



Abong v Safaricom Limited (Employment and Labour Relations Cause 419 of 2018) [2024] KEELRC 2656 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2656 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 419 OF 2018
K OCHARO, J
OCTOBER 31, 2024**

BETWEEN

RUSSEL OTIENO ABONG CLAIMANT

AND

SAFARICOM LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 19th March 2018, the Claimant sued the Respondent seeking against it the following reliefs:-
 - a. One month's pay in lieu of notice Kshs 154,023.54;
 - b. Payment of accrued house allowance for the entire period of employment, which is 34 months, at 15% of the monthly salary i.e. Kshs 133,933.51 x 0.15 x 34 months = Kshs 785,520.10;
 - c. Salary for the month of December 2017 Kshs 52,085.25
 - d. Annual leave encashment Kshs 139,514.07
 - e. Christmas gift Kshs 21,428.57
 - f. Damages for wrongful dismissal under Section 49 (c) of the Act i.e. Kshs 154,023.54x12 months = Kshs 1,848,282.44
 - g. The Claimant's cell phone, Huawei P9 Lite, which was wrongfully, unlawfully and forcefully confiscated.
 - h. Certificate of Service.
 - i. Interest on (i), (ii), (iii), (iv), (v) and (vi) above.



- j. Costs of the suit.
 - k. Any other relief that this Honourable Court may deem fit to grant.
2. In response to the Memorandum of Claim, the Respondent filed a Memorandum of Reply dated 19th September 2018. The Claimant's assertions that he was unfairly and wrongfully dismissed from employment and that he is entitled to the reliefs sought, were vehemently denied.

Claimant's case

- 3. At the hearing, the Claimant adopted his witness statement dated 19th March 2018 as his evidence in chief. He stated that he came into the employment of the Respondent, on 2nd February 2015 as a Senior Officer, Mpesa Operations, a position later renamed Senior Officer, Mpesa Customer Support, at a starting salary of Kshs 100,000/- per month.
- 4. He contended that he performed his duties diligently, faithfully, and obediently, at all material times, up until 14th November 2017, when he was arrested on suspicion that he had been involved in fraudulent activities. Upon the arrest, he was detained at Parklands Police Station without any charge being preferred against him. His, office laptop, office access card, name tags, and personal phone were confiscated from him by one Dennis Yegon.
- 5. On 17th November 2017, he wrote an email to the Human Resources Department, inquiring about how he would access his workstation as his access card had been taken away. The email elicited no response, prompting him to physically visit the Department on 20th November 2017 for the inquiry.
- 6. The Claimant stated that on 11th December 2017, he received a summary dismissal letter dated 8th December 2017 in his Gmail account russellbong@gmail.com, from the email account ninafula@safaricom.co.ke.
- 7. The Claimant complained that the Respondent's action was unlawful, as was summarily dismissed from employment without a fair hearing. The panel's decision was informed by an account given by a third party. He was categorical that he was not allowed to defend himself against the claims levelled against him.
- 8. The Claimant also contended that he is yet to receive his terminal dues from the Respondent, including his salary for December 2017 and other accrued benefits including house allowance.
- 9. At the time of his dismissal from employment, the Claimant states that he earned a monthly salary of Kshs 139,514.07.
- 10. Cross-examined by Counsel for the Respondent, the Claimant testified that upon joining the workforce of the Respondent, he was furnished with a staff manual and taken through an induction process. Further, he familiarized himself with the Respondent's Code of Conduct.
- 11. He further testified that the Respondent Company in its Operations is a custodian of funds from members of the public. It had a portfolio for archived/unclaimed funds. His role as regards the funds was to consolidate and release them to the Unclaimed Finance Assets Authority.
- 12. Asked about Sylvia Ngori, the Claimant denied that he had any personal relationship with her. She was a former employee of the Respondent.
- 13. The Claimant admitted that in the dismissal letter, it was expressly alleged that Sylvia Ngori was his wife. He denied knowing Patricia Ngori, and that she was his sister-in-law.



14. When he was being arrested he wasn't informed of why. He was not involved at all in the transaction, which the Respondent alleges was the reason for his arrest.
15. On 20th November 2017, when attended the Respondent's offices to see the Human Resources Manager, he was not allowed to. In fact, nobody in those offices wanted to see him. He couldn't call his supervisor as his phone had been confiscated.
16. In his evidence in re-examination, the witness testified that he was not issued with a notice to show cause. The Respondent didn't explain to him as to why he was dismissed.

