REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2205 OF 2015

PAUL WAA MWAPONDA.....CLAIMANT

-VERSUS-

OLA ENERGY KENYA LIMITED (FORMERLY KNOWN

AS LIBYA OIL KENYA LIMITED) .....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Statement of Claim on 10th December 2015 alleging that he was summarily dismissal from his 21 years' employment by the Respondent on 15.10.2015 contrary to principles of fair labour practices within the meaning of section 45 of the Employment act and Article 41 of the Constitution of Kenya. He averred that the dismissal was based on allegations that cannot and do not warrant drastic action of summary dismissal. He therefore prayed for the following reliefs:

a. A declaration that the Claimant's fundamental right under Article 41 to Fair Labour practices has been violated and or infringed by the Respondent.

b. A further declaration that the summary dismissal of the Claimant was unfair, unjustifiable, unlawful and null and void ab initio.

c. An order for specific performance by way of reinstatement with full salary and benefits from date of unfair termination.

d. Alternatively, and in default of reinstatement an order that the Respondent pays the sum of Kshs. 163,205,555.00 or such other amount as the court finds is reasonable and fair and in the Respondent's policy of unlawful termination inclusive of full salary and benefits from the date of unfair termination to the date of Judgment and interest thereon.

e. An order that the Respondent remit to the Kenya Revenue Authority such tax which is due and payable in respect of the Claimant's employment for the full employment period.

f. General damages.

g. Costs of the suit and interest thereon.

h. Interest on commercial bank rates on (c) and (d) above till payment in full.

i. Any other further relief that this Honourable Court shall deem fit and just to grant.

2. The Respondent denied the alleged unfair dismissal and averred that the dismissal was for a valid reason and fair procedure was followed as provided in the law and her internal disciplinary mechanism. She further averred that the Claimant was dismissed from employment because he carelessly and improperly performed work which from its nature was his duty under the contract of service to have performed carefully and properly. She also averred that the claimant was accorded hearing before the dismissal but he declined to attend the hearing of his appeal and opted to file this suit. She therefore prayed for the suit to be dismissed with costs because the claimant is not entitled to any reliefs sought.

3. The main issues for determination arising from the pleadings herein are whether the summary dismissal of the claimant was unfair and unconstitutional and whether the reliefs sought should be granted. The suit was heard on diverse dates the Claimant testified on his own behalf while the respondent called her Legal Counsel, Benedicta Karimi, as the only defence witness. After the hearing, each party filed its respective submissions. Considering the facts of the case which were brought by evidence and submissions, the answer to the two questions is in the affirmative.

Claimant's Case

4. The Claimant testified as Cw1 and basically adopted his Witness Statement filed on 10th February 2015 as his evidence in chief. He further relied on his pleadings and his bundle of documents, and also the Respondent's list of Supplementary documents. In brief he testified that he was employed by the respondent from 1.8.1994 to 15.10. 2015 when he was summarily dismissed for alleged negligent and careless performance of his duty. He denied the said misconduct and contended that he was dismissed unfairly for misconduct of other people who were found culpable after a Forensic Audit.

5. He testified that the Disciplinary Report which was produced in the Respondent's Supplementary List of Documents was never availed to him prior to filing the suit, which would have enabled him to mount a successful appeal against his dismissal. He further testified that on 30.4.2015, he received a letter from the respondent inviting him to a disciplinary hearing before a Disciplinary Committee (DC) to answer to two allegations. The first allegation against him was that he wilfully neglected to perform work, which was his duty, and that he carelessly performed work which was by nature his duty under his contract to perform carefully. The second allegation was his failure to follow written procedure and policy. He further stated that after the hearing, the DC exonerated him from the second allegation but upheld the first allegation to some extent. He stated that the DC panel had 12 options of punishment to mete out against him of which the panel chose the option of a first written warning.

6. He further testified that the decision and the punishment of warning was unfair and unreasonable because it did not consider all the relevant evidence and had the effect of making him responsible for other people's misconduct. In addition, he testified that the management never followed the verdict of the DC by serving a written warning letter but instead served him with a summary dismissal letter. He contended that he was never given any other opportunity to defend himself by the management before the verdict by the DC was enhanced from a warning letter to summary dismissal.

7. He also testified that during the disciplinary hearing, he was concerned on how the loss was ascertained and investigated but the DC chairman only responded that the company had suffered significant loss. He contended that he Chairman adjourned the proceedings to consult the General Manager (GM) before continuing with the hearing. He confirmed that Benedicta Karimi, the defence witness herein attended the disciplinary hearing as the recorder of the proceedings.

8. He testified that no criminal proceedings were commenced against him and no report on the alleged loss was made to the police. He however testified that 9 employees were affected by the alleged losses among them 3 senior managers who were dismissed and that 8 managers underwent disciplinary proceedings.

9. He testified that the Respondent had attempted to claim reliefs from the Kenya Revenue Authority (KRA) in relation to the purported losses but KRA investigated the alleged loss and found no merits due to lack of evidence. He contended that he had copies of the same from the Business Daily newspaper published on 9th May 2018 to substantiate the foregoing contention.

10. He admitted that he was given a warning in 1995 over his driving skills and since then no other warning was issued to him. He further testified that on 9th October 2014 the HR/PA Manager wrote to him informing him that there was an allegation of sexual harassment against him. He stated that he proposed for a meeting at 2.30pm to discuss the matter but the meeting never took place. He further stated that the persons alleging he never got to know the persons who alleged they had been harassed.

11. He testified that after receipt of his dismissal letter he appealed vide the letter dated 30th October 2015 but the appeal was never heard because his request for various documents necessary for his appeal was declined. He contended that even in this case, he served a notice to produce documents but only the report on the disciplinary proceedings was produced.

12. In cross-examination, he admitted that Clause 1 of his Letter of Employment provided for one month's termination notice; that remuneration of employees as based on job classification and individual performance; and that as at the time of his dismissal he had no outstanding leave days. He further admitted that in June 2010 he was the Supply and Pricing Manager which post he held until January2015; that his job description was to manage costing, invoicing amongst others and plan, manage and optimise supply and demand; that he was also to ensure accurate product costing, sales and profitability analysis; that he had responsibility of invoicing crude oil, raw materials and finished product reports; and that he was required to have good analytical skills for the job. He further admitted that he was responsible for loss to the company if failure was related to his responsibilities.

