

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E111 OF 2021

MARGARET ACHIENG MBOGACLAIMANT

VERSUS

SAMEER AFRICA PLCRESPONDENT

JUDGMENT

1. It is not in dispute that the Claimant was employed by the Respondent as a Sales Representative through a letter dated 15th January 2004 and initially stationed at the Respondent's Kisumu branch. She was later transferred to the Respondent's Nairobi branch in 2007. The Claimant avers that she consistently excelled in her duties, serving with utmost loyalty and dedication, which led to her promotion to the position of Brand and Communications Manager effective 1st December 2011.
2. The Claimant further avers that while serving substantively as the Brand and Communications Manager, she was appointed Acting Marketing Manager from June 2018 to September 2019 without any additional remuneration, in violation of the Respondent's Human Resource Policy and the law. She adds that she was later appointed Acting Retail Sales Manager by a letter dated 16th April 2019,

effective 1st May 2019, but was similarly not paid any acting allowance during this period.

3. The Claimant contends that, while serving as Acting Retail Sales Manager, the Respondent denied her the benefit of a company vehicle, which she asserts she was entitled to, as had been accorded to her predecessors, most of whom were male, to facilitate official movements.
4. The Claimant further avers that she was entitled to an education allowance of up to Kshs. 90,000/= per annum. That in September 2019, she made her first application for this benefit, mistakenly believing the full amount could be claimed since her daughter was joining school in the third term (September to December 2019).
5. She asserts that despite expressing regret over this inadvertent mistake and demonstrating willingness to be corrected, the Respondent proceeded to terminate her employment, disregarding her 15 years of dedicated service.
6. The Claimant maintains that the Respondent's decision to terminate her employment was disproportionate, harsh, unfair, unlawful, and amounted to a witch-hunt.

7. In view of the foregoing, the Claimant seeks the following reliefs against the Respondent: –

- i. A declaration that the termination of the Claimant's employment by the Respondent was without valid and/or fair reason hence unfair and unlawful.*
- ii. A declaration that the disciplinary process adopted by the Respondent was noncompliant with the law and that the same was biased and incapable of affording the Claimant a fair hearing under the circumstances hence unfair.*
- iii. In view of items (i) and/or (ii) hereinabove, a declaration that the termination of the employment of the Claimant by the Respondent was unfair hence unfair and/or unlawful.*
- iv. A declaration that the failure by the Respondent to allocate the Claimant a motor vehicle by virtue of her holding of the office of Acting Retail Sales Manager amounted to discrimination considering that her predecessors had enjoyed such benefits.*
- v. A declaration that the failure by the Respondent to pay the Acting Allowance of the Claimant amounted to a violation of the law and the Constitution.*

vi. An Order directing payment to the Claimant of all the following terminal dues arising out of service to the Respondent: -

- 1. 12 months' salary being compensation for unfair termination of the Claimant's employment calculated at the rate of the Claimant's salary of Kshs.245,009.45 per month amounting to Kshs.2,940,113.40**
- 2. Payment of the Acting Allowance in the office of Acting Retail Sales Manager being 30% of the monthly salary of the substantive office holder per month for the duration of the months commencing from June 2018 to September 2019 amounting to Kshs.1,125,000.00.**
- 3. School fees allowance of Kshs.90,000.00 to be paid to the school of the Claimant's child.**

SUB-TOTAL= 4,155,113.40

- vii. Compensation for wrongful, unfair and unlawful dismissal;**
- viii. General damages for discrimination by the Respondent.**
- ix. Exemplary and/or punitive damages;**
- x. Costs of this suit;**
- xi. Interest on (x) hereinabove at the Court rates.**
- xii. Any other, better and further relief this honourable court deems fit to grant in the circumstances.**

8. In response to the Claim, the Respondent contends that the Claimant was lawfully and summarily dismissed from employment due to unprofessionalism and gross misconduct, which was detrimental to the company's operations and image, contrary to both her contract of service and her obligations as an employee under the Employment Act.

9. The Respondent maintains that the Claim is misconceived, misplaced, and amounts to an abuse of the court process. Accordingly, the Respondent prays that the Claim be dismissed with costs.

10. The matter proceeded for hearing on diverse dates, during which both sides called oral evidence in support of their respective cases.

Claimant's Case

11. The Claimant testified in support of her case as CW1 and, at the outset, adopted her witness statement as her evidence in chief. She proceeded to produce the documents filed alongside her Claim as exhibits before the Court.