Respondent's case

17. The Respondent presented two witnesses to testify on its behalf. Dennis Yegon [RW1] and Jackonia Odhiambo Ooko [RW2]. RW1. adopted his witness statement dated 18th September 2018 as his evidence in chief.
18. The witness testified that he works for the Respondent as a Fraud Investigator in the Ethics and Compliance Department, Risk Management Division. In October 2017, his Department conducted a routine fraud monitoring exercise on the monetary transactions carried out on the Respondent's mobile money transfer platform [M-pesa] involving archived funds.
19. The exercise revealed suspicious transactions involving the archived funds transacted through three mobile numbers. The transactions were by individuals who had different identification documents but shared the same photo image. Following this, it was decided that a thorough investigation be undertaken.
20. Through the investigations, the team was able to link some fraudulent transactions to a former employee of the Respondent. Further, some of the fraudulent beneficiaries of the archived funds had been linked with him through their phones that had been paired sometime in October 2017. This unearthing was enabled by link analysis and identification of IMEI [International Mobile Equipment Identity] numbers of each of the concerned handsets.
21. The witness stated that pairing of mobile phones indicates that the individual mobile subscribers' SIM Card [Subscriber Identification Module] had shared the same mobile phone handset. Furthermore, he also received M-Pesa funds from another fraudulent beneficiary of the archived funds on or about 23rd October 2017.
22. Based on these connections between the two former employees and the two fraudulent transactions, he became a person of interest. A further analysis was done, and it was established that he had been in constant communication with Job Anacet Eshiada Kweyu, an employee of the Respondent who was then based at the Respondent's Junction Mall Retail Shop, Patricia Ngovi a former employee of the Respondent whose employment was terminated earlier in 2017 on account of being involved in fraudulent dealings.
23. Mr. Job Kweyu was called to explain his involvement in the fraudulent transactions. In the course, he revealed that some of the Respondent's members of staff were actively, but fraudulently benefitting from the archived funds.
24. Link analysis on Ms Patricia Ngovi's SIM Card showed that she had been communicating constantly with the Claimant. This, coupled with the fact that the Claimant was the process owner of the Archive Fund and Unclaimed Assets, prompted the Ethics team to consider him a person of interest. They placed him under investigation.



25. Investigations on the Claimant's work computer brought to bear a Word document created thereon by the Claimant which contained detailed information on the customers' archived funds and the status of the refunds. The Word document contained the fraudulent transactions mentioned herein above.
26. A scrutiny of the three archived funds application forms revealed that each bore the same identification photo, and the photo coincidentally happened to be that of Silvia Nduku Ngovi, the Claimant's wife. Further analysis of the Claimant's and Silvia Nduku Ngovi's SIM Cards revealed that both had been paired with those of five beneficiaries who had fraudulently acquired Kshs 320, 052, from the archived funds.
27. On 13th November 2017, the Ethics team interviewed the Claimant. He was unable to explain the source of the Word document and the purpose for which it was in his possession. Further, he was unable to explain the coincidence that the phone numbers in the Word document which had been used to defraud the Fund, had previously been paired with his mobile phone handset.
28. After analyzing the material before it, the team concluded;
 - I. That the photo of the Claimant's wife, Silvia Nduku Ngovi, was used to generate three [3] forged identification documents [IDs] that were used to make applications for archived funds.
 - II. Link analysis revealed that the Claimant and his wife's lines shared handsets with beneficiaries who fraudulently obtained customers' archived funds.
 - III. The Claimant abused his position by obtaining information and sharing the same with a third party without the customer's consent, leading to fraudulent activities and loss of customers' funds amounting to Kshs 320,000.
29. As a result, the team recommended that disciplinary action be taken against the Claimant for his role in the fraudulent activity and breach of confidentiality to the Respondent's customers. It was further recommended that the above-stated sum be recovered from him.
30. Cross-examined by the Claimant's Counsel the witness stated that the Claimant was the Process Owner. He was not directly involved in the fraud. The Claimant didn't directly get access to the money in the archives.
31. The witness further testified that he left the Respondent Company shortly after the investigations had commenced.
32. Work emails could be accessed through Microsoft Outlook installed on the computers within the station. Further, an employee could access his emails through his phone if he installed Outlook on it with authority from the Respondent.
33. The witness testified that he searched the Claimant's computer. The action didn't require any Court order as the Computer was the property of the Respondent.
34. The Respondent has no document to show that Silvia was the Claimant's wife. However, when he was interviewing him, the Claimant confirmed this.
35. The witness further testified that the Claimant didn't have a role in approving the release of any archived funds.
36. From the documents presented to the court by the Respondent, it is clear that the Claimant was involved in the fraud as; the people involved in the fraud frequently communicated; the list of the customers who were targeted was found in his computer; and his Sim card had on various dates been used in gadgets the fraudsters were using.