13. He testified that he sat in a Committee known as Stock Loss Committee, which was for reviewing losses that occurred in various areas especially in respect of petroleum. He testified that he attended the Committee meeting held the 22nd May 2014 which reviewed the loss for the month of April 2014 that affected the profitability of an organisation. He further testified that he sat in another Committee known as the Affiliate Management of Accounts Analysis and Recommendation (AMAAR) whose mandate was to review products, clearing accounts, KPC recommendations, system affiliate reconciliations amongst others.

14. He testified that the email dated 23rd October 2014, which was part of the Claimant's documents, whose subject was Stock Reconciliation Exercise-Preliminary Report was referring to the task of reconciliation at Nairobi terminus depot that was necessitated by a reported stock variation but there was no loss. He further testified that the email dated 17th October 2014 from Robert Nyamu referred to a Forensic Audit conducted by Deloitte which led to a finding in the email by Millicent Onyonyi dated 16th October 2014. He admitted that the Audit Report noted that the irregular movements of book stock between KPC and Oil Libya. That Clause 2.1.1.4 of the Report stated that there were discrepancies amounting to 5.6 Million Litres of AGO (Gasoil Diesel), 800,000 litres of PMS (Super Petrol) and 200,000 litres of IK (Kerosene).

15. He further admitted that the Auditor identified fraudulent shipment through the Engen throughput and the Auditor confirmed that the shipments were received by Engen representative Jediel Muchui. He also admitted that the Report recommended for disciplinary and/or legal proceedings against the culpable individuals. He however testified that the persons implicated in the Audit Report were reporting to the Operations Department and not Supply Department where he was working.

16. He admitted that he was invited to a disciplinary hearing by the letter dated 30th April 2015 which stated that the gross misconduct charges he was facing. He further admitted that he was given an opportunity to be accompanied by a colleague but he waived that right. He contended that he protested short notice given for the hearing but nevertheless agreed to proceed with the hearing on condition that if any new matters were raised he would be given an opportunity to defend himself. He admitted that he never objected to the composition of the disciplinary panel.

17. He further testified that the hearing explored all the allegations made against him and the panel stated that it would not disclose the value of the loss. According to him, the Company had not suffered loss because the panel could not state any loss. He testified that he knew that there was an Oil Loss Committee where he sat and that the industry by a Legal Notice allows nominal loss of up to 0.75%. He however admitted that he never raised the issue during the hearing because the DC comprised his seniors and they ought to have known of the Legal Notice.

18. He testified that he complained of the delay in the decision and that he received a dismissal letter setting out the grounds for dismissal which were different from the charges he faced at the disciplinary hearing. He admitted that he was given a right of appeal but maintained that his appeal was never heard for reason that he was not provided with the documents he had requested for, including the Disciplinary Hearing Report by the DC. In his view he was denied a fair hearing.

19. In re-examination, he testified that the first time he heard of the losses was when he received his summary dismissal letter. He further testified that the disciplinary Report filed on 11th October 2018 by the Respondent did not mention any losses and that the report was on violations and procedures. He maintained that he was not informed how he was linked to the losses. He contended that he was never charged with any criminal offence but contended that he was aware that there are various ongoing cases on the alleged loss of oil products. He further contended that the company wanted to dismiss him because he had problems with General Manager.

20. He concluded by contending the disciplinary panel never recommended for his summary dismissal and prayed for reinstatement because he was willing to continue working for the Respondent. He testified that the dismissal had destroyed his career since he could not secure any employment and as such he resorted to consultancy work. That even the latter undertaking was also not successful due to lack of certificate from the relevant institute.

Respondent's Case

21. Benedicta Karimi Ikiara, Respondent's in-house Legal Counsel testified as Rw1 and basically adopted her Witness Statement filed on 6.3.2019 and the respondent's bundles of documents as her evidence in chief. In brief, she confirmed that the claimant was employed by the respondent until 15.10.2015 when he was dismissed for gross misconduct. That during his employment, the claimant served in various capacities including Customer Service, Supply and Pricing Manager, Supply Manager and finally Sales and Marketing Manager from 1.2.2015. That though the claimant rose through the ranks, his employment record was not impeccable. That on 13.3.1995, he was served with a warning letter for poor driving habits while between April 2003 and

March 2004, while serving as Retail Manager, his performance assessment revealed that he was unable to manage multiple tasks, and he was rigid. Finally, while serving as Sales and Marketing Manager, employees made several harassment complaints against him contrary the respondent's policy on harassment at the workplace.

22. Rw1 further testified that as part of internal controls, the respondent established AMAAR Committee and Oil Loss Committee to review and act upon reported variances between physical stocks and book stocks.

That the said committee highlighted various stock discrepancies between the respondent's book stocks and the physical stocks at KPC in Nairobi. That claimant was a member of the said committees and the said highlighted stock variations were repeated over the years from 2011 to 2013 according to the minutes recorded. As a result the respondent sanctioned an internal audit in July 2014 and a Report was prepared in September 2014 which noted that there were several reconciliation issues with the KPC like KPC's opening balance as per the statement of physical stock held on behalf of the respondent was not agreeing with the respondent's book stocks. That during the said audit, the respondent was trying to reconcile a difference of 4.1 million litres of diesel (AGO) between its book stocks and the physical stocks at KPC Nairobi.

23. Rw1 further stated that the report noted that in April 2013, 200 cubic of Premium Motor Spirit (PMS) was erroneously adjusted by KPC and replaced with the same volume of Automotive Gas Oil (AGO) without correctly following instructions from the respondent. That also on a number of cases, the product transfer quantities by KPC did not agree with those in the respondent's books and action to reconcile the differences took long. That as a result of the outstanding KPC reconciliation issues, the auditors' opinion was that attention was required at the Supply and Distribution Department were the claimant was working and especially the claimant's section which had the mandate to close out KPC reconciliations issues.

