REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 126 OF 2014

PATRICK ABUYA **CLAIMANT**

v

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA (ICPAK) **1ST RESPONDENT**

EDWIN NYABUGA MAKORI **2ND RESPONDENT**

JUDGMENT

1. Patrick Abuya (Claimant) was offered employment as Assistant Manager, Procurement by the Institute of Certified Public Accountants of Kenya (1st Respondent) through a letter dated 5 September 2011.
2. The employment relationship appeared to hit turbulence, for only two years later, the 1st Respondent issued the Claimant with a show cause notice dated 12 February 2014 to explain within 7 days why disciplinary action should not be taken against him.
3. The Claimant responded to the show cause notice in writing through his letter dated 18 February 2013. The 1st Respondent appears not to have been satisfied with the response and through its letter dated 3 March 2014, it invited the Claimant to appear before a Disciplinary Committee for a hearing the next day, 4 March 2014.
4. After an appearance before the Disciplinary Committee (which was a subcommittee of the 1st Respondent's Council) as scheduled, the 1st Respondent wrote to the Claimant on 5 March 2014 informing him of the termination of his employment under section 44(4)(c) of the Employment Act.
5. The Claimant was aggrieved with the dismissal and he lodged a Memorandum of Claim with the Court on 25 April 2014 against the 1st Respondent and one Edwin Nyabuga Makori (2nd Respondent) stating the issue in dispute as *wrongful/unfair termination of employment.* He quantified the total claim as Kshs 60,165,056/-.
6. The 2nd Respondent was the Chief Executive Officer of the 1st Respondent at the material time. On 27 May 2014, the Cause was placed before Ongaya J and directions were given and hearing fixed for 18 December 2014.
7. The Respondents filed a Memorandum of Reply on 29 May 2014. On 11 July 2014, the Claimant filed a List of Witnesses.
8. On 17 September 2014, the Respondents filed a Supplementary Memorandum of Reply and a Supplementary List of Documents, and List of Witnesses on 18 December 2014.
9. The hearing commenced on 18 December 2014 when the Claimant testified. The hearing was then adjourned to 15 January 2015.

10. But the Respondents filed a Further Supplementary List of Documents on 13 January 2015 before resumption of the hearing and the same were admitted after hearing submissions from both parties on 15 January 2015. Thereafter, the Claimant continued with his testimony after which he closed his case.
11. The Respondents case commenced immediately thereafter but was adjourned to, and proceeded on 25 February 2015, 4 June 2015 and 23 June 2015 when the hearing was closed.
12. The Claimant filed his submissions on 24 July 2015 while the Respondents submissions were filed on 25 September 2015.
13. Both parties identified 5 issues in their submissions.
14. Save for style in language, the issues are similar save for the 1st issue identified by the Respondents (whether there was a cause of action against the 2nd Respondent).
15. In the view of the Court, the issues for determination can be generally be categorised as 3 and these are, *whether the 2nd Respondent is non-suited, whether the dismissal of the Claimant was unfair* and *appropriate remedies/orders.*

Whether 2nd Respondent is non-suited

16. According to the Respondents, there was no employer/employee relationship between the Claimant and the 2nd Respondent because the 2nd Respondent was acting in his capacity as Acting Chief Executive Officer (in good faith) of the 1st Respondent (a body corporate) and therefore by dint of section 38 of the Accountants Act there was no cause of action against him.
17. The body of the Memorandum of Claim allege that the 2nd Respondent acted irregularly (para 15) and unlawfully harassed the Claimant, of which specific particulars are given (para 31). Bad faith was also alleged (para 37).
18. On the face of the pleadings, the Claimant demonstrated facts which set out a cause of action against the 2nd Respondent and therefore the question of non-suiting or failing to disclose a cause of action is a red herring.
19. Setting out facts constituting a cause of action and proving those facts are of course related but distinct questions. If a party fails to prove his facts, the consequence would be obvious, and it would be to dismiss the Cause for not proving the facts but not on the ground of failing to disclose a cause of action as a preliminary issue.
20. The Court, on this question finds that the pleadings disclosed a cause of action against the 2nd Respondent.