37. RW2 testified also adopted the contents of her witness statement filed herein as her evidence in chief. She stated that the Claimant was employed by the Respondent as a Senior Officer- Customer Support, M-Pesa Product Development vide a letter of appointment dated 2nd January 2015. In the position, he was tasked with the management and redemption of archived funds and unclaimed financial assets held with the Respondent on behalf of its customers.
38. Sometimes in October 2017, the Respondent's Ethics and Compliance Department [Ethics Team] conducted a routine fraud monitoring exercise on the monetary transactions carried out on its mobile money transfer platform involving archived funds.
39. During the exercise, suspicious transactions involving archived funds were unearthed. Full investigations were conducted. The Claimant was held linked to the fraudulent transactions. The Ethics team recommended that disciplinary action be taken against him.
40. Subsequently, she sent a memorandum dated 23rd November 2017 to the address the Claimant had provided, inviting him to a disciplinary hearing to defend himself against the allegations and findings raised in the Investigation Report. He was also informed of the charges levelled against him.
41. Follow-up calls and SMS were sent to the phone number provided by the Claimant, but the calls went unanswered and the Claimant did not acknowledge receipt of either the emails or the text messages, sent to him.
42. On 29th November 2017, the day slated for the disciplinary hearing, the Claimant failed to avail himself. The disciplinary hearing proceeded in his absence, with the disciplinary committee carefully considering the evidence gathered by the Ethics Team and the Claimant's representations made during the interview on 13th November 2017. The Respondent finally resolved to dismiss the Claimant summarily.
43. The Claimant was notified of his summary dismissal from employment via a letter dated 8th December 2017, sent to him through email. He was informed that his terminal dues and his Certificate of Service had been prepared and urged to collect them by 31st December 2017 from the Respondent's Payroll Section, subject to him undergoing the clearance process.
44. He was also informed that he had a right to appeal against the Respondent's decision within ten (10) working days of receipt of the dismissal letter. The Claimant acknowledged receipt of this letter on 10th December 2017 but did not lodge any appeal against the Respondent's decision.
45. According to the witness, the Respondent had a valid and fair reason to terminate the Claimant's employment. Further, the Respondent followed due process before the termination by granting the Claimant an opportunity to defend himself.
46. In her evidence under cross-examination by Counsel for the Claimant, the witness stated that the disciplinary hearing was undertaken by the Employee Relationship Committee. The investigators appeared as witnesses.
47. Minutes of the disciplinary hearing were not taken as Claimant didn't appear for the hearing. In situations where an accused employee is invited for a disciplinary hearing but doesn't turn up, the committee makes recommendations to the management.
48. The witness admitted that there was no document or evidence from which it can be discerned that the Claimant received an invitation to the disciplinary hearing.



49. The witness further testified that she wasn't aware that the Claimant's work laptop and mobile phone were confiscated from him. However, she is aware that his official email address was shut down by the Respondent.
50. The witness further stated that the investigations revealed that Patricia was a wife to the Claimant.
51. On the reliefs sought by the Claimant, the witness asserted that the house allowance sought cannot be availed to him as his salary was consolidated as can be discerned from his pay slips. However, she added that the employment contract between the Respondent and the Claimant was silent on house allowance.

