



**Kinuka v Powermax General Electrical Merchants Limited (Cause 1996 of 2017) [2024] KEELRC 1754 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1754 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1996 OF 2017  
NJ ABUODHA, J  
JULY 5, 2024**

**BETWEEN**

**BEATRICE KAMENE KINUKA ..... CLAIMANT**

**AND**

**POWERMAX GENERAL ELECTRICAL MERCHANTS  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed her Memorandum of Claim dated 15<sup>th</sup> September, 2017 and pleaded inter alia as follows: -
  - a. The Claimant was engaged as a Human Resource /Administration Manager by the Respondent vide a letter dated 20<sup>th</sup> February 2013 and was placed under 3 months' probation commencing 18<sup>th</sup> February 2013 and her consolidated salary was Kshs. 30,000/= per month
  - b. That due to her exemplary performance the Claimant was later confirmed as the Human Resource and Administration Manager vide a letter of appointment dated 6<sup>th</sup> May 2013 which position she held for 4 years.
  - c. The Claimant's appointment was reviewed by the Respondent at various intervals and her consolidated salary increased at various intervals due to her exemplary performance and her consolidated salary increased to Kshs 80,000/= vide a letter dated 25<sup>th</sup> June,2015. That in the said letter the Claimant was praised for being a hard worker, disciplined and committed to her work.
  - d. That during her tenure, the Claimant remained a diligent, obedient and loyal employee who dedicated her skills, time and energy to her work and zealously served the Respondent with unmatched honesty and professionalism.



- e. That she was never questioned on the mode of performance of her duties nor issued with a warning letter complaining of the manner she discharged her duties during her engagement with the Respondent. That she carried out all instructions given by her supervisors.
- f. The Claimant averred that on or about 19<sup>th</sup> May 2017, she was summoned to the Director of the Respondent and falsely accused of failing to issue a warning letter to one Mr Eric Boro who was a stock auditor with the Respondent and who had been accused of pilferage and loss of the Respondent's stock and the Claimant was put under pressure to tender her resignation allegedly on grounds of failure to obey a lawful command by a person placed in authority, being the Director.
- g. The Claimant averred that she resisted the illegal attempts by the Director to falsely accuse her in an elaborate and well calculated ill-mentioned scheme to malign and force her out of her employment upon which the said Director purported to summarily dismiss her.

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The claimant averred that the said Director of the Respondent then immediately proceeded to summon a security officer in the employ of the Respondent as well as another employee who the Director instructed to accompany the Claimant to her office and instructed the Claimant to collect her personal belongings from her desk. The said Director then snatched the Claimant's official mobile phone issued to her by the Respondent.

- i. The Claimant averred that the Respondent's conduct while illegally kicking the Claimant out of her office in full view of her colleagues and juniors was conducted with utter contempt and in a humiliating manner meant to embarrass and ridicule the Claimant and a violation of the *Employment Act*.
- j. The Claimant further averred that prior to the illegal and unfair summary dismissal by the Respondent, the Claimant in her capacity as a Human Resource and Administration Manager had intended to issue a notice to show cause on one Eric Boro on why disciplinary action should not be taken against him relating to accountability and losses on Respondent's goods.
- k. The Claimant averred that when she had prepared the letter and shared the same with the Respondent's Director, Mr. Samuel Njau, he however intervened and instructed the Claimant not to issue it until he issued further instructions.
- l. The Claimant averred that the Respondent's Director was later to turn around and falsely accuse the Claimant of failure to follow his orders to issue the warning letter.
- m. The Claimant averred that prior to the illegal termination of her services, the Claimant was not given an opportunity to defend herself and/ or tender any evidence in support of her case. She was intimidated, humiliated and not offered a fair hearing.
- n. The Claimant averred that having been forcefully evicted from the Respondent's premises without good cause or reasons vide email correspondence dated 26<sup>th</sup> May 2017 and letter dated 30<sup>th</sup> May 2017 tried to inquire on the fate of her job but did not receive any response.
- o. The Claimant averred that on or around 6<sup>th</sup> June 2017, the Claimant received a computation of her terminal dues from the Respondent which only computed payment for leave days and salary for month of June but failed to provide the Claimant with reasons for her summary dismissal.



