigations that revealed the three was pairing of security computer to a Nokia mobile phone and configured to connect number 0733 256 971 which the Claimant admitted as being his. There was numerous instances when the Bluetooth was initiated using the mobile number and part of the configuration linked to email finelitho@yahoo.com; and that there was communication between the Bluetooth, the mobile number and email all by the

claimant. Proper procedure was followed in the dismissal, upon interdiction, the claimant was able to respond and was invited to a hearing that led to his dismissal. The disciplinary committee held several sittings over the matter and the IT expert report helped confirm the allegations. The committee had the discretion to hear oral or written hearing. The disciplinary committee used the exchanged correspondences to make a decision.

Determination.

35. The enactment of the Constitution, 2010 created specific rights within employment and labour relations in Kenya – right to fair labour practice. Such a right in employment and labour relations looked at together with the Employment Act, 2007 give emphasis to parties in an employment relationship to ensure that each is accorded fairness especially in a matter that is likely to have adverse effect on either. In this case, before the Claimant was issued with the sanction of dismissal from his employment with the Respondent recourse should have been gone into the provisions of section 43 of the employment Act that requires that before such dismissal, every employer as a mandatory requirement must satisfy both the procedural and substantive justice to the employee. Even in the very serious cases of summary dismissal that is allowed under section 44 of the Employment Act, it is now mandatory to give an employee a hearing. Such a hearing is regulated under section 41 of the Employment Act, an employee must be called in the presence of another employee of his choice or where unionised in the presence of the shop steward and heard on his defence. Such forms the procedural requirements that must be guaranteed before dismissal can be found to be fair.

36. Failure to abide by such procedural requirements impedes on the substantive reasons that an employer may have so as to terminate an employee. In this case, Ms Mwithaga for the Respondent testified that the matters that faced the Claimant related to security that she had no capacity to speak to but when the matter came to the disciplinary committee there was a strong *feeling* that the Claimant had been under suspicion of committing offences that were of a criminal nature hence the dismissal. The disciplinary committee therefore relied on the report of the security committee, the IT expert recommendations and the responses the Claimant had filed to arrive at the decision to dismiss him. Ms Mwithaga also testified that the Claimant was invited at the hearing on 29th August 2014 but he was not called inside the meeting room to attend the hearing as the committee found sufficient evidence against him.

37. However, section 41 of the Employment Act has changed such procedures and made it a mandatory requirement that every employee faced with a disciplinary case however serious the case and that has the implication of possible loss of employment must be heard in the presence of the subject employee. It is not a matter of choice for the employer, the law is stated in mandatory terms. The employee must be given a hearing and this must be in his presence of another employee of his choice. Such I find to be a good practice as all facts that require to be established and the evidence to be used is within the shop floor and hence the internal hearing is the best forum where the employee can be given a hearing. Failure to comply with such basic requires only defeats the purpose of setting up a disciplinary committee to make a finding without giving the subject employee a chance to give his defence.

38. The Respondent submitted the disciplinary committee minutes for 29th August 2014. Senior officers of the Respondent were present. Part of the agenda for this meeting was to consider previous meeting held on 12th August 2014 particularly to consider the outcome of the security analysis conducted by IT experts, a forensic audit on the Macintosh Computer Server. The meeting proceeded and made conclusions and findings, but the Claimant was never called to give his defences. The subject report relating to investigation on his case had just been submitted by the IT expert on 26th August 2014 but there is no record that the Claimant was able to access such report so as to be able to give responses on matters that affected him. Such flaws are not explained. The failure to follow procedures set out under section 41 of the Employment Act by the Respondent is not justified and such amounts to an unfair practice contrary to section 45 of the Act.

39. Save for the procedural requirements, every dismissal must meet substantive justice. Section 43 of the Employment Act requires that an employer must give reason(s) for termination of employment. Such reasons must be genuine, valid and fair.