Claimant's Submissions

52. In his submissions dated 27th September 2023, the Claimant submitted that the termination of employment can only be considered to be fair, if it is demonstrated that, due process was observed, and there was a justifiable reason for the termination.
53. The responsibility to demonstrate that there was procedural fairness in the termination of an employee's employment always lies on the employer. Section 41 of the *Employment Act* requires the employer to comply with a fair disciplinary process. He or she must show that the process that led to the decision to terminate the employee embodied all the necessary ingredients for a fair process as contemplated under the provision. To buttress this submission reliance was placed on the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited* [2013] eKLR.
54. It was submitted that the Claimant's position that he was not allowed to be heard as he wasn't invited to a disciplinary hearing wasn't controverted. The Respondent didn't place forth any evidence to demonstrate that an invitation was extended to him to attend a disciplinary hearing, and that indeed there was a disciplinary hearing. RW1 stated on oath that he was not in a position to factually state whether there was a disciplinary hearing. RW2 confirmed that no minutes were arising from the alleged disciplinary hearing.
55. Section 43 of the *Employment Act* placed a duty upon the Respondent to prove the reason[s] for the termination. The investigation by the Respondent didn't implicate him in the alleged fraudulent transactions. The only reason that led the Respondent to hold that he was involved in the infraction was the far-fetched suspicion that the former employee of the Respondent who allegedly was at the centre of the fraud, was his wife. By no means, that couldn't be a justifiable reason for his dismissal. In fact, the said Silvia Nduku is a stranger to him.
56. Lastly and in conclusion, the summary dismissal violated Sections 41,43 and 45 of the *Employment Act*. Further, it violated the International Labour Organization Conventions and the *Constitution* of Kenya. It should be declared unfair.
57. On the reliefs sought, the Claimant submitted that having proved that he was summarily dismissed unfairly, the compensatory relief contemplated under section 49 of the *Employment Act*, should be granted to him. He proposes the maximum amount awardable under the provision of 12 months' gross salary. The proposal is premised on the fact that he had worked diligently for the Respondent from the year 2015, he did not contribute to his dismissal, and the dismissal ruined his reputation making it difficult for him to obtain employment elsewhere.
58. On notice pay, the Claimant submitted that the summary dismissal against him was sudden. He wasn't therefore, issued with the termination notice provided under Section 35 of the Act on notice or payment in lieu thereof made. As such, he is entitled to notice pay.



59. Submitting on house allowance, the Claimant stated that payment of house allowance or provision of housing accommodation by the employer is mandatory under Section 31 of the *Employment Act*. Section 20 of the Act provides for the provision of an itemized pay statement. The Claimant's pay slips did not indicate that house allowance was being paid. The true position is that the Claimant was not provided with housing accommodation or paid house allowance. He should therefore be awarded a house allowance for the whole period of his employment at 15% of the basic salary. The Claimant relies on the case of *Ayanna Yonemura v Liwa Kenya Trust* [2014] eKLR to support the submission.
60. On the issue of the unlawfully confiscated mobile phone, the Claimant submitted that the same was forcefully confiscated by the Respondent as acknowledged by RW1 during cross-examination. This not being a fact in dispute, an order should be given for the same to be released to him.
61. Under Section 51 of the Act, the Respondent should be ordered to issue the Claimant with a Certificate of Service.

The Respondent's Submissions.

62. In their submissions dated 4th December 2023, the Respondent submits that the Claimant admitted that he owns and uses the email address russelabong@gmail.com and that he received the Notice of Summary Dismissal through the same email.
63. It was further submitted that material placed before this Court clearly shows that the Respondent adhered to the statutory procedural dictates in dismissing the Claimant as ; on 13th November 2017 the Claimant was invited by the Respondent's Ethics Team, to explain his involvement in the loss of archived customer funds, but he failed to give satisfactory responses; during the investigations , he was requested to provide the Respondent's HR team with a valid email address and working phone number to enable the Respondent contact him upon conclusion of the investigations; the report of the Respondent's Ethics Team implicated the Claimant in fraudulent activities relating to customers' archived funds; the Respondent sent the Claimant, through his email address russelabong@gmail.com, a Notification for Disciplinary Hearing on 23rd November 2017; a disciplinary hearing was held at the agreed venue on 29th November 2017; that the Claimant did not show up and after waiting for him for over an hour, the Respondent's disciplinary committee was forced to proceed with the disciplinary hearing in the Claimant's absence; that the disciplinary panel found the Claimant culpable of the charges brought against him and recommended his summary termination; and the Respondent sent the Claimant a Letter of Summary Dismissal through his email russelabong@gmail.com on 8th December 2017.
64. The Claimant cannot be allowed to feign ignorance of receipt of the invitation to a disciplinary hearing as the same was sent through the email address that he provided, namely russelabong@gmail.com which was also the same email address where he received the Letter of Summary Dismissal. Further, the Claimant did not appeal the summary dismissal on the ground that he had not received the invitation to the disciplinary hearing.
65. Further, he neither raised the issue of non-service of the invite in his demand letter nor the pleadings filed herein. An employee who is invited to a disciplinary hearing but deliberately fails to show up, cannot be heard to complain that he wasn't accorded fair procedure. To buttress this submission reliance was placed on the decision in the case of *BIFU v Barclays Bank of Kenya* Cause No 1660 of 2013.
66. Addressing the aspect of substantive fairness, the Respondent submitted that under Section 43 of the Act, the Respondent was required to prove the reason[s] for the dismissal of the Claimant from