Whether dismissal was unfair

Initial burden on employees

21. In a complaint of unfair termination of employment, an employee has a low threshold burden to discharge before the employer is called upon to prove and justify the grounds and reasons of the termination of employment.
22. That, in my view is the import of section 47(5) of the Employment Act, 2007 and the Court ought to engage on an initial inquiry to establish whether a Claimant has discharged the burden before calling upon and interrogating whether the Respondents have discharged the legal burden placed upon employers.
23. Section 35(1)(c) of the Employment Act, 2007 envisages advance 28 days written notice of termination of employment, for employees paid by the month like in the present case. The Claimant in this case was not issued with such a notice.
24. Of course section 44 of the Employment Act 2007 permits an employer to terminate the services of an employee on shorter notice or with pay in lieu of notice.
25. In my view, where no notice is given, then the evidentiary burden shifts to the employer to show that there was a breach of a fundamental obligation arising out of the contract of service to warrant not serving notice and/or a summary dismissal.
26. I am therefore satisfied that the Claimant has discharged the burden placed upon Claimant's by section 47(5) of the Employment Act, 2007, and therefore it is worth calling upon and considering

whether the Respondents discharged the onerous burden placed on employers by sections 41, 43 and 45 of the Act.

Procedural fairness

27. The Claimant was issued with a show cause letter dated 12 February 2014. The letter set out 2 allegations against him. The notice requested the Claimant to make representations within 7 days. He made the representations through a letter dated 18 February 2014.
28. The representations were considered but on 3 March 2014, the Claimant was invited to attend a face to face disciplinary hearing. It is not in dispute that the Claimant attended the hearing the next day (4 March 2014).
29. It is only after the face to face hearing that the Claimant was dismissed.
30. The Claimant challenged the process on the grounds that he was not afforded reasonable opportunity and/or adequate notice to be heard.
31. On this score he contended, firstly, that he was out of the country and reported to work on 17 February 2014 on which date he was served with the show cause letter dated 12 February 2014.
32. In the view of the Claimant, the 1 day he had to make a response was too short and he was disenfranchised from making a *solid* response.
33. Secondly, and still on the reasonable opportunity to prepare, the Claimant asserted that he was served with the invitation letter dated 3 March 2014 to appear for the oral hearing on 4 March 2014 at 8.30am at 8.00am on the morning of the hearing. He produced an extract of the delivery book. He barely had 30 minutes.
34. Thirdly, the Claimant also challenged the process on the ground that the Disciplinary Committee was irregularly constituted because its composition was contrary to clauses 9.1, 9.3 and 9.4 of the 1st Respondent's Human Resource Policy Manual.
35. According to the Claimant, the Disciplinary Committee should have been composed of the Chief Executive Officer and/or the Human Resources Manager and that members of the 1st Respondent's Council could only sit on appeal from the decision of the 2nd Respondent.
36. The Claimant took the challenge further by contending that the Disciplinary Committee composed of the Council members therefore lacked jurisdiction to hear his case.
37. Fourthly, the proceedings before the Disciplinary Committee, according to the Claimant were not in accord with the principles of natural justice (he was not accorded opportunity to bring witnesses or to be accompanied) and the rights to fair administrative action and hearing (Articles 47 and 50 of the Constitution).
38. Fifthly, the Claimant contested the fairness of the process on the ground that the Respondents did not carry out investigations prior to the disciplinary process as required by clause 9.0 of the Human Resource Policy Manual and that no documentary evidence was produced, no complainant was brought, nor his written response considered.
39. The Claimant's attack on the process, as gleaned from the above is anchored on breach of constitutional rights and freedoms, statutory provisions and ultimately contractual agreement.
40. Article 41 of the Constitution broadly provides for the right to fair labour practices. The basic substance or essentials of the right as far as procedural fairness is concerned is located in section 41 of the Employment Act, 2007.
41. I have previously attempted to adumbrate on these essentials of procedural fairness in *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR, where I observed (and I beg forgiveness for setting out in extenso the observations and holding) that

> Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.
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> An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.