40. The letter of dismissal issued to the Claimant related to 3 reasons. First was that he had typed a personal letter on KNEC computer intended for security work only; second that he configured Bluetooth on phone number 0733 256 975 which was his phone number; and thirdly that there was pairing of his phone device to the KNEC Computer. That such were matters the Claimant admitted to and was in breach of section 44(4) (g) of the Employment Act and clause 12.21.3.g of the Respondent terms and conditions of service. The Claimant submitted his response to the allegations against him giving details as his defence. This was on 12th June 2014 and before the IT Expert report was submitted to the respondent. The responses by the Claimant therefore did not factor major parts that were addressed by the security team and in the report implicating him comprising investigations undertaken while he was on interdiction.

41. The Claimant explained that he was required to update his details with regard to human resource division. He drafted the letter that was part of his official record and the human resource office accepted this letter. I find no plausible challenge to this defence, the Claimant admitted this much that indeed as part of his records, he submitted his official change of spouse's name. Such now forms part of his file with the respondent. Indeed the IT expert explained that such letter was traced in the computer system upon analysis.

42. I have gone through the respondent's terms and conditions of employment submitted in defence. Section XIII comprise the *Employee Conduct and Discipline*. At section XIII (8) sets out the offense and misconduct that an employee may commit and are subject to disciplinary action. I have gone through the entire list of possible offences and misconduct from A (1) to (13), none relates to typing of official records/letter or personal letter on the KNEC computer. The practice in many entities is to set out the offences relating to the business and the nature of it and the Employment Act section 44 also adds to various offences where committed by an employee may amount to gross misconduct. Typing of personal letter or official letter using the employer computer is not one such offence. In this case, the alleged 'personal letter' typed by the Claimant on the computer that was 'intended for security work only' is part of his employment record. Such is not a personal letter anymore. There is admission to this fact that the letter was done for official use and submitted to the employer. Such letter is not done in secret for the private benefit of the Claimant as the employee. Such cannot in its most basic use be inferred to allege misuse of the employer property so as to fit into the provisions of section 44(4) (g) of the Employment Act. To do so would be sheer simplistic set up to justify an otherwise admitted fact of the letter being done for official purposes. The reason used to terminate the Claimant lacks genuine and fairness that can stand the test of reasonableness.

43. On the second reason, it is common knowledge that Bluetooth is a wireless device which requires connectivity with software and hardware/chip only used with another device configured with similar Bluetooth connectivity. A device with Bluetooth will therefore only be discovered by another device with Bluetooth connected based on a unique address within respective signal and within the limited range. As such, the Bluetooth as a wireless device is not configured on a mobile phone number or email address or an email address. Most telephone handsets and computers as devices have capacity to be installed with Bluetooth, some are purchased already with such installation or configured once purchased. When installation is complete, the Bluetooth connectivity can be traced by another Bluetooth in the same radius for sharing of data. The devices cannot be linked or traced by email addresses or the telephone number in the handsets.

44. The Respondent evidence is that the IT expert was sourced to track the use of mobile No. 0733 256 975 on the Bluetooth installed in the CPT computer. As Mr Omtanyi testified, such is an impossibility technologically. There is no linkage between a cellophane number such as 0733 256 975 or 0733 256 971 to a Bluetooth or a computer. Each is used without the attachment to the other. The case is the same to an email address. Such is not attached to any device as it can be connected to any. The Respondent does not make the case any stronger as in the statement of defence at paragraph 12(b) (i) states;

That after the Respondent contracted security analysts to undertake forensic investigations on the affected computer that:

i. There was a pairing of the security computer to a Nokia mobile phone and configured to

connect with mobile phone number 0733 256 971 which the Claimant has admitted as his.

ii. There was evidence that on numerous instances the Bluetooth connection was initiated using the mobile number.

45. The IT expert for the respondent; the disciplinary committee seating on 12th August 2014; the disciplinary committee seating on 29th August 2014; in the letter of dismissal; and the evidence of Ms Mwithaga is that the Claimant admitted being the owner of mobile number 0733 265 975. This anomaly was never corrected until the close of the defence. Such is not excusable.