- p. That the decision by the Respondent to summarily dismiss her from employment was grossly unfair, unlawful and in contravention of Article 41 of *the Constitution* of Kenya, sections 44 and 45 of the *Employment Act*.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. A declaration that the dismissal of the Claimant by the Respondent was wrongful, unfair and unlawful.
  - b. Salary in lieu of Notice- Kshs. 80,000/=
  - c. 12 months compensation for wrongful, unfair and unlawful dismissal.
  - d. Certificate of service
  - e. General and exemplary Damages
  - f. Interest on a b and c at Court rates
  - g. Cost of the suit
3. The Respondent filed its Statement of Defence dated 30<sup>th</sup> October,2017 and averred inter alia as follows;
- i. The Respondent averred that the Claimant had been warned severally for failing to follow Labour Laws in dealing with members of staff.
  - ii. The Respondent averred that its Director summoned her to his office after failing to receive a warning letter after she had unprocedurally sacked one Mr. Erick Boro.
  - iii. The Respondent averred that the Claimant walked out of the meeting with the Company managing director and left the building without anyone directing her to leave.
  - iv. The Respondent further averred that the Claimant walked out and deserted/ absconded from duty, from 19<sup>th</sup> May 2017 without any plausible reason forcing the Respondent to summarily dismiss her.
  - v. The Respondent averred that the summary dismissal was done in accordance with the Law and was the only remedy in the circumstance.
  - vi. The Respondent further averred that the Claimant was in violation and breach of her employment contract.
4. The Claimant on the other hand filed her reply to the statement of Defence dated 15<sup>th</sup> November,2017 and averred that the said defence was diversionary, an afterthought and an attempt to invent a ground to justify her dismissal. That the said dismissal was not carried out in accordance with the law as alleged by the Respondent.

### **Evidence**

5. The Claimant's case was heard on 17<sup>th</sup> April, 2023. She adopted her statement and documents filed in court as her evidence in chief and further testified that she was employed by the Respondent as HR and Admin Manager. Her duties included hiring, recruitment, personnel record management among others. CW 1 testified that her performance was exemplary which was acknowledged by her employer through salary increment. That she had no disciplinary incidents.



1. It was her evidence that on 19<sup>th</sup> May 2017 she reported to work as usual and had a series of meetings when at around 11 am she was told that the Director was calling her. When she went she found the Director alone. He pulled a letter from his drawer and asked her to sign. She requested to read it first before signing but the director insisted on her signing before reading it. It was a warning letter accusing her of not professionally discharging her duties. She refused to sign the letter before reading it and understanding it. The director therefore called security who took her to her office and asked her to clear what was hers. It was her evidence that she was thereafter chased from the premises and told never to appear at the Respondent's premises.
2. It was the Claimant's evidence that she thereafter called the director who never responded. She also wrote an email and a letter which were never responded to. She was later called by the Secretary to go collect a letter from the Director's office. That the said letter was a summary dismissal in which she was accused of absconding duties.
3. CW1 testified that she followed the right procedure while terminating the services of Eric Boro. The said Eric was summarily dismissed when she had just been employed after stock was found missing. According to the claimant, her termination was carried out in a traumatic and embarrassing manner.
4. In cross examination CW1 confirmed that her duties were as previously stated in examination in chief. She further confirmed that she was involved in the termination of Eric and that she did not submit a report with summary dismissal letter.
10. CW1 confirmed that she did not have any previous warning letter and that she did not refuse to sign the warning letter but just wanted to read it before signing. She further confirmed that she sent email to the Respondent enquiring about her work to which she never got response. She was only called to go pick her dismissal letter and that she worked entire month of May and was paid 6 days in June.
11. In re-examination CW 1 clarified that she was paid salary and leave dues of about Kshs 94,000/= and that she was not paid in lieu of notice or issued with termination Notice.
12. The Respondent's case on the other hand was heard on 5<sup>th</sup> October, 2023 with the Operations Manager of the Respondent testifying. RW1 adopted his statement of 2<sup>nd</sup> October, 2023 and the Respondent's documents filed in court earlier as his evidence in chief. He further testified that the Claimant was employed in May 2013 and one of her duties was recruitment and management of employees. According to him the claimant did not perform well and that in November 2016 she dismissed a staff without following labour laws.
13. RW1 further testified that the Claimant was issued with a warning letter and she refused to take it. She instead went to her office and collected her belongings and left the premises. After three days they called her and she never responded. They subsequently notified the labour office of her absence. After one week, the claimant came back inquiring about her job but the position had been filled. It was his evidence that the Claimant was never evicted or chased from her office and that she was paid all her dues after termination.
14. In cross examination RW1 confirmed that he had worked for the Respondent since August 2013. He joined as an intern and in 2015 was issued with a contract. It was further his evidence that he did not know how much the Claimant was earning at the time she left the Respondent. He guessed her last salary as Kshs 80,000/= per month.
15. RW1 denied the fact that the Claimant was a good worker. He confirmed that there were several incidents of discipline against the Claimant. Questioned about the Eric Boro termination letter he