24. Rw1 further stated that due to lack of satisfactory explanation for the continuing variances between physical balances for its petroleum stocks and the stock balances for the same in its books of account, the respondent, constituted a Stock Reconciliation Team in October 2014 to carry out a complete verification of the system (ACCPAC) and the physical documents. That the preliminary report of the team found that one of the main causes of the book to physical differences was the fraudulent movement of product out of Nairobi terminal through collusion between the respondent's staff and the respondent's through-put customer's agent. That during the period 2012 to 2014 2,840,731 litres of Gasoil Diesel, 1,103,955 litres of Super Petrol and 650178 litres of Kerosene were fraudulently moved out of the Nairobi Terminal and the documents relating to the said fraud were removed from the respondent's records and the transactions not included in the through put statement at the end of the month.

25. Rw1 further stated that the fraud was done by the Nairobi Terminal Stocks Accountants, Mr. Boniface Wanjau and Daniel Mwiso by inflating the respondent's book stocks by non-existent product as having been returned to the storage terminal (falsified shipment returns) by a through-putter and then made fraudulent actual loadings of physical product against the non-existent inflated book stocks through fraudulent orders by one of the respondent's through-putters, KENGEN Kenya Limited. She contended that although the fraud was by the said accountants and the through-putter, the same could not have occurred and or continued to the magnitude and for the length of time it did without the enabling failures or collusion of others including the claimant.

26. Rw1 further stated that as a result of the said report that there was existence of an irregularity in the respondent's Nairobi Terminal, the respondent instructed Deloitte Consulting Limited to conduct a forensic Audit of Stock Movement at her Nairobi Terminal and a report was prepared in March 2015. That the report revealed variances of 2,897,845, 3,683,442 and 2,160,556 litres of Gasoil diesel, Super Petrol and Kerosene respectively between book stock balances and the physical stocks which represented the estimated stock losses that the respondent incurred between 2012 and September 2014. The report further noted that Boniface and Daniel processed the fraudulent transactions in the respondent's ERP and the ACCPAC, while the through-putter representative

signed off on the respondent's Delivery Note to confirm that the product was received. That the Auditor recommended for disciplinary/ legal action against all the individuals found culpable following the fraudulent through put shipments revealed in the report.

27. Rw1 stated that as the Supply and Pricing Manager, the claimant played a critical role in the internal controls and processes around petroleum stocks management by being a member of AMAAR committee and the Oil Loss Committee which had the responsibility of ensuring controls and deal with stock variances; being the person with supervisory responsibility of oversight , monitoring and close-out review stock movement and reconciliation of stock balances in the respondent's statements with KPC; being the person responsible to develop, review, communicate and implement procedures to guarantee no gaps, loss or irregularities; and being the module owner of ACCPAC Inventory Control accesses, he was responsible for undertaking a proper and adequate review of accesses to ensure that there was no duplication of ACCPAC IC transaction access being maintained by Nairobi Terminal personnel.

28. Rw1 further testified that, as a result of the recommendation by Deloitte, and in compliance with her HR Policies and Procedures Manual, the respondent invited the claimant to a hearing by the letter dated 30.4.2015. That the charges against him were explained to him in the invitation letter and they included the failure to perform his work as set out in his Job description (JD) dated 16.2.2011 and updated in 2014, and also under his Performance Agreement with the respondent executed in 2014; and further the failure or refusal to follow written policies and procedures in the conduct of his job. That the said misconduct related to the period between 1.5.2010 and 31.1.2015 when he was the Supply and Pricing Manager, and the Supply Manager of the respondent.

29. Rw1 further stated that the invitation letter also explained the consequences of the of being guilty of the gross misconduct cited and allowed the claimant to be accompanied by a fellow employee of his choice and to call witnesses during the hearing. That the claimant attended the hearing alone and he never objected to the composition of the Panel but protested the short notice. That when the panel offered to adjourn the hearing, the claimant declined and asked that the hearing be heard the same day. That he made his representations in respect of the allegations made against him contending that the ACCPAC system had poor controls; that the respondent had set up a mitigation process to assess errors and all other discrepancies; that the responsibility of determining discrepancies in third party service provider's statement was moved from Supply Department to Accounting & Finance Department in 2009 but he continued to sign the historical KPC stock reconciliations; and that he failed to raise stock discrepancy issues at the Nairobi Terminal because that was not under his area of responsibility.

30. Rw1 stated that after the hearing, the panel upheld the allegation that the claimant had carelessly and improperly performed work which from its nature was his duty to have performed carefully and properly. In doing so, the panel considered the fact that the claimant signed the monthly stock reconciliation statements relating to respondent's physical stocks held at the KPC Nairobi; that he was collectively responsible together with others over the transactions that affected the respondent's physical stocks held at the KPC Nairobi (KPC Location 6); that he failed to highlight the management of the increasing Nairobi Terminal operation issues; and that the claimant had lacked commitment to the general interest of the respondent and her improvement and instead engaged the panel in passing the buck and lack of team work by stating that Supply and Distribution Department did not have ownership and authority over KPC Terminal 6, which he knew had increasing stock discrepancies.

31. Rw1 further stated that the disciplinary panel recommended that the claimant be served with a first written warning but the respondent dismissed him on ground that she had lost trust and confidence in him after considering the magnitude of the loss

suffered due to the claimant's failure to effectively perform his supervisory responsibility; the length of the period over which the failures and the losses occurred; the claimant's visibility of the stocks discrepancies as highlighted in the AMAAR Committee and the Oil Loss Committee meetings over the extended period; and the claimant's position of accountability, responsibility, and experience. Rw1 contended that the respondent was not bound the decision of the DC that a warning letter be served on the claimant.

32. In cross-examination, Rw1 contended that she was involved in the Claimant's disciplinary hearing but her role was only recording of the proceedings as a transcriber but not as a panellist. She confirmed that she never generated the recommendations by the panellists and that she became aware of the same when the report was handed over to her. She also confirmed that the disciplinary panel recommended for written warning but after review of the report and the recommendations by the HR Department, it decided that the Claimant be dismissed from service and a dismissal letter issued.