employment. Under, Section 43[2] the reasons for the termination/dismissal are matters that the employer at the time of termination of the employment contract genuinely believed to exist. For the purpose of this case, the Respondent was supposed to prove on a balance of probabilities, that it genuinely believed that the reasons advanced for termination of the Claimant's employment existed at the time of his summary dismissal. To support this point, reliance was placed on the holding by the Court of Appeal in the case of *Kenya Revenue Authority v Reuel Waitbaka Gitahi & 2 others* [2019] eKLR.

67. It was further submitted that in interrogating the reasonableness of the Respondent's decision to terminate, the Court should refrain from substituting its own views with those of the Respondent. Rather, it should assess whether a reasonable employer, faced with the same facts, would have decided to summarily dismiss the Claimant from employment. Reliance for this submission is placed on the case of *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR.
68. The Respondent concluded that considering all the circumstances of this matter as brought out in the evidence by the Respondent's witnesses, any reasonable employer, faced with the same circumstances would have summarily dismissed the Claimant from employment, as he betrayed the trust and confidence bestowed upon him by the Respondent, and also threatened the company's financial well-being and operational integrity. The Respondent emphasizes that they operate in the financial services sector where trust and confidence are key aspects of employment. They rely on the case of *Violet Kadala Shitsukane v Kenya Post Savings Bank*, Nairobi Civil Appeal No 295 of 2016 [2020] eKLR.
69. On the reliefs sought, the Respondent submitted that the Claimant is not entitled to damages for unfair termination as the summary dismissal was fair in substance and procedure. He is also not entitled to one month's pay in lieu of notice as he was summarily dismissed. He didn't place forth any evidence to support his claim for annual leave encashment, the relief sought cannot be availed to him, therefore.
70. The Claimant received a consolidated salary as such his claim for house allowance is misplaced. The claim for the Christmas gift is equally misplaced. He was summarily dismissed on 8th December 2017 well before Christmas day. Further, this item was not payable under the Claimant's contract of employment.
71. The Respondent confirms that the Claimant's salary for days worked in December 2017; his Certificate of Service and his Huawei P9 cell phone are readily available once the Claimant clears with the Respondent.

Analysis and Determination

72. I have carefully considered the pleadings, the evidence by the parties, and the submissions filed by their Counsels, and the following issues emerge for determination: -
 - a. Was the Claimant's summary dismissal from employment unfair? And;
 - b. Is the Claimant entitled to the reliefs sought?

Was the Claimant's summary dismissal from employment unfair?

73. Called upon to interrogate whether or not a summary dismissal of an employee was fair, as this Court has been, the Court must consider two statutory aspects, procedural fairness and substantive justification. These two aspects were never in the pre-2007, employment and labour relations regime. The new regime aimed at ensuring employment security for employees. Employment security properly understood refers to the existence of explicit or implicit rules and provisions putting a leash on the ability of the employer to terminate employees' employment at will.



74. The *Employment Act* expressly prohibits unfair termination of employees' employment and provides what in the eyes of the law amounts to fair termination. Section 45 (1) and (2) of the *Employment Act* 2007 provide that:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

75. Inarguably, for a termination of an employee's employment to pass the fairness test, it must be demonstrated that the same was for cause, premised on a valid and fair reason[s], and arrived with regard to procedural fairness. Addressing this, the Court in the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR held that:

“... For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

76. Section 41 of the *Employment Act*, 2007 sets out a mandatory procedure that must be followed by the employer contemplating terminating an employee's employment or summarily dismissing an employee from employment. The ingredients for due process are; Notification- the employer must inform the employee that they intend to take action against him or her and the reason[s] the basis thereof; the hearing – the employer must afford the employee affected an adequate opportunity to make representations on the reasons. Interwoven with this right is the right of accompaniment. The employee should be allowed to be accompanied by a colleague of choice, or a trade union representative where applicable to the hearing. Lastly, the consideration- the employer has to consider the representations by the employee before making a final decision. See also, *Pius Macha Isunde v Lavington Security Guards Limited*[2017]eKLR.