stated that the same was signed by two parties. The other signatory was the operations Manager. The company had termination policy where the two signatories signed termination letter stating it was a safety mechanism. The Operations Manager relied on information from HR. He confirmed that they did not produce the HR policy before the court.

16. RW1 stated that the matter of Eric's dismissal was raised six months later because Eric reported the issue to labour office and that the Claimant was not issued with any earlier warning over the incident of terminating Eric. That there was discussions between HR and Eric over payment of his dues where HR had to clear the issue before payment was done. No disciplinary hearing took place over the Claimant because she was not around and was not receiving calls.
17. RW1 confirmed that the Claimant wrote an email enquiring about her job and that she walked out of the meeting and was not forced out. They hired someone after one week due to the sensitivity of the office.
18. RW1 confirmed that the Claimant signed staff clearance form. That they notified labour office of the Claimant's absconding of duties but did not write a similar letter to the claimant.
19. In re-examination RW1 clarified that the Claimant absconded duty from 19<sup>th</sup> May, 2017 and it was captured in the dismissal letter. That they notified labour office on 22<sup>nd</sup> May, 2017 and the Claimant continued absconding duties. That the dismissal of Eric was not the only one since the dismissal letter alludes to other cases of dismissal and failure to follow staff procedures.

### **Claimants' Submissions**

20. The Claimant filed written submissions dated 3<sup>rd</sup> November, 2023. On the issue of Whether the Claimant committed gross misconduct to warrant dismissal from employment the Claimant submitted that it was not in dispute that she was summarily dismissed by the Respondent on 5<sup>th</sup> June, 2017.
21. The Claimant submitted that the law on summary dismissal was provided for under Section 44 of the *Employment Act*. The section enumerates circumstances under which an employee was considered to have committed gross misconduct. It was the Claimant's submission that the Respondent vide a letter dated 5<sup>th</sup> June 2017 listed the grounds upon which it claimed the claimant had breached as the basis to dismiss her.
22. It was the Claimant's submission that the first ground for the basis of dismissal of the Claimant was failure to follow the right procedures when sacking Eric Boro. The Claimant submitted that from the perusal of the dismissal letter, this ground seemed to be the main ground for her dismissal.
23. The Claimant thus submitted that in her letter of employment, there was a document referred to as office standing orders issued by management from time to time and that she was supposed to familiarize herself with these standing orders. However, according to the claimant, the respondent's witness in cross-examination confirmed that the Respondent did not have in place an existing "standing order" which allegedly formed the basis for the Claimant's dismissal for non-compliance therewith.
24. The Claimant further submitted that during the hearing of the case, no such "standing order" was tendered in evidence. It was therefore the Claimant's submission that it was unfair and unjust for the Respondent to summarily dismiss an employee on a vague, unknown and unsubstantiated procedure. That the Respondent did not point out the exact clause of the standing order breached by the Claimant.