33. She contended that the disciplinary procedure provided that the Company is not bound by the recommendations of the disciplinary panel. She further contended that the recommendations were not commensurate to the gravity of the offence committed. She confirmed that both local and corporate members were involved in the Claimant's dismissal process but she was not aware whether the CEO was involved. She admitted that it would not be fair to appeal without being given a copy of the Judgment and proceedings from the DC.

34. She admitted that several of the Respondent's employees represented the Respondent at the Petroleum Institute of East Africa but she was not aware of the Claimant having represented the Respondent at the Institute.

35. She admitted that there were irregularities which were perpetuated by Nairobi terminal accountants who are now facing criminal charges but the Claimant was not charged with any criminal charges. She further admitted that the investigations never made any criminal findings against the Claimant. She also admitted that the findings and recommendations by the disciplinary committee are two separate issues. She however maintained that the company followed fair procedure by dismissing the Claimant.

36. In re-examination, she confirmed that the disciplinary panel constituted two senior managers and that Claimant made no objection to the composition. She maintained that the Claimant only raised the issue of short notice and upon being offered more time he declined and opted to proceed with the case. She further maintained that the Claimant was availed the right of appeal by the letter dated 15th October 2015 and 30th October 2015 and thereafter invited to hearing on several occasions but he declined.

37. She contended that the company procedure under Clause 6 of the HR Manual allows termination without warning and that the finding of culpability was under section 44 of the Employment Act which entitled the employer to summarily dismiss the Claimant. She maintained that the company had lost trust in the Claimant due to his carelessness which led to huge losses.

Claimant's submissions

38. The claimant submitted that he joined the respondent in 1994 and rose through the ranks to the position of Department Manager due to his stellar performance. That on 30.4.2015 he was served with a show cause letter that set out two charges and invited him to a hearing on 6.5.2015 before a Disciplinary Committee (DC). That the decision of the DC was delayed and on 19.9.2015 he wrote a letter of complaint about the delay of his case. That when no verdict was released to him, he wrote the letter dated 10.10.2015 requesting for an early retirement but on 15.10.2015 the respondent served him with a Notice of Summary Dismissal.

39. Aggrieved by the summary dismissal, he lodged an appeal on 23.10.2015 and requested for a copy of the findings and Recommendations of the DC among other documents, which according to him were necessary to mount a successful appeal. However, the documents were never given to him and the appeal aborted forcing him to file this suit.

40. He further submitted that his summary dismissal was unlawful because he was subjected to an unfair process. That the charges set out in the show cause letter were unilaterally changed by the DC in its report after the hearing to his detriment. That the process was unfair because the outcome was delayed from May 2015 to October 2015 forcing him to write a complaint letter.

41. He further faulted the procedure because the recommendation by the DC that he be served with a first written warning as one of the sentences set out in the respondents policy and procedure manual was ignored by the management who enhanced the sentence to summary dismissal without according him a hearing. He contended that the HR manual did not allow the management to depart from the recommendations by the DC.

42. He observed that the departure from the DC's findings was driven by irrationality and disregard of fair process of the Africa CEO based in Dubai who was unfamiliar with matters relating to the case. He relied on ***Mathew Kipkemboi Kitai v postal Corporation of Kenya [2016]eKLR*** where Radido J held that it is unfair for management to overturn the decision of a DC without giving the employee a hearing except where the contract of service allows such power to alter the DC's recommendation.

43. Finally, he faulted the procedure followed because after lodging his appeal against the summary dismissal, he was denied a copy of the DC's report and recommendations plus other documents which were necessary to enable him mount a successful appeal. He contended that due to such denial, his appeal aborted and brought the instant suit. That it was not possible to pursue the appeal without the findings and recommendations of the DC which had already been overturned by the management. That although the defence and the Rw1 alleged that he was supplied with the substance of the basis of the decision, the letter responding to his request for the documents included words, which were not used by the DC in its findings and recommendations. He observed that the requested report by the DC was not given to him until he filed a Notice to produce in this case.

44. As regards the validity of the reason for the dismissal, the claimant submitted that the alleged losses occurred at the respondent's Nairobi Terminal in Industrial Area while he was based in the Supply Department at the respondents Head Office situated at Muthiga. He contended that he had nothing to do with the loss which the respondent's management was always aware of as admitted by the respondent through the documents she produced herein as her exhibits. That from January 2011, the AMAAR committee meetings were chaired by the Managing Director/General Manager and it was attended by Department Managers of the respondent. He therefore submitted that it was not true that he failed to detect the discrepancies in stocks, which was already made known and discussed by the Managers during the AMAAR Committee meetings.

45. He further submitted that the respondent prepared and compiled financial statements for 2011 to 2014 in line with international standards which were signed by her Directors and which reports included inputs from annual physical stock conducted at each of its storage facilities, and which did not identify, state or make references to the losses claimed by the respondent.

46. He further submitted that Petrol, Diesel and Kerosene are volatile and tend to evaporate at normal ambient temperatures experienced in Kenya. That the loss through evaporation is recognised by law through legal Notice No. 196 of 2006 and the loss is compensated to the Oil Companies at 0.5% for Super Petrol, 0.3% for Diesel and 0.25 pipeline losses for all petroleum products.

47. He further submitted that the forensic audit being relied upon by the respondent was not done in line with International Audit Standards (IAS). He observed that, a reconciliation of stock done by KRA found that only 400,000 litres had not been accessed and for which tax had been paid, but the report clarified that the 400,000 litres were still accessible by the respondent.

48. In conclusion the claimant submitted that the respondent had no valid or genuine reason for terminating him because he was working in a different department from the one where the alleged losses occurred, that he executed his duties as per his contract of service and brought to the attention of the management, the stock discrepancies but no steps were taken by the management; and that the respondent has not demonstrate to the court by evidence that the alleged losses continually occurred, and that they were attributable to the claimant's acts or omissions.

49. To fortify the foregoing submissions, he relied on ***Walter Ogal Anuro v Teachers Service Commission [2013]eKLR*** and **Jane Samba Mukala v Ol Tukai Lodge Limited [2010]LLR 255 (ICK) (September, 2013)**.