The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin maxim *audi alteram partem rule* into the employment contract. Whatever the reasons, the Employment Act, 2007 has fundamentally changed the employment relationship in Kenya.

And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person,writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

42. The challenge by the Claimant herein however goes beyond the basic essentials or frontiers of procedural fairness as stated in the above decision.
43. I say so because the Claimant was informed of 2 allegations. He responded to those allegations extensively in his written response. After the response, he was invited to an oral hearing where he also made representations. But he still complains that he was not afforded reasonable opportunity to prepare and make representations; witnesses were not called; investigations were not carried out and that the composition of the Disciplinary Committee meant it had no jurisdiction over him.
44. It cannot be disputed and the Claimant did not dispute that he was aware of the allegations to confront. He was also aware that an audit was ongoing to unearth the true facts surrounding the procurements queries. But the Court must nevertheless evaluate his challenges to the procedural fairness of the process.

Failure to carry out investigations

45. An investigation prior to a disciplinary process is not an express requirement of the Employment Act, 2007.
46. The Claimant in this case anchored the challenge on a contractual requirement and specifically clause 9.0 of the Respondent's Human Resource Policy Manual. The clause envisages investigations to establish facts prior to the disciplinary hearing.
47. The clause is to the effect that, The matter shall be investigated to establish the facts surrounding the complaints *if appropriate* taking into account the statements of any available witness. An employee may be suspended to facilitate investigations.

48. The point which emerges from the use of the words *if appropriate* suggest in my view that investigations would depend on the circumstances of each case.
49. The question therefore begs of what nature should the investigations take.
50. In my view, an investigation within the employment relationship is to gather the facts to establish whether there are grounds for a disciplinary action and after the facts have been established the employer should inform the employee of the allegations or facts and give the employee time to make a response. It is not necessarily mandatory that the employee be involved in the investigations. Such investigations should not have the strictures of police investigations.
51. And drawing from comparative jurisdictions, in *Ulsterbus Ltd v Hendersen* (1989) IRLR 251 NICA, an Irish Court held that it was not incumbent upon an employer to carry out a quasi-judicial

investigation into allegations of misconduct with a confrontation of and cross examination of witnesses.

52. The Employment Appeal Tribunal in England took a similar approach in *Santemerra v Express Cargo Forwarding* (2003) 273 EAT wherein it held that fairness does not require a forensic or quasi-judicial investigations for an employer may not be qualified for such type of investigations.
53. The English Court of Appeal in *Dick & Ar v Glasgow University* (1993) IRLR 23 had observed that in determining whether an employer had carried out a reasonable investigation, the Employment Tribunal ought to consider the nature of the material which was available to the employer before taking the decision to dismiss.
54. The same Court of Appeal had earlier in *W Weddel & Co. Ltd v Tepper* (1980) held that an employer is expected to make reasonable inquiries appropriate to the circumstances of the case but it should not form a belief hastily or act hastily.
55. I would endorse the legal principles enunciated in the cases cited from the comparative jurisdictions as sound in our legal framework.
56. The evidence before Court is that the Respondent had commissioned an audit to be carried out as early as 20 January 2014 before the show cause notice was issued.
57. In my view the Respondent had reasonable and sufficient facts to commence the disciplinary process against the Claimant and in any case he was not prejudiced as there was no requirement to hear him before issuing the show cause notice.