25. The Claimant further submitted that the burden of demonstrating that there was a set procedure or standing order or code of conduct in the operations rests with the employer. In addition, the Claimant relied on Section 10(7) of the Employment Act to submit that the employer had a duty to prove the existence of a term which it claims was breached by an employee to warrant disciplinary proceedings.
26. The Claimant submitted that the Respondent claimed that she was guilty of gross misconduct by failing to “follow the right procedures” when she allegedly sacked Eric Boro yet no evidence was placed before court to demonstrate what “right procedures” were.
27. The Claimant further submitted that the reasons advanced by the Respondent as basis of dismissal were vague, general and unclear and invented to justify the unlawful and wrongful dismissal.
28. The Claimant further submitted that there was no appeal mechanism in the Respondent’s organization such that even if the said Eric Boro was irregularly dismissed he could not appeal. The Claimant as well was not offered any opportunity to appeal her dismissal hence the Respondent had a set pattern of terminating contracts.
29. The Claimant submitted that failure to demonstrate a staff grievance resolution procedure as provided by Section 41 of the Employment Act and Section 4 of the Fair Administrative Action Act vitiated any decision reached by the Respondent.
30. The Claimant submitted that the letter dated 22<sup>nd</sup> November, 2016 written to Eric Boro was a termination and not a dismissal and further that the said letter was signed by the 3 officials of the Respondent who were the Claimant, Operations manager and Director.
31. The Claimant further submitted that during hearing the Respondent’s witness confirmed that the said letter was cosigned by other staff members of the Respondent and that the decision to dismiss Eric Boro was not the product of the Claimant’s unilateral action or failure to adhere to any procedures but was sanctioned by the Respondent.
32. The Claimant submitted that this ground therefore does not amount to gross misconduct on her part. That it was upon the Respondent to prove such a ground existed and the Claimant relied on Section 44(4) of the Employment Act.
33. The Claimant submitted that the Employment Contract did not list the issue of dismissing or terminating any employees contract such as Eric Boro as her duties. That this would amount to rewriting the Claimant’s contract which is against Section 10 of the Employment Act.
34. On the issue of the said Eric Boro not having being paid his dues the Claimant submitted that this was not her role as she was not in charge of accounts or head of accounts for her to pay the said Eric Boro his dues.
35. On the Ground of absconding of duties from 19<sup>th</sup> May,2017 to 5<sup>th</sup> June,2017, Claimant submitted that the duty to prove this ground rested on the respondent. According to her, the evidence provided by the Respondent on this ground had a lot of contradictions without specifying when the Claimant was away without leave.
36. The Claimant submitted that she wrote to the Respondent on more than two occasions inquiring about her job which were never responded to as well as a formal letter. Further that during hearing the Respondent’s witness conceded to receiving the Claimant’s email and letter inquiring about her job. This contradicted the Respondent’s assertion of absconding duties by the Claimant.



37. The Claimant submitted that the Respondent's witness confirmed that she was not issued with a show cause letter, no disciplinary hearing was initiated and no letters were issued on her disappearance.
38. The Claimant relied on the cases of Joseph Nzioka v Smart Coatings Limited [2017] eKLR, Boniface Francis Mwangi v B.O.M Iyego Secondary School [2019]eKLR and Simon Mbithi v Inter Security services limited[2018] eKLR on proof of absconding duties.
39. The Claimant went on to differentiate absconding and desertion by relying on the case of Judith Atieno Owour v Sameer Agriculture & Livestock Ltd [2020]eKLR.
40. On the issue of whether the Claimant was dismissed unfairly and wrongfully the Claimant submitted that having demonstrated that the matters complained of did not constitute gross misconduct by the Claimant and that there were no valid reasons for terminating her, the Respondent unfairly and wrongfully terminated her employment.
41. The Claimant relied on section 45(2) of the Employment Act on the fairness and validity of the reason for termination. Further there was no show cause letter or a forum for the Claimant to challenge the allegations against her as per Section 41 of the Employment Act as well as Section 4(3) of the Fair Administrative Actions Act.
42. In addition, the Claimant submitted that there were no minutes of disciplinary session conducted regarding allegations in the dismissal letter. The Respondent ought to have first suspended the Claimant pending investigation of the alleged gross misconduct. According to her, she was dismissed without any form of investigations. The Claimant relied on the case of Christopher Kariuki v Cargo Services Centre East Africa BV t/a Swissport services Kenya [2015] eKLR.
43. The Claimant submitted that the Respondent's actions of replacing her and ignoring her inquiries on her work status attested to the fact that the Respondent did not give a thought to her rights. The Claimant further submitted that under Article 47 (1) of the Constitution she was entitled to both substantive and procedural fairness even on summary dismissal. The Claimant relied on among cases the case of Pamela Nelima Lutta v Mumias Sugar Co. Ltd[2017] eKLR.
44. The Claimant submitted that having confirmed that there were no minutes of any disciplinary procedure, no letter, telephone or email sent to her despite her reaching out to the Respondent which fact was not denied then the Respondent failed to discharge its burden of proof to the required standard.
45. On the issue of whether the Claimant was entitled to reliefs sought the Claimant submitted that she was entitled to the same having illustrated clear violations of the law as well as due process.
46. The Claimant submitted that the Respondent's conduct was attempting to force her to take the blame for mistakes not of her own making and upon resistance, forcefully ejected her from office under most humiliating circumstances.