50. On the other hand, he contended that his summary dismissal seriously affected his credibility and reputation in the oil industry in Kenya. That since the dismissal, he has not been able to secure any other job and his chance of engaging in consultancy work which has also failed because his application for membership in the Petroleum Institute of East Africa, (PIEA) has since 2017 not been processed. Consequently, he contended that he has suffered serious financial crisis in supporting his family.

51. Finally, he contended that the respondent was served with notice to produce his employee performance records, Records of other disciplinary cases, and report of the alleged losses but she failed to produce. He contended that the withheld information would have demonstrated to the court that he was an excellent performer and that he was only discriminated and dismissed for no genuine reason. He urged the court to draw an adverse inference from the respondent's failure to comply with the notice to produce. He relied on ***Peter* Gichuki Kin'ara Vs IEBC & 2 others [2013]eKLR** to support the foregoing submission for adverse inference.

Respondent's submissions

52. The respondent submitted that it is a fact that the claimant was her employee from 1994 to 15.10.2015 when she dismissed him for gross misconduct committed while serving as the Supply and Pricing Manager between May 2010 and June 2012, and while serving as the Supply manager from July 2012 to January 2015. She contended that the dismissal was lawful within the meaning of section 45 (2) of the Employment Act because it was grounded on a valid reason and a fair procedure was followed.

53. As regards the procedure, the Respondent submitted that the Claimant's disciplinary process was governed by section 41 (2) of the Employment Act and the Human Resources Policies and Procedure Manual, which formed part of the claimant's contract of service. She argued that in compliance with this, the Claimant was invited to a disciplinary hearing on 6th May 2015 vide the show cause letter dated 30.4.2015, which informed him of the purpose of the hearing and he was given an opportunity to respond to the allegations. That the claimant was further given the right to call another employee to accompany him but he attended alone. That he was asked to avail any documents he wished to rely on his defence and if he needed to be availed with any by the respondent, to make a request.

54. She denied the claimant's contention that the charges were changed during the hearing from the ones cited in the show cause letter and submitted that she made only 2 allegations against the Claimant which were based on 4 grounds. That she only sought the Claimant's response to the specific charges and communicated in the invitation letter the 4 grounds or basis of the charges. That on the day of the hearing he alleged that he was given a short notice and when more time was offered he refused and said he was ready

to proceed. That the claimant was given sufficient time to present his defence and thereafter he was availed the notes of the hearing and he signed to confirm that they were accurate. She further submitted that the delay in communicating the decision of the DC did not prejudice the claimant because he remained in office working and earning his emoluments until his dismissal on 15.10.2015. She concluded by contending that she has proved that the claimant was given a fair hearing as required by section 41 of the Act. she relied on **Antony Mkala Chitavi v Malindi Water & sewerage Co. Ltd [2013] e KLR** to fortify the foregoing contention.

55. As regards the reason for the dismissal, she submitted that she was justified to summarily dismiss the Claimant pursuant to sections 43 (2) of the Employment Act as the allegations against the Claimant were valid and they related to his role as the Supply & Pricing Manager as set out in his Job Description (JD) dated 16.2.2011, and not the role of Sales and Marketing Manager which he held at the time of dismissal. She contended that under the said JD, the claimant had the following roles among others:

a. Supervisory roles over 6 non-managerial employees in the Supply and Distribution Department including supervisory responsibilities for oversight, monitoring, close out review of stock movements including booking and reconciliation with third party service provider statements and review of account balancing close out;

b. Guide the development, periodic review, communication and implementation of procedures in line with best practices to cover all supply related processes to ensure no gaps, loss or irregularities;

c. Manage issuing of ACCPAC book stocks to individual plants and corresponding issuance of KRA COSIS entries to enable physical access by plants and review account balancing close-out.

56. She submitted that at the conclusion of the disciplinary hearing the DC established that in as much as there was a collective responsibility of the Kenya Pipeline Corporation (KPC) Location 6 reconciliation, the Claimant approved the reconciliations and did not raise concerns of the increasing NBIT operations issue. Further, the DC found that the Claimant was expected to be diligent in overseeing all operations and processes under his watch since he was the one entrusted with the oversight of the ACCPAC system which was used for the fraudulent stock adjustment and shipment returns and approving of the monthly stock reconciliations. He was therefore faulted for signing off the anomalous movement of stock within the ACCPAC system.

57. She further submitted that, in view of the foregoing conduct by the claimant, the DC found that the claimant had carelessly and improperly performed his work which from its nature was his duty to, under his contract to have performed carefully and properly. As a consequence of above finding, the respondent genuinely believing that the claimant had misconducted himself as such, and proceeded to dismiss him summarily. She therefore contended that, as required by section 43 of the Employment Act, she has proved that there existed a valid reason for dismissing the claimant at the time she dismissed him and that it is that reason that led her to dismiss him.

58. In support of this argument she relied on this court's decision in **Mwanajuma Juma Kunde v KAPS Municipal Parking Services Ltd [2013] e KLR** and Lord Denning's decision in **British Leyland UK Ltd v Swift [1981] I.L.R 91** where it held that the test of whether dismissal was warranted should be hinged on the objective test, loosely referred to as range of reasonable responses test and that the court should eschew substituting its views for that of the of a reasonable employer or re-enact the internal the internal disciplinary process.

59. She further relied on the House of Lords decision in **Polkey vs A.E Dayton Services Limited [1987]UKHL 8** where it was held that in the case of misconduct , the employer will normally not act reasonably unless he investigates the complaint fully and

fairly, and then hear whatever the employee wishes to say in his defence or in explanation or mitigation. She contended that she acted fairly in this case by carrying out internal audit and investigations and finally a forensic audit all of which revealed variances between book stock balances and the physical stocks as at December 2012,2013 and 2014 respectively and the claimant continued to sign the reconciliation reports as and when they fell due while fully aware that there were anomalies in the stocks.

60. As regards the appeal by the claimant, she averred that the HR Manual only provides that in filing an appeal an employee is only limited to filing an appeal together with any relevant information which may not have been fully taken into account by the management. That the HR Manual does not allow the introduction of new information or evidence not considered by management. That the claimant had been furnished with all the documents that he intended to rely on during the disciplinary hearing. She further submitted she invited the claimant for hearing of his appeal severally, and even allowed him to be accompanied by his lawyer, but he declined.