Witnesses during oral hearing/documentation

58. The Claimant lamented that no witnesses were called during the oral hearing or documentation produced. This issue of calling witnesses can have a simple answer.
59. Unless the circumstances warrant, an employer is not expected to hold a mini-court in the name of disciplinary hearing. An employee desirous of making reference to documents or records by an employer should make that request at the first instance. If the records are available and are not furnished, a case of prejudice would be easy to demonstrate.
60. In some instances, an employer may need to balance the confidentiality and need to protect whistleblowers. The comparative jurisprudence in the case of *Ulsterbus Ltd* (supra) is instructive in this respect even in our jurisdiction.

Composition of Disciplinary Committee

61. A few words on some another challenge raised by the Claimant. This is in respect to the complaint relating to the composition of the Disciplinary Committee.
62. He contended that the Council should have served as an appellate panel and that the Committee should have been composed of the Chief Executive Officer/Human Resources Manager.
63. The explanation given by the Respondents as to why the Board handled the disciplinary process was that there was no substantive Chief Executive Officer and that some of the management staff who could have comprised the Disciplinary Committee was part of the staff undergoing a disciplinary process was not challenged.
64. The Respondents Council was therefore under the circumstances in order to deliberate/conduct the disciplinary process.

Adequate/reasonable notice to respond

65. But the question whether the Claimant had adequate/reasonable time or opportunity to respond to the show cause notice when he returned to the country, and appear for the oral hearing, and whether he was prejudiced is not so straight forward. What is adequate or reasonable time depends on the circumstances of each case.
66. The difficulties start to arise when the Claimant states that he reported to work on 17 February 2014 and was confronted with the show cause letter which required him to respond within 7 days. The 7 days apparently were to expire around 19 February 2014.
67. The Claimant responded on 18 February 2014, a day before the expiry of the 7 days. He made reference to being disenfranchised by 5 days but did not go as far as seeking from the Respondents

for more time to respond.

68. The Claimant was out of the country when the show cause was issued. The Respondents were aware of this fact even though it was contended it was unauthorised.
69. On reporting back to work, the Claimant made an extensive written response. He did not seek for more time. The Court is therefore unable to decipher or conclude that the Claimant was prejudiced or suffered an injustice during the written phase of the process.
70. But that is not all that there is to it. There was an oral hearing. The Claimant was informed of the hearing on the morning of the hearing and barely had 30 minutes to prepare.
71. The minutes of the hearing show that the Claimant confirmed he did not need the presence of any other person/colleague during the hearing but there is no explanation on why the invitation was served on the morning of the hearing.
72. The 2nd Respondent's testimony however throws some light on the issue. According to him, the Claimant was not on duty on 3 March 2014 when the Council resolved that a hearing be conducted the next day, and therefore he could not be served with the invitation letter. In cross examination, the witness stated that the Claimant had absconded and only appeared in the office on the morning of the hearing.
73. Now, if the Claimant had absconded as suggested by the witness, it was mere speculation and conjecture for the Respondents to wait for him to appear on the morning of 4 March 2014 in order to serve him with the invitation letter. It is not clear what would have happened had he not appeared at the workplace on the morning of 4 March 2014.
74. The Court was not informed of any positive steps the Respondents had taken from 3 March 2014 when the invitation letter was issued to look for the Claimant to serve him with the same.
75. It appears the Respondent was in a rush to get rid of the Claimant. No reasons were tendered. The Human Resources Policy Manual provided for suspension pending investigations. If the Respondents felt the Claimant's presence in the work place was prejudicial or would expose it further, it had an option to suspend him.
76. The circumstances obtaining from 3 March 2014 to the next day show that the Claimant was ambushed.
77. An employer should commence disciplinary action without any biases and ready to listen to and consider any representations to be made by the employee. That is more so when the invitation to the oral hearing did not indicate whether the written responses had been found wanting and in what respects.
78. Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood.
79. In my view, the Respondents action of writing an invitation letter on 3 March 2014 inviting the Claimant to hearing on the morning of 4 March 2014 when, according to it, he had absconded and therefore his whereabouts were not known was ill motivated and was not in consonance with the statutory requirements of procedural fairness.
80. It was equally not in accord with justice and equity as envisaged by section 45(4)(b) of the Employment Act, 2007. The dismissal was therefore procedurally unfair.
81. Because of the conclusion, and considering the mandatory nature of the requirements of section 41 of the Employment Act, 2007, it is not necessary, in the view of the Court to consider whether the Respondents have discharged the burden placed on employers by sections 43 and 45 of the Employment Act, 2007.