### **Respondents' Submissions**

47. The Respondent filed its submissions dated 24<sup>th</sup> October 2023 and on the issue of whether the Claimant committed an act of gross misconduct to warrant summary dismissal from employment that on the ground of failure to follow the correct procedure when sacking employees including but not limited to Eric Boro, that the Claimant as Human Resource Manager for the Respondent, part of her job description was to coordinate administrative activities related to the Respondent's employees.



48. The Respondent submitted that the Claimant's duties included developing recruitment strategies, implementing systems for managing staff benefits, payroll and behaviour and onboarding new employees and dismissing employees.
49. The Respondent submitted that the Claimant was not following due process when terminating its employees, one case being that of Eric Boro where he was not issued with any notice, no warning letter and no payment was made to him. This case came to the attention of the Director when the labour officer contacted the Respondent.
50. The Respondent submitted that the Claimant wilfully neglected to perform her duties which was to ensure that employees were onboarded and terminated procedurally.
51. On the ground of insubordination and absconding duty the Respondent submitted that when the Claimant was invited for meeting by the Respondent's managing Director and asked to sign a warning letter but she declined to sign the letter and walked out of the office, went to her office and carried her bag.
52. The Respondent submitted that the Claimant was to stay away from the Respondent for one week from 19<sup>th</sup> May, 2017 to 5<sup>th</sup> June 2017 and thereafter the efforts to reach her proved futile resulting in the Respondent writing to the labour officer notifying them of the Claimant's absconding of duties.
53. The Respondent submitted that the Claimant did not tender any reason for absconding duty despite knowing that it was end month and she needed to process employees' salary.
54. The Respondent submitted that under section 44(4)(a) absconding duty was a gross misconduct and renders an employee liable for summary dismissal. The Respondent relied on the case of Richard Kiplimo Koech v Yuko Supermarket Ltd [2015] eKLR on this issue.
55. On the issue of whether the dismissal of the Claimant from employment was unfair and wrongful the Respondent relied on Section 44 of the Employment Act on summary dismissal and that the Claimant's employment was brought to an end summarily.
56. The Respondent submitted that it had justifiable ground to dismiss the Claimant for willful neglect of her duties as the termination of Eric Boro fell within her job description and she neglected to follow the correct procedure.
57. The Respondent while relying on the case of Samuel Kalomit Murkomen v Telkom Kenya Limited [2017] eKLR submitted that a court ought not to substitute its decision for that of an employer. That its duty was to determine whether the decision to dismiss was valid and fair within the circumstances of the employer.
58. The Respondent submitted that the Claimant's summary dismissal was valid and lawful.
59. On the issue of whether the Claimant was entitled to reliefs sought the Respondent submitted that having demonstrated valid reasons for termination and having followed due process and making full payment to the Claimant was not entitled to any compensation.
60. The Respondent urged the court to award the Claimant one-month compensation of KShs 80,000/= in case they find her termination was unfair.