61. On the departure from the DC's recommendation of First Warning and summarily dismissing the claimant, the respondent submitted that the Claimant never pleaded that issue in his pleadings and as such it should therefore be disregarded. She relied on the decisions of the Court of Appeal in **David Sironga Ole Tukai v Francis Arap Munge & Others Ciilp Appeal no. 76 of 2014** and **Independent Electoral and Boundaries Commisio & another v Stephen Mutinda Mule & 3 Others [2014] eKLR.**

62. She argued that the HR Manual required the Respondent to administer disciplinary action matching the severity of the offence or the problem. That it recognized gross misconduct as a serious offence warranting the summary dismissal without previous warning and it did not provide for the issuance of warnings when an employee was found liable for gross misconduct. That under section 44(4) (c) of the Employment Act, the claimant was liable for summary dismissal for the offence he committed. That she never varied the finding of guilty by the DC but only the sentence. She contended that **Mathew Kipkemboi Kitai case** is not binding on this court and the facts are distinguishable from this case because the HR manual herein unlike the in the cited case provides for summary dismissal without first serving warning letter.

63. Finally, on the issue of the reliefs sought, he submitted that this Court lacks requisite jurisdiction to award reinstatement as section 12 (3) (vii) of the Employment and Labour Relations Act only authorizes the Court to award a prayer of reinstatement within 3 years of dismissal of an employee. She relied on the decision in **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** .

64. She further submitted that the Claimant has failed to meet the threshold of drafting constitutional petitions as set in the case of **Anarita Karimi Njeru v the Republic (1979) KLR 154** by failing to particularize the manner in which his rights had been violated and not tendering any evidence to show the alleged violation of his right to fair labour practices.

65. As regards the claim salary and other benefits before the mandatory age of retirement, she averred that the law does not provide for salary until retirement as a remedy for wrongful dismissal. In support of this position she relied on **Alphonce Maghanga Mwahanya v Operation 680 Limited [2013] eKLR** and **D.K Marete v Teachers Service Commission [2013] e KLR.**

66. She also submitted that the prayer for salary on promotion based on the Respondent's Compensation & Benefits Policy is baseless as the Respondent did not issue any letter to the Claimant regarding his salary increase on promotion to the position of Sales and Marketing Manager.

67. On the other hand, she submitted that the claim for redundancy benefits was baseless because the termination was not on account of redundancy but summary dismissing.

68. Finally, she submitted that the Employment Act does not provide for general damages as a remedy for wrongful dismissal and unfair termination and relied on the Court of Appeal decision in **Cyrus Nyaga Kabute v Kirinyaga County Council Civil Appeal No. 29 of 1985**.

69. In conclusion, she submitted that the Claimant has not proved on a balance of probability that his dismissal was as unfair as provided under section 45 (1) of the Act, and that he did not plead for remedies under section 49 of the Employment Act.

Claimant's rejoinder

70. In his Supplementary Submission, the Claimant submitted that the basis for determination of the alleged losses in the Forensic Report was not supported by any Court testimony including that of its author, and further, the report was inconclusive with no clear declaration of the alleged losses.

71. He submitted that no appeal ever took place on account of the Respondent's refusal to furnish the Claimant with a copy of the disciplinary findings and recommendations. In addition, the failure to supply him with a copy of the disciplinary findings and recommendations was a violation of his right to access information as provided under Article 35 (1) (b) of the Constitution.

72. He further submitted that the Respondent had unjustly withheld the Disciplinary Hearing Report until one year after the claim had been instituted this therefore renders the allegation of departure from pleadings as a complete nugatory.

73. He submitted that the prayers sought are fair and reasonable having in mind the circumstances and conduct of the case. He also relied on the court's finding in **D.K. Njagi Marete v Teachers Service Commission**. He submitted that should the Court find that the provisions of Section 12 (3) (vii) of the Employment and Labour Relations Court Act holds sway he urged the Court to grant the Claimant's prayers in the alternative.

Analysis and determination

74. It is undisputed that the Claimant was employed by the Respondent from 1st September 1994 until 15th October 2015 when he was summarily dismissed for gross misconduct. The issues for determination are:

a. Whether the dismissal of the claimant was unfair and unlawful.

b. Whether the Claimant is entitled to the reliefs sought

a. Whether the dismissal of the claimant was unfair and unlawful

75. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if it is not grounded on

valid and fair reason(s) and/or if done without following a fair procedure. A valid and fair reason is one that relates to the employees conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refers to, but not limited to according the employee a fair hearing before termination. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests with the employee who alleges that he was so terminated, while the burden of justifying the reason for the termination rests with the employer. The said burden of proof does not shift unless the employee proves on a balance of probability that the termination did not pass the muster of substantive and procedural fairness set out under section 45 of the Act.

Reason for the summary dismissal herein

76. The reason cited for the dismissal of the claimant was conveyed by the letter dated 15.10.2015 which stated as follows:

"A final decision has been made to summarily dismiss you from your employment on the following grounds:

1. You carelessly and improperly performed work which from its nature was your duty, under your contract, to have performed carefully and properly; and

2. on account of the above failures on your part, the company lost significant volumes of product averaging almost 3 million litres a year between the years 2012 and 2014.

The above reasons have therefore led the company to conclude that it has lost trust and confidence in you. As a result, a decision has been made to summarily dismiss you from your employment with the company with effect from 15th October 2015."

77. The claimant denied the validity of the said allegation and maintained that he was being punished for other people's misdeeds which did not fall within his JD and his department since 2009 when it was transferred to Operations Department. He further contended that he had a stellar performance throughout his tenure at the respondent and that he carefully did all his roles under his contract of service. He also contended that the respondent was fully aware of the variances in the oil stocks at all the material times to this case because the MD/ General Manager chaired all the AMAAR Committee and the Oil Loss Committee whose mandate was review product variances for reconciliation of book stock balances and the physical stock balances with KPC; and review losses at various areas respectively.