12. The Claimant testified that she diligently executed her duties, consistently delivered exemplary performance, and upheld the highest standards of integrity throughout her service to the Respondent.

13.Regarding the education allowance, the Claimant stated that eligible employees are required to submit an application to the Human Resources Department for consideration, approval, correction, or rejection.

14.She further explained that although the Human Resources Policy provides that an employee may only apply for an amount equivalent to the termly tuition fees indicated in the child's school fees structure, the established practice within the organization has been that qualifying employees routinely applied for the full annual entitlement without facing any sanction.

15.Upon vetting and approval, the allowance would then be paid directly by the Respondent to the relevant school or institution where the employee's child was enrolled.

16.The Claimant was emphatic that the employee does not receive the school fees allowance directly, as the payment is remitted by the Respondent to the school. She added that it is the responsibility of the Human Resources Department to approve, reject, or request corrections to an application to ensure compliance with policy requirements.

17. The Claimant maintained that it was also the duty of the Human Resources Department to guide first-time applicants through the process of applying for the allowance.
18. She contended that the Respondent's decision to dismiss her on the grounds of an inadvertent error in her application, purportedly under the guise of attempted fraud, was baseless, unreasonable, discriminatory, unfair, unlawful, and invalid.
19. The Claimant asserted that, based on her job grade, she was entitled to an annual education allowance of Kshs. 90,000. In September 2019, she applied for the said amount to cover school fees, admission costs, and related expenses for her three-year-old child joining school for the first time.
20. She explained that she made an honest mistake in applying for the full annual amount, genuinely believing she was entitled to do so, and that she would not submit any further application within that calendar year.
21. The Claimant clarified that her intention in seeking the lump sum of Kshs. 90,000 instead of the termly Kshs. 45,000 was to avoid making repetitive applications every term and not to deceive the Respondent or obtain funds unlawfully. She

further noted that this approach had been the long-standing practice among employees of the Respondent.

22.The Claimant maintained that her actions were not motivated by any intent to defraud the employer to whom she had given 15 years of loyal and exemplary service.

23.According to her, the Respondent disregarded her explanation and, without offering guidance or an opportunity to amend her application, unfairly and maliciously construed her request as an attempt to commit fraud.

24.The Claimant believed that the Respondent acted as though it had gained visibility of the lifetime opportunity for her termination.

25.She added, without prejudice, that the Respondent's Human Resources Policy provides for several disciplinary measures such as reprimand, warning, or suspension, and reserves dismissal as a sanction of last resort.

26.The Claimant contended that the Respondent failed to justify why it resorted directly to dismissal.

27. In the Claimant's view, the Respondent's decision to terminate her employment was therefore drastic, unfair and an act of witch-hunt.

Respondent's case

28. The Respondent presented oral evidence through **Alice Adhiambo Outta**, who testified as RW1 and identified herself as the Head of Human Resources at the Respondent company. Similarly, she adopted her witness statement as her evidence in chief and produced the documents filed on behalf of the Respondent as exhibits before the Court.

29. RW1 testified that the Claimant held a position of significant trust and responsibility but breached her legal and contractual obligations by attempting to misuse the school fees benefit extended to the Respondent's employees.

30. She stated that the Claimant had allegedly altered a school fees structure to reflect a higher amount than was actually due, with the intention of defrauding the Respondent into paying excess benefits.

31. RW1 further testified that, according to the Respondent's records, the Claimant had previously received a warning following a disciplinary hearing where she

was found to have altered a mileage claim requisition to obtain payment exceeding her entitlement.

32. She asserted that the Claimant's summary dismissal was lawful and justified, as investigations established gross misconduct and unprofessional conduct, and that due process was followed, including giving the Claimant an opportunity to be heard.

33. RW1 added that upon the conclusion of the disciplinary process, the Claimant's terminal dues were duly computed and paid in accordance with procedure.

Submissions

34. The Claimant submitted that the Respondent's reason for terminating her employment on the alleged attempted abuse of the school fees allowance was unfounded, malicious, speculative, and non-existent, thereby rendering the termination substantively unlawful.

35. The Claimant further contended that she was not accorded a fair hearing and that the purported disciplinary process conducted by the Respondent was a mere charade designed to hasten her removal from employment. To support this

position, she relied on the decision in **Oyombe v Eco Bank Limited [2022] KECA 540 (KLR)**.

36. The Claimant further argued that the disciplinary hearing contravened the principles of natural justice, particularly the right to a fair hearing before condemnation, as enshrined in Article 50 of the Constitution and Section 41(1) of the Employment Act.