### **Determination**

61. I have reviewed and considered the pleadings, testimonies, submissions and Authorities relied on by both parties.



62. I have And I have come up with two main issues;
- a. Aa. aa. Whether the Claimant's dismissal from employment was unfair and unlawful
  - b. WHEHWWw Whether Whether Whe Whether the Claimant is entitled to the reliefs sought.
    - a. Whether tne Whethr WWhwr Whether the Claimant's termination of employment was unfair and unlawful
63. In the instant case, the Respondent alleged that they terminated the Claimant on grounds of failure to follow right procedures while terminating Eric Boro's employment and absconding of duties from 19<sup>th</sup> May, 2017 to 5<sup>th</sup> June, 2017. The Claimant on the other hand alleges to have been unfairly terminated.
64. I have perused the Respondent's letter dated 5<sup>th</sup> June 2017 which confirms the above grounds which basically revolve around terminating Eric Boro's employment.
65. It is now established requirement that for termination to pass fairness test there must be both substantive and procedural fairness. This was the principle established in Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR among other cases.
66. On substantive fairness the Respondent is under duty to prove and justify the reasons for the termination as per section 47(5) of the Employment Act while the Claimant under the same section has to prove that indeed she was unfairly terminated.
67. Section 43(2) of the Employment Act provides that the reasons for the termination must be fair and valid and which reasons the employer must have believed to have existed.
68. In this instant case the main ground for the termination of the Claimant's employment was failure to follow right procedures while terminating Eric Boro. This was the same issue on the warning letter which is said that the Claimant refused to sign. The Respondent equally stated that there were standing orders that the Claimant was supposed to familiarize herself with. The Said standing orders were referred to in the parties employment contract although they were never availed to the court. However, the Respondent did not point out the exact clause of the standing order breached by the Claimant and did not produce the HR policy Manual before the court.
69. Furthermore, the Respondent's allegations that the Claimant was guilty of gross misconduct and failed to follow the right procedures when terminating Eric Boro while failing to table any evidence before court to demonstrate what the right procedures were begs the question as to what then was the right procedures she failed to follow that caused her dismissal.
70. During the Defense hearing, RW1 confirmed the said Eric Boro's termination letter was signed by two other parties. That is, the Respondent's operations manager and Director thus the decision to dismiss Eric Boro was not purely dependent on the Claimant but was sanctioned by the Respondent.
71. The Respondent did not illustrate that the other signatories did not sign the said termination letter or if there was forgery/ impersonation of them signing the termination letter.
72. The Claimant stated that the allegations by the director that she did not issue warning letter to Eric were not true as she prepared a warning letter which the Director told her to hold until further communication. This fact was not denied by the Respondent. Similarly, the Claimant's contract did not include dismissing or terminating any employees' contracts such as Eric Boro, as one of her duties. She was also not in charge of account or was head of accounts to pay the said Eric Boro his dues.