78. The respondent contended that the claimant failed to perform or carelessly performed his duty which under his contract was his duty to perform carefully. She blamed him for failing to do periodical reconciliation in order to close out variances in stock balances highlighted by finance, AMAAR and Oil Loss Committees. That such variances remained unresolved for extended period contrary to his JD and Performance Agreement. She further blamed him for failure toreview ACCPAC system access which ended up being used for fraudulent transactions to the detriment of the company.

79. I have carefully considered the evidence and the rival submissions. It is clear that the there was a problem of unreconciled stocks between the book balances and the physical stock balances at Location 6. The claimant contended that he did his part to reconcile and close out all stocks variations highlighted by AMAAR, Oil Loss Committee and the PMI according to his JD and the Performance Agreement and blamed the Operations Department for the mess in the unreconciled stocks at the Location 6. The DC agreed with the claimant's contention in its Disciplinary Hearing Report dated 22.7. 2015 when it made the following finding:

“4. Supply was not the custodian of Location 6 and the S&P Manager clarified that approval of the Reconciliation was historical based on Supply having most of the issues. Supply cannot be responsible for reconciling non-supply items.”

80. With the foregoing finding the DC acquitted the claimant of the charge of failure or refusal to follow written policies and procedures in the conduct of his duty. Having found that the unreconciled stocks in issue were not falling within the claimant’s Department of Supply and that he had followed the written policies and procedures of the company during the performance of his duties, the court finds that the DC had no basis to convict him of the charge of careless and improper performance of work because it was not his duty under the contract to perform that work of reconciling “non-supply items”. A reasonable employer in the circumstances of this case, in my view, cannot punish his employee, where it clear that the employee had no contractual duty to perform a duty he did not do or which he did not perform properly.

81. On the other hand, the claimant’s evidence that the management was aware of the variances in stocks through the AMAAR and Oil Loss committees has not been rebutted by the MD/ General Manager who were said to have been chairing the said committee meetings where oil loss and variances were a constant agenda. As regards the ACCPAC system access and fraudulent use, the claimant’s evidence that the system could easily be manipulated was corroborated by the Forensic Report at Paragraph 5.3.1.17 which found that there were adjustments which revealed significant weaknesses in the posting of adjustments into the ACCPAC system and recommended that the Respondent ought to strengthen the controls around posting of adjustments. The claimant’s explanation was further corroborated by the DC in its finding number 3 and recommendation number 5 of its report, thus:

“3. There is a fundamental ERP issue as ACCPAC access allows users to make stock adjustment which may be considered normal for business, but can be fraudulent.”

“5. The Inventory Module should be reviewed to mitigate the system flaws.”

82. In view of the said findings and recommendations by the DC the court finds that the JD and the Performance Agreement relied upon by the defence cannot be a proper basis for the court to find that the claimant was responsible for the failures by the Operations department to manage its stocks at Location 6. It was not the claimant’s duty under his contract of service to properly and carefully reconcile “non-supply items”. This opinion is fortified by the fact that none of the reports produced here whether internal investigations or internal audit or Forensic Audit implicated the claimant for any wrong doing with respect to stocks in Location 6.

83. For example, the Forensic Audit Report by Deloitte recommended that Boniface, who was a former employee, and Daniel be held accountable for fraudulent manipulation of stock balances and that the Respondent does institute disciplinary proceedings against the two staff and all others who were found to be culpable. While the Claimant was at the time the Supply& Pricing Manager he was not directly mentioned in the reports and as rightly averred in the Claim, the Forensic Report at Paragraph 5.3.1.17 found that there were adjustments which revealed significant weaknesses in the posting of adjustments into the ACCPAC and recommended that the Respondent, and not the claimant or his Supply Department, ought to strengthen the controls around posting of adjustments.

84. In view of the matters analyzed above the court finds that the claimant has proved on a balance of probability that there was no valid and fair reason to justify his summary dismissal at the time when the respondent dismissed him. The court believes that due to the said lack of a valid reason, the DC eschewed from recommending for his dismissal. Under section 43 of the Employment Act, in any legal proceeding challenging termination as unfair, the employer has the burden of proving that the reason for termination

existed at the time when he terminated the employee and it is that reason that led to the termination, and in default the termination is unfair within the meaning of section 45 of the Act.

85. After sifting through the evidence presented, and after exercising all fairness, this court is of the considered view that the evidence tendered herein by respondent fell short discharging the said burden of proving a valid reason for summarily dismissing the claimant on a balance of probability. Although the documentary evidence tendered was not disputed, it is worth noting that, in my opinion, that they painted the picture of a general lapses in the management of the respondent's stocks, and a weak ACCPAC systems which could easily be manipulated to the detriment of the company by its own staff under the cover of its management who chaired the committees which were set up to deal with the problem but turned a blind eye for years.

The procedure followed before the termination

86. As regard the procedure, the jurisprudence emerging from this court and the Court of Appeal is that before terminating an employee for misconduct, the employer must comply with Section 41 of the Employment Act, 2007 which provides as follows:

"41(1) Sub*ject to section 42(1), an employer shall, before* terminating the employment of an employee, on the grounds of misconduct … explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee …hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make."

87. Applying the evidence on record tendered by both parties to the said provision of the law, I find that the respondent has proved on a balance of probability that a fair procedure was followed before the dismissal. The claimant admitted that he was invited to a disciplinary hearing on 6.5.2015 vide a show cause letter dated 30.4.2015. That the said letter set out the charges to be answered and granted him the right of being accompanied by another employee of his choice. Considering the content of the signed notes from the hearing, the clamant was given sufficient time and material to defend himself and in the end confirmed that he had adequately done so.

88. However, the court faults the procedure adopted by the respondent in dealing with the claimant's appeal. I agree with the claimant and also RW1 that the right of appeal could only be exercised effectively upon being granted his request for the DC's Disciplinary Hearing Report for him to know the decision and the basis upon which the decision was made. However, the same was not availed to him and instead the employer persisted in inviting him to a hearing. In my view the said denial amounted to, not only, breach of contract, with regard to the procedure s in the HR Manual, but also, unfair labour practice by the respondent and which catapulted the dispute to the court prematurely. The right to fair disciplinary hearing under section 41 of the Act must be constructed to include the hearing of the employees appeal after the separation.

89. The forgoing view is fortified by **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where

Mbaru J held:

"Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only." [Emphasis Added.