37. On the other hand, the Respondent maintained that it was insufficient for the Claimant to merely allege the absence of a valid reason for termination; she bore the burden of proving that the termination was indeed unfair.

38. Citing the case of **Unilever Tea Kenya Limited v Kenya Plantation & Agricultural Workers Union [2025] KECA 830 (KLR)**, the Respondent argued that it was entitled to summarily dismiss the Claimant for gross misconduct following her attempted abuse of the school fees benefit.

39. The Respondent further submitted that the absence of the Claimant's representative did not invalidate the disciplinary process, as the hearing in question was the fourth scheduled sitting.

40. Referring to the case of **Charles Njagi v Air Connection Limited [2016] KLR**, the Respondent maintained that the process it followed was procedurally fair and that the reason for dismissal was both valid and justifiable.

41. In further submission, the Respondent asserted that the Claimant had failed to discharge her burden of proving unfair termination as required under Section 47(5) of the Employment Act.

Analysis and determination

42. Having considered the pleadings by both parties, the evidentiary material on record, and the rival submissions, the Court identifies the following issues for determination: -

- i. Whether the Respondent has established that there existed a valid and fair reason for terminating the Claimant's employment;**
- ii. Whether the termination of the Claimant's employment was carried out in accordance with the requirements of procedural fairness;**
- iii. Whether the Claimant has established a case of discrimination; and**
- iv. Whether the Claimant is entitled to the remedies sought.**

Valid and fair reason for termination?

43. Pursuant to **Section 43 of the Employment Act**, an employer bears the burden of proving the reasons for terminating an employee's employment, and failure to do so renders the termination unfair under Section 45. Turning to **Section 45(2)(a) and (b) of the Employment Act**, a termination is deemed unfair where the employer fails to demonstrate that the reason for termination was valid, fair, and related to the employee's conduct, capacity, or compatibility, or was based on the operational requirements of the employer.

44. In the present case, the record bears that the Claimant's employment was terminated on allegations that she uttered a falsified/fictitious document with the intent to defraud the Respondent.

45. To support its position, the Respondent produced a copy of a fee invoice from St. Bakhita School, which it claimed was the falsified/fictitious document presented by the Claimant in support of her education allowance claim. The said invoice reflects a fee balance of Kshs. 117,700/= which, according to the Respondent's audit report dated 2nd September 2019, exceeded the legitimate claimable amount by Kshs. 69,920/= under the applicable policy.

46. The audit report further indicated that the Claimant had submitted the altered fee invoice in order to claim an inflated amount for the term, with the intention of rolling over the excess to cover fees for the following year.

47. The Claimant, however, maintained that she merely applied for the full education allowance to which she was entitled.

48. In her response to the notice to show cause dated 10th September 2019, the Claimant explained that it was her understanding that the company could process the allowance either in full or partially, depending on the employee's request and the number of dependents benefiting. She further admitted to adjusting the invoice to reflect her allocation to cover tuition for two terms, so that the subsequent year's allocation could cater for the full tuition amount for that year.

49. It is notable that, although the Claimant later disowned the invoice during the hearing in court, she did not dispute in her response to the notice to show cause the allegation that she had submitted a fee invoice different from that issued by her child's school. If anything, she admitted in her written response and in her email dated 28th August 2019 that she had adjusted the invoice to reflect her allocation for two terms.

50. Given the Claimant's own admission that she altered the fee invoice to align with her allocation, it is evident that the invoice she submitted was falsified and therefore not genuine. This admission lends credibility to the Respondent's allegations.

51. Granted, this may have been the Claimant's first time applying for the benefit and she may have required guidance on the proper procedure; however, she ought to have known better than to alter the invoice. Her duty was simply to present the genuine fee invoice. Clearly, the act of submitting an altered invoice cannot be excused as an inadvertent mistake.

52. Contrary to the Claimant's assertion that she merely applied for her full annual entitlement, it is clear that her conduct went beyond that and that she actively submitted an altered document in support of her claim.

53. Such conduct, without doubt, amounted to dishonesty and constituted a serious breach of the trust and confidence inherent in her senior position within the Respondent company.

54. The Claimant's actions went to the root of the employment relationship, irreparably eroding the trust the Respondent had placed in her.

55. This is further compounded by evidence that the Claimant had previously been implicated in two separate incidents involving inflated mileage claims and overcharging for the hire of a television during the Total Motor Show event.