73. The Respondent raised the issue of the Claimant refusing to sign the warning letter on 19<sup>th</sup> May,2017. They denied chasing the Claimant from their premises. On the other hand the Claimant averred that she did not refuse to sign the said warning but she wanted to read and understand the warning letter which revolved around the issue of terminating Eric Boro.
74. On the issue of absconding duty, the Respondent averred that the Claimant refused to sign the warning letter and left their premises. The Claimant on the other hand averred that when she insisted on reading the warning letter, the Respondent called security who took her to her office to take her belongings and was told never to be seen on the premises.
75. Whereas I appreciate that Section 44(4)(a) of the Employment Act provides absconding of duties as one of the grounds for summary dismissal; the same ground needs to be substantiated by the Respondent.
76. Taking in to account the circumstances of this case it can only be true that the Claimant was a good employee where the Respondent increased her salary due to her good performance. It is therefore not possible that the Claimant just woke up on that day and decided to leave the Respondent's premises unless she was told do so.
77. The Claimant submitted to have written to the Respondent on more than two occasions inquiring about her job which the Respondent agreed to have received during hearing. The learned Judge Nzioki wa Makau in the case of Boniface Francis Mwangi v B.O.M. Iyego Secondary School stated that:
- “it is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”
78. In this case the Respondent did not tender evidence of calling the Claimant despite the Claimant making enquiry about her job. It is also plausible that the Respondent alleges that the Claimant was not picking her calls yet they called her on 5<sup>th</sup> June,2017 to come pick her dismissal letter and she came and picked it. How then did they reach her to pick the dismissal letter yet she was not picking calls to return to work?
79. The Respondent's evidence is also tainted with a lot of contradictions where they state that the Claimant was away for one week which technically was supposed to end on 26<sup>th</sup> May, 2017. They also state that they replaced the Claimant after one week yet the dismissal letter alleges that the Claimant was absent to date which was 5<sup>th</sup> June,2017.
80. This therefore means that the Claimant was replaced even before she was dismissed. This was despite the fact that she followed up through email dated 26<sup>th</sup> May, 2017 and a through a formal letter dated 30<sup>th</sup> May, 2017 to which the respondent never replied to.
81. The above being the case there was no evidence tendered by the Respondent showing that the Respondent reached out to the Claimant to inquire as to the reason she had absconded duty.
82. In conclusion this court finds and holds that the Respondent did not justify its reasons for terminating the Claimant's employment as required by section 47(5) of the Employment Act hence the termination of her service was unfair within the meaning of section 45 of the Employment Act.
83. On procedural fairness section 41 of the Employment Act is the guiding law on this issue and requires hearing and notification to the employee before termination. An employee ought to be notified, allowed to make their representations and attend disciplinary hearing accompanied by a fellow



employee or union official. In this case it is not in dispute that it was a case of summary dismissal hence the above procedure was not followed.

84. The Claimant's dismissal was thus procedurally unfair because the Respondent did not comply with section 41 of the *Employment Act*. The court in *Nicholas Otinyu Muruka v Equity Bank Limited* [2013]eKLR stated that;

"...disputes of summary dismissal will always be subjected to the test of section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct."

85. Even if the Claimant's conduct amounted to gross misconduct, which the court is of the opinion that it did not, Section 41 sets out the mandatory procedure to be followed before termination. In *Kenya Union Of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR the Court held that: -

Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

86. In addition, it was confirmed that the Respondent did not have any staff grievance mechanism in place such that the employees could not appeal dismissal/termination verdicts. The Claimant as well as the said Eric Boro were never spared by this practice as they were never afforded chance to appeal their terminations.

87. In conclusion I am of the view that there existed no justifiable reasons for the termination of the claimant's service and that the termination was conducted through an unfair procedure.

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

88. Whereas the Respondent offered the Claimant her terminal dues in the dismissal letter I note that it offered her only payment for leave days and salary for month of May and the 6 days in June before dismissal. I further note that the employment contract provided for one month notice of payment in lieu of notice. Parties are bound by their agreement. The Respondent terminated the service of the Claimant summarily on 5<sup>th</sup> June 2017 which meant there was no notice of the said termination hence the Claimant is entitled to notice pay equivalent to one month's salary.

89. On the prayer for 12 months compensation for unfair termination having found that the reasons for the termination were not justified and that the Respondent did not follow the laid down procedure by law for termination, and the Court noting that the claimant at the time of termination had worked for the respondent for approximately four years and further bearing in mind that the employment contract could have been lawfully terminated by either of the parties and considering the circumstances of the termination, the Court hereby awards the claimant eight months' salary as compensation for unfair termination.

90. In conclusion the Claimant's claim is hereby allowed with costs as follows;

- a. Salary in lieu of Notice.....Kshs 80,000/=
  - b. 8 months' salary as compensation for unfair termination .....Kshs 640,000/=
- TOTAL.....KSHS....720,000/=



- c. The respondent shall issue the claimant with
- d. Certificate of service
- e. Costs and interests of the suit
- f. Items (a) and (b) shall be subject to taxes and statutory deductions but shall attract interest at Court rates from the date of Judgment until payment in full.
- g. It is so ordered.

**Dated at Nairobi this 5th day of July, 2024**

**Delivered virtually this 5th day of July, 2024**

**Abuodha Jorum Nelson**

**Judge**