46. In any event, the alleged configuration, pairing and movement of data said to have been done by the Claimant through Bluetooth only arose in the security report, the investigations conducted and from the report submitted on 26th August 2014 after the Claimant had been recalled from his interdiction, and he was never given time, opportunity or the hence to know such allegations so as to give his defence. Upon the claimant's recall back to work, any discoveries made on his conduct should have as a rule required that he be issued with a show cause letter so as to have him respond to the new evidence and discoveries made against him. In any event the recall back to work and lifting of interdiction was conditional, it was to ensure the investigations were completed. Why did the Respondent fail to share the investigations report with the claimant? In the case of **Fredrick Owegi versus CFC Life Assurance, Cause No.1001 of 2012** the Court held;

...where there is procedural unfairness the substantive issue faced by the employee is muzzled in the process. Where there was an opportunity to address the core concerns that an employee may have, once due process is not applied the possible outcome is already eschewed against such an employee. ...

46. In **Dr Kizito Lubano versus KEMRI & Others, Petition No.47 of 2015** the Court in a case where due process was not followed held that;

... disciplinary proceedings against the Petitioner were already eschewed and the resulting decision clothed with illegalities. Whatever outcome arose out of proceedings that were shrouded with such illegalities as set to above, the appeal not having been considered, such result became a nullity. It is of no legal effect. This should be quashed.

47. See decision in **Fredrick Saundu Amolo [suing through KUPPET Kajiado County Branch versus the Principal, Namanga Mixed Day Secondary School and Others, Cause No. 747 of 2014.**

48. In this case, I find no valid reasons to justify the summary dismissal of the claimant. The summary dismissal was therefore procedurally and substantively unfair as provided for under section 45 of the Employment Act. The Claimant is entitled to compensation under section 49 of the Employment Act.

Remedies

49. The Claimant is seeking reinstatement back to his employment. However in his evidence, there was no great emphasis on this remedy. From the circumstances of the case, the nature of dismissal that was most inhumane and degrading, the call of CID officers to detain the Claimant so as to interrogate him on matters that the Respondent was well aware had no justification, I find to return the Claimant back to the same employment would to put him in an unhealthy work environment. Such would not be an appropriate remedy to grant. This however does not render the Court without other remedies to award on the finding that the termination was unfair. Compensation is therefore awarded at 12 months' salary based on the last gross salary paid to the Claimant at Kshs.65, 350.00 all being 784,200.00.

50. Notice pay is due noting the termination was unfair. The claimant's letter of appointment required termination notice to be for 30 days or payment in lieu thereof. The Claimant is therefore awarded Kshs.65, 350.00.

51.The Claimant is seeking ½ pay due from May 2014. The Respondent did not speak into this claim at all save that they are willing to pay terminal dues once he has cleared with the respondent. The ½ pay not paid to the Claimant during the period of interdiction is therefore due. Such is awarded for the period of May 2014 to August 2014, a period of 3 months all being 98,025.00.

52.There is a claim for severance pay. In the analysis of this case, I find no evidence with regard to redundancy to justify a claim for severance pay. Such is declined.

53.Claim for remainder of the contract term. The Claimant was on an employment contract terminable upon 30 days' notice. This was not a fixed term contract. The claim is declined.

54.Costs are also payable in this case. This is due to the procedural and substantive flaws set out above. The matters leading to this case were all of the respondent's making. All due costs herein shall be met by the respondent.

Judgement is hereby entered for the Claimant in the following terms;

- a) I declare that the Claimant was unfairly terminated from his employment;**
- b) I declare that the letter of summary dismissal shall be expunged from the claimant's record of employment with the respondent;**
- c) Compensation awarded at Kshs.784,200.00;**
- d) Notice pay Kshs.65,350.00;**
- e) Half (1/2) pay due at kshs.98,025.00;**
- f) The Claimant be unconditionally issued with Certificate of Service in accordance with section 51 of the Employment Act; and**
- g) Costs of the suit.**

Orders accordingly.

Dated and delivered in open court at Nairobi this 19th day of July 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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