77. Did the Respondent comply with the canons of procedural fairness in dismissing the Claimant from employment? I fear not duly. It isn't in dispute that there was no disciplinary hearing that took place in the presence of the Claimant. The Respondent asserted that the Claimant was invited for the disciplinary hearing but didn't show up on the appointed date, prompting the Disciplinary Panel to proceed to consider his case in his absence.

78. This then pushes the question, was the Claimant invited to the disciplinary hearing? to the fore. It is alleged by the Respondent that the invitation was extended to him through the email address russellabong@gmail.com. The Claimant denied that he was invited. At this point, it became imperative



for the Respondent to prove the service. Other than speculating that since the show cause letter was received through the email address, the Claimant must have received the invitation letter, nothing more in the form of evidence was placed before this Court to establish service.

79. Employers must heed this. Where service of any disciplinary process document is denied by the employee affected, it would not suffice for the employer to just assert that service was effected through the employee's last known email address. The employer must go further and demonstrate that the email was delivered.
80. It is my considered view that the Respondent failed to demonstrate that the invitation document was ever served upon the Claimant to enable him to prepare and attend the disciplinary hearing. By failing to invite the Claimant to the disciplinary hearing, he was denied the opportunity to defend himself against the accusations that had been levelled against him.
81. By reason of the foregoing, I hold that the summary dismissal against the Claimant was procedurally unfair.
82. I now turn to consider whether the Summary dismissal was fair. Section 44 of the *Employment Act* 2007 stipulates when summary dismissal can occur:

“ 44. Summary dismissal

- (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

83. What happened in the circumstances of this matter was a summary dismissal against the Claimant. However, whether or not the conduct of the Claimant was one that fundamentally breached his obligations arising under the contract, I shall delve into, shortly hereinafter.
84. Section 43 of the *Employment Act* places an obligation upon the employer to prove the reason[s] for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45 of the Act.
85. Section 44[4] of the Act, provides actions and inactions of an employee that may amount to gross misconduct to justify the sanction of a summary dismissal. However, it is pertinent to note that the list isn't exhaustive. An employer can summarily dismiss an employee a ground outside those in the catalogue for as long as the ground has the characteristics such as I will demonstrate shortly.
86. It was the Respondent's case that the Claimant's acts that were in issue during the investigations, at the notice to show cause level, and at the disciplinary hearing that proceeded in the absence of the Claimant amounted to grounds for summary dismissal. The grounds were that he; engaged in fraudulent



activities, leading to customers losing money amounting to Kshs 320,000; shared his handset details with fraudsters who fraudulently obtained customer archived funds; breached confidential customer information by sharing customer details with a third party without the customer's consent.

87. I have carefully considered the Claimant's evidence and note that he remained silent on very key matters: why did he have the Word document on his computer with details of customer accounts with archived funds, including accounts that were defrauded, and for what purpose was his handset paired with the others that, according to the investigations, were used to defraud the accounts?
88. Instead of explaining how genuine the pairing was, or gearing his evidence towards duly assailing the investigations and the report that emanated therefrom, if at all he had a reason to, the Claimant focused his energies towards a matter that wasn't in my view, material, his relationship with Silvia Nduku.
89. It is not enough for the employer to cite that an employee committed one or more of those actions or omissions obtained in the list provided in Section [44][4] of the *Employment Act* 2007, or its Human Resource instrument[s]. An employee's misconduct doesn't inherently justify a summary dismissal unless it is "so grave" that it intimates the employee's abandonment of the intention to remain in employment. In *Laws v London Chronicles* [2 ALL L.R 285, the English Court of Appeal stated the following on page 287;
- "Since a contract of service is but an example of contracts in general so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded essential conditions of the contract of service."
90. Whether an employee's misconduct warrants dismissal requires an assessment of the degree and the surrounding circumstances, the contextual approach. In *Mckinley v BC Tel* it was held;
- "29. When examining whether an employee's misconduct justifies his or her dismissal, Courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behavior was such that the employment could no longer viably subsist.
39. To summarise, this first line of case law establishes that the question of dishonesty provides just cause for dismissal, for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, Courts have held that factors such as the nature and degree of the misconduct, and whether it violated the "essential conditions" of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause."
91. I have considered the circumstances in this matter, including but not limited to the industry in which the Claimant was working, the position in which he was working within the Respondent's enterprise, and the two vital questions hereinabove mentioned that remained unanswered by the Claimant, and find that the dismissal was on valid and fair reasons.
92. Consequently, I hold that the summary dismissal against the Claimant was substantively fair.



Whether the Court should grant the prayers sought by the Claimant.

93. The Claimant sought a compensatory reward under the provisions of section 49[1][c] of the *Employment Act*, 2007. He sought for 12 months' gross salary. Courts have held that an award under this provision is discretionary. The extent of the award shall always depend on the circumstances of each case. In this case, I have considered that the dismissal was substantively fair, that the award which I will make herein is a result of a single procedural misstep, rendering the dismissal unfair, the conduct of the Claimant, and the general circumstances of the matter, and consequently find that a nominal award of one-half [1/2] of a month's gross salary will serve justice.
94. Having found that the Claimant the summary dismissal of the Claimant was substantively justified and considering the circumstances of the matter, I am not persuaded to hold that he could be entitled to notice pay under section 35 as read together with section 36 of the Act. His claim under this head is declined.
95. Section 31 of the *Employment Act* bestows upon the employee a right to house allowance, or reasonable accommodation by the employer. Therefore, under the provision, a corresponding duty is created on the employer to either pay house allowance or provide reasonable accommodation where house allowance isn't provided. The Claimant contended that despite this statutory right, the Respondent didn't at any time pay him a house allowance.
96. Resisting the claim under this head, the Respondent asserted that the salary earned by the Claimant was inclusive of house allowance. I have carefully considered the letter of appointment dated January 2, 2015, and note that it doesn't provide for a house allowance. It didn't provide for gross pay but basic pay. As such, it is difficult to understand where the Respondent's argument that the Claimant was earning a gross salary, inclusive of house allowance flows from.
97. By reason of the foregoing premise, I hold that the Respondent didn't at all material times, discharge its statutory obligation of paying the Claimant a house allowance. He should be compensated for this. Thus, $133,933 \times 0.15 \times 34 = 683,059.065$. There is no doubt he worked for 34 months.
98. The Respondent did not present any evidence to demonstrate that the Claimant was paid for the 11 days of December 2017. He remained an employee of the Respondent up until 11th December 2017. I see no good reason why he cannot be paid for the 11 days. I award him Kshs 52, 085, appearing on his pay slip for December 2017.
99. From the stated pay slip, it is clear that the Claimant was entitled to leave encashment of Kshs 139514.07, and Christmas gift, KSHS.21428.57. These amounts were not paid, I think for the reason that the Respondent decided to offset the same against the alleged loss suffered, Kshs 320,000.
100. The Respondent didn't file any counterclaim for this amount, KSHS.320,000. Considering the evidence of RW1, that the Claimant was not directly involved in siphoning money from the archived accounts, prudence required that a counterclaim be filed against him, wherein the reasons and extent of his liability could be canvassed. The Respondent was not therefore entitled to withhold the sum as it did.
101. The Respondent admits the Claimant is entitled to the Certificate of Service under section 51 of the Act and the release of his phone.
102. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
 - I. A declaration that the summary dismissal against him was procedurally unfair but substantively justified.



- II. Compensation for unfair dismissal pursuant to Section 49[1][c] of the *Employment Act*, Kshs 66, 966.75.
- III. Compensation for unpaid house allowance, KSHS.683,059.065.
- IV. Leave encashment, Kshs 139514.07.
- V. Christmas Gift, Kshs 21428.57
- VI. Release of his phone Huawei P9, Lite.
- VII. The Claimant be issued with a certificate of service per section 51 of the *Employment Act*, within 30 days of this Judgment.
- VIII. Interest on the awarded sums above, from the date of this judgment till full payment.
- IX. Costs of the suit.

103. It is so ordered.

READ, DELIVERED AND SIGNED THIS 31st DAY OF October 2024

OCHARO KEBIRA

JUDGE

In the presence of:

Claimant

Respondent