56. In **McKinley v BC Tel [2001] 2 S.C.R. 161**, the Supreme Court of Canada held as follows:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship... Just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent in the work relationship, or is fundamentally inconsistent with the employee’s obligations to the employer.” Underlined for emphasis

57. Applying the foregoing principles to the present case, the Court is persuaded that the Respondent’s trust and confidence in the Claimant had considerably waned, rendering the continuation of the employment relationship untenable.

58. In view of the Claimant's conduct, a reasonable employer in the Respondent's position would have been justified in dismissing her. Accordingly, the termination of the Claimant's employment satisfies the reasonableness test.

59. This reasoning aligns with the holding in *British Leyland UK Ltd v Swift [1981] IRLR 91*, thus:

“The correct test is whether it was reasonable for the employer to dismiss the employee. If no reasonable employer would have dismissed him, the dismissal is unfair. But if a reasonable employer might reasonably have dismissed him, the dismissal is fair... If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers might not have done so.”

60. In sum, the Court finds that the Respondent has proved, on a balance of probabilities, that there existed a valid and fair reason for terminating the Claimant's employment within the meaning of **Sections 43 and 45(2)(a) & (b) of the Employment Act.**

Procedural fairness?

61. The requirement for procedural fairness is anchored in **Section 45(2)(c) of the Employment Act.** Additionally, **Section 41** sets out the specific steps an employer must follow, namely, to notify the employee of the allegations against

them and to afford them an opportunity to respond, in the presence of a fellow employee or a shop floor union representative of their choice.

62. The record shows that the Claimant was issued with a show-cause letter dated 3rd September 2019, requiring her to explain why disciplinary action should not be taken against her. She responded through a letter dated 10th September 2019.

63. Subsequently, she was invited to attend a disciplinary hearing scheduled for 23rd September 2019. The hearing was later postponed to 26th September 2019, as one committee member was unavailable, and the Claimant was duly notified of the change.

64. The Claimant produced extracts of messages sent on 22nd September 2019 to one Ojijo Nixon, informing him that her baby had been hospitalized and that she would remain with the child until discharge.

65. On 24th September 2019, she received a message from one Eric Githinji instructing her that she was required to proceed with the disciplinary hearing since the Respondent had not received an official doctor's note and she had not been formally granted leave.

66.The Claimant thereafter sent the Respondent a copy of the doctor's report.

During cross-examination, she testified that she was later informed by a human resource officer, via phone call on 26th September 2019, that the hearing had been rescheduled to 30th September 2019. She further averred that on 30th September 2019, the hearing did not take off despite her being ready with her representative. She added that this was without any notice to her.

67.It appears, however, that the disciplinary hearing ultimately took place on 8th October 2019. The Claimant testified that she was caught unawares by this hearing, as she was at her workstation when she received a call from Eric Githinji requiring her to attend the hearing within 30 minutes.

68.The Claimant stated that she requested additional time to allow her representative, who was on leave, to attend, but her request was declined. To this end, she exhibited an email dated 8th October 2019 addressed to Eric Githinji, making this request, to which there is no recorded response.

69.Notably, the Respondent did not produce evidence to demonstrate that the Claimant had been given sufficient notice of the new hearing date or that she was informed in advance that the hearing would proceed on 8th October 2019.

Needless to say, the Claimant's assertion that she was informed of the disciplinary hearing on the very day it took place remains uncontroverted

70. Further, the record of the disciplinary hearing indicates that at the start of the hearing, the Claimant requested for more time to allow her representative to appear with her but she was informed that the matter had already been delayed for too long and the committee had resolved to proceed on that day.

71. In these circumstances, the Court finds no reason to doubt the Claimant's claim that she was denied adequate time to prepare for the hearing and to appear with the representative of her choice.

72. The Court of Appeal, in considering the issue of the adequacy of the notice period in the case of **Nebert Mandala Ombajo v Institute of Certified Public Accountants of Kenya (ICPAK), Nakuru Civil Appeal No. 62 of 2018**, reckoned that disciplinary proceedings are a grave matter for an employee, as the consequences may be catastrophic to the employee's life. The learned Judges of Appeal proceeded to hold that in that case, the complaints against the employee were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could.

73. Similarly, in the present case, I am persuaded that the timeframe accorded to the Claimant was insufficient to enable her to adequately prepare for the disciplinary hearing. It is highly probable that this short notice impaired her ability to mount a proper defence, particularly given the seriousness of the allegations against her and their potential impact on her career.

74. Further, the Court finds the Respondent's refusal to accommodate the Claimant's request for additional time so that her chosen representative could attend was unjustified and unreasonable. Indeed, the Respondent would have suffered no prejudice by postponing the hearing for a few more days.