90. As regards the issue of variation of the sentence from a warning to summary dismissal, it is a fact that the DC in its Disciplinary Hearing Report dated 22.7.2015, made a recommendation that the Claimant be issued with a First Written Warning but the respondent enhanced the sentence to summary dismissal. I however will not go there because the court was not invited by the parties through pleadings to determine that issue. The claimant having noticed that the said variation matter after the said report was filed in court on 11.10.2018 chose not amend his pleadings in order for the defence to respond. It is a cardinal principle of fair hearing that parties are bound by their own pleadings and the court should shy away from any invitation to deal with matters that falls outside the four walls of the pleadings before it.

Declaration

91. The Respondent submitted that the Court ought not to declare that there was a violation the Claimant's right under Article 41 of the Constitution since this was not a petition. However, Article 23 of the Constitution provides that the Court can issue an order for declaration of rights should there be a violation. In any case before ELRC (Procedure) Rules, 2016 where published, there was no clear guidelines on how litigants were to approach this court for constitutional references and the then Rules forbade objections to pleadings for want of form. Consequently, I dismiss that objection for want of form.

92. The respondent raised a further objection that the alleged constitutional violation does not meet the threshold of drafting constitutional petitions as set out by **Anarita Karimi Njeru v Republic [1979] KLR 154** in that no particulars have been pleaded with clarity. I however dismiss that objection also because the said particulars are pleaded in paragraph D on page 18 of the Claim and responded to by the respondent in paragraph 70 of the defence.

93. The court has already made a finding of fact that the manner in which the respondent mishandled the claimant's appeal was not only tantamount to breach of his contract of service but also unfair labour practice on her part. I therefore now make declaration that the claimant's his fundamental right to fair labour practices as enshrined under Article 41 of the Constitution was violated and infringed by being denied the DC's Disciplinary Hearing Report to enable him mount an appeal as provided under HR Manual.

94. For the reason that the claimant's fundamental right to fair labour practices were violated and also the reason that the respondent had no valid and fair reason for dismissing the claimant, I make further declaration that the summary dismissal of the claimant was unjustified, unlawful and unfair. I however decline to declare the dismissal *void ab initio* because it is a fact that, it was done and the parties have been separated for over three years now. Granting the said declaration would be tantamount to ordering reinstatement after the lapse of three years from the date of the separation which is barred by section 12 (3) (vii) of the ELRC Act.

Reinstatement

95. For the foregoing reason that the law bars reinstatement after the lapse of 3 years from the date of separation, I dismiss the prayer for reinstatement.

Alternative relief of anticipated emoluments and benefits sum of Kshs. 163,201,555.00

96. The Claimant prayed for anticipatory salary, allowances and other benefits that he would have earned where it not for the said unlawful dismissal totaling to Kshs. 163,201,555.00. There is however no basis in law, contract of service or judicial precedents upon which the claims stand and consequently it is dismissed entirely. It is not in the public policy to pay employees for no work done after separation. Likewise, it is trite that fringe benefits cease upon termination of employment relationship unless the employer in her discretion extends the same to former employee after the separation which is not the case herein.

97. The foregoing view is fortified by **D.K Marete v Teachers Service Commission [2013] eKLR** where Rika J held that:

“What remedies are available to the Claimant" This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. In Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others v. Nairobi City Water & Sewerage Company Limited [2013] e.KLR and the unreported Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East Africa

Limited, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy.”

Dues payable on lawful termination of kshs. 27,584,249

98. The claimant prayed for a total of kshs. 27,584,249 made up of one-month salary in lieu of notice, severance pay at the rate of one-month gross pay per year of service, seniority equivalent to six months gross pay, half gross pay for each between the current year and the mandatory age of retirement (60 years), ex-gratia pay equivalent of two months gross pay. He based the above claim on the allegation that the respondent has a policy of paying her employees who are terminated lawfully or declared redundant. The said policy was no substantiated by evidence and as such it remains a mere allegation.

99. Be that as it may, the court finds that the claimant having been unlawfully terminated, is entitled to the prayer for one month salary in lieu of notice as prayed being kshs.759,635.

Remittance of tax to the Kenya Revenue Authority

100. This claim lacks particulars and proof and as such it is dismissed.

General Damages

101. General damages are both discretionary and compensatory relief. In paragraph D (vi) of the Claim the claimant pleaded that he is entitled to reinstatement or compensation by general damages for the respondent's unconstitutional, unlawful and unfair acts or omissions.

The court has already found that the dismissal of the claimant was unfair and unlawful and that his fundamental right to fair labour practices was violated by the respondent through denial of disciplinary hearing report to enable him mount his appeal against the dismissal. Under section 49 (1) read with section 50 of the Employment Act, the court has jurisdiction to award compensatory damages to an employee whose employment was terminated unfairly. The quantum of damages under the said provision is capped at 12 months' salary for unfair termination. Considering that the claimant worked for the respondent for over 20 years, that the court found him innocent of any wrong doing and because he has since the unfair dismissal in 2015 not secured any other job, I award him the maximum compensation of 12 months' gross salary for the unfair termination under section 49 (1) (c) of the Act.

Conclusion and disposition

102. I have found that the summary dismissal of the claimant from employment by the respondent was unfair and unlawful because it was not grounded on a valid and fair reason and also because the claimant was not accorded a fair hearing on his appeal. I have further found that the refusal by the respondent to supply the claimant with the disciplinary hearing report to enable him mount his appeal to impugn the unfair dismissal amounted to breach of the contract of employment and also an affront to his fundamental right to fair labour practices. Finally, I have found that the claimant is entitled to an award of one-month salary in lieu of notice and compensation for unfair termination of his employment. Consequently, I enter judgment for the claimant in terms of the declarations made herein above in addition to and the following:

One-month salary in lieu of notice……kshs. 759,635

Twelve months salary compensation…….. kshs. 9,115,620

Total **kshs. 9,875,255**

103. The Claimant will also have costs plus interest at courts rates rate from the date hereof but the sum awarded above is subject to statutory deductions.

Signed, delivered, date at Nairobi the 20th day of September, 2019

ONESMUS MAKAU

JUDGE