Appropriate remedies

Lost income to retirement

82. Under this head of claim the Claimant sought Kshs 49,129,344/-. The Claimant, in the submissions appeared to anchor this head of claim on the doctrine of legitimate expectation though he did not cite statutory or case law.
83. The Respondents cited the decisions of *Simon Patrice Matianyi v G4S Security Services (K) Ltd* (2013) eKLR and *Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Ltd* (2013) eKLR.
84. I extensively reviewed the domestic authorities on this head of relief in *Mary Mutanu Mwendwa*

v Ayuda Ninos De Afrika-Kenya (Anidan K) 2013 eKLR and I do not wish to revisit the debate here.

85. In my view, considering the material placed before Court, I can only endorse as very persuasive, the holding by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

86. I therefore decline the invitation by the Claimant to award lost earnings in this case.

Terminal benefits/Service pay

87. The contract between the parties herein provided for a pension. The Claimant however sought Kshs 8,290,576/80 as terminal benefits/service pay.
88. Terminal benefits/service pay can have either a contractual or statutory basis.
89. The Claimant did not demonstrate any contractual basis for terminal benefits as opposed to pension.
90. On the head of claim for service pay, if the Claimant was seeking it under section 35(5) of the Employment Act, 2007, he cannot succeed because his pay slip show that he was a member/contributor of the National Social Security Fund.

Unpaid leave days

91. Some Kshs 159,215/50 was pleaded as due on account of leave not taken. The Respondents had admitted that the Claimant was owed about 4 days worth of leave, but no computation was given. Even leave records were not produced.
92. The Court would therefore adopt the computation by the Claimant taking into consideration the provisions of section 10(3) and (7) of the Employment Act, 2007.

Wages for March 2014

93. By dint of section 49(1)(b) of the Employment Act, 2007 the Claimant is entitled to the earned wages. He sought Kshs 27,514/20.
94. The Respondents admitted they were ready to pay this upon the Claimant clearing but gave no figures.
95. The Court would find for the Claimant.

3 months wages in lieu of notice

96. The Court has reached a conclusion that the dismissal of the Claimant was unfair. Pursuant to clause 10 of the contract, he is entitled to only 1 months wage as pay in lieu of notice and not 3 months.

Damages for wrongful termination of employment

97. The Claimant sought Kshs 2,047,056/- as damages.
98. Section 49(1)(c) of the Employment Act, 2007 provides for the primary remedies for unfair termination of employment/wrongful dismissal. The award has not been categorised either as general damages or compensation, but by practice, such awards have been referred to as compensation.
99. The statute has also set out the factors the Court ought to consider. But the remedy remains discretionary.
100. Considering the length of service, the Court would award the Claimant the equivalent of 2 months gross wages as compensation.

General and exemplary damages for harassment

101.The Claimant did not prove a cause of action for harassment. This relief is dismissed.

Cause of action against 2nd Respondent

102.The Claimant did not prove a case against the 2nd Respondent and the same is dismissed.

Conclusion and orders

103.The Court finds and holds that the dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

a. Unpaid leave days Kshs 159,215/50
b. Wages for March 2014 Kshs 27,514/20
c. 1 month pay in lieu of notice Kshs 148,088/-
d. 2 months gross wages compensation Kshs 341,176/-

TOTAL **Kshs 675,993/70**

104.Claimant to have costs.

Delivered, dated and signed in Nakuru on this 4th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Anyuor instructed by Ongoya Masitsa & Mukururi Advocates

For Respondent Ms. Kashindi instructed by Hamilton Harrison & Mathews Advocates

Court Assistant Nixon