75. It bears to note that a disciplinary process must embody the principles of a fair hearing, including sufficient prior notice and the reasonable grant of adjournments where valid grounds exist. Such a hearing is not a mere procedural formality or an exercise for ticking boxes.

76. In light of the foregoing, I arrive at the irresistible conclusion that the Respondent failed to adhere to the requirements of procedural fairness set out under Section 41 of the Employment Act in effecting the Claimant's termination from

employment. Consequently, the disciplinary process was flawed and fell short of fairness, rendering the termination procedurally unfair.

Discrimination?

77. The Claimant contends that the Respondent violated her right to equality and freedom from discrimination on the basis of gender by failing to allocate her an official motor vehicle despite various reminders. She maintains that this benefit had previously been extended to her predecessors in the same position.

78. The Claimant produced a letter dated 16th April 2019 confirming her appointment as Acting Retail Sales Manager for a period of three months. The letter indicated that she would receive a monthly acting allowance of Kshs 45,000= in addition to her regular salary.

79. The Respondent, in its defence, asserted that the Claimant was entitled to and did receive mileage allowances. To support this assertion, the Respondent sought to rely on an audit report alleging that the Claimant had exaggerated her mileage claims. However, this evidence is of little probative value since the audit in question was conducted in 2018, whereas the Claimant's acting appointment commenced in April 2019. It therefore follows that the mileage allowance was unrelated to her acting capacity.

80. **Article 27 of the Constitution** expressly prohibits discrimination in any form or on any ground. As to the definition of the term “discrimination”, the **Black’s Law Dictionary, 9th Edition** defines the same to mean ***“Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured.”***

81. During cross-examination, RW1 acknowledged that the position of Marketing Manager was entitled to the use of a company vehicle and further confirmed that all of the Claimant’s predecessors in that position were male.

82. Applying the foregoing definition of discrimination to the facts of this case, the key question that arises is whether the Claimant was treated differently on account of her gender.

83. It is important to emphasize that not every instance of differentiation amounts to discrimination or a violation of constitutional rights. The decisive test is whether the differentiation was unfair, unjustified, or lacking in a legitimate basis.

84. As was held in the case of **Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR**: -

[95]. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate

legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

85. In the instant case, it is undisputed that the Claimant held the position of Retail Sales Manager only in an acting capacity, while her predecessors who were allocated official motor vehicles served in a substantive capacity. There is no evidence that the Claimant was ever confirmed to the substantive position prior to her termination, thereby entitling her to the full benefits attached to that office. Consequently, the Claimant and her predecessors were not similarly situated, and the differentiation in treatment was justifiable.

86. In view of the foregoing, the Court finds that the Claimant has not proved her allegation of discrimination. Accordingly, the claim on that account fails.

Reliefs?

87. As the Court has found that although the Claimant's termination was based on a valid and fair reason, the process leading to it was procedurally flawed, she is entitled to compensatory damages equivalent to four (4) months of her gross salary. In awarding this sum, the Court has considered the length of the employment relationship as well as the Claimant's contribution to the termination of the employment contract.

88.The Claimant also seeks payment of acting allowance for the position of Retail Sales Manager. Under the letter of appointment dated 16th April 2019, the Claimant was expressly notified that she would receive a monthly acting allowance of Kshs 45,000/= in addition to her regular salary.

89.The Claimant did not deny receiving this allowance, nor did she claim that the sum of Kshs 45,000/= constituted an underpayment or that she was entitled to a higher amount.

90.Accordingly, the claim for additional acting allowance is without merit and is therefore declined.

91.The Claimant has further sought payment of Kshs 90,000/= as school fees allowance for her child. Given the Court's finding that her termination was justified on account of submitting a falsified fee invoice, it would be unconscionable to award her compensation in respect of the same benefit she had misapplied. This claim is therefore declined.

Orders

92.It is against this background that the Court enters Judgment in favour of the Claimant against the Respondent in the following terms: -

- a) A declaration that the termination of the Claimant’s employment was procedurally unfair and unlawful.
- b) The Claimant is awarded compensatory damages in the sum of Kshs 800,000.00, being the equivalent of four (4) months of her gross salary.
- c) Interest on the amount awarded in (b) shall accrue at court rates from the date of judgment until payment in full.
- d) The Claimant shall also be entitled to the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of October, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant

Mr. Wambua

For the Respondent

Ms. Muthama instructed by Mr. Kamau

Court Assistant

Milicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that

judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE