

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E107 OF 2022

FRANCIS ZAKAYO WAMBUA.....CLAIMANT

VERSUS

MUSONI MICROFINANCE LTD.....RESPONDENT

CORAM

Before Lady Justice J. W. Keli

C/A Otieno

JUDGMENT

1. The claimant aggrieved with the decision of the respondent to terminate his services as their Chief Technology Officer following the hacking of their direct messaging system filed suit against the respondent vide a memorandum of claim dated 15th day of February 2022 seeking for the following relief-
 - a. **A declaration that the termination of the Claimant's employment by the respondent was unfair, irregular, unjustified and in breach of the law, terms of employment existing between the parties and natural justice.**

and the minutes of the disciplinary proceedings. It further filed an undated witness statement of Joshua Mokaya.

Hearing and evidence

4. The claimant's case was heard on the 22nd January 2025 when he testified on oath as the only witness for his case, adopted his witness statement dated 15th February 2022 as his evidence in chief together with documents of evidence date. He produced his supplementary list of documents dated 8th November 2023. The claimant was cross-examined by counsel for the respondent, Ms. Mayieka, and re-examined.
5. The respondent's case was heard on the 18th June 2025, with Audrey Oloo (RW1) as the witness of fact. He testified on oath and adopted his witness statements dated 29th September 2022 as his evidence in chief. The witness produced documents filed by the respondent under the list dated 29th September 2022 and supplementary list of documents dated 28th October 2024. The witness was cross-examined by counsel for the claimant Ms. Wambua and re-examined. On same date the respondent called a 2nd witness Sammy Mugendi Njeru as an expert witness. He produced the computer forensic report dated 21st May 2021. He was cross-examined on the report by Ms. Wambua and re-examined.

The Claimant's case

6. The claimant was employed by respondent as a Chief Technology Officer vide the letter of employment dated 31 October, 2018 (Exb 1 page 12). His salary was Kshs.467,100/- as shown in the payslip (P.Exb 11 page 44).

7. He performed his duties exceptionally well. At the time of commencement of his employment he did a report to the committee dated April 2019 (P.Exb 14 page 4-14) (supp. list) and in which he tables the status of the IT Department from the time he joined. It is the claimant's case that once he tabled the report, the same was supposed to be implemented by the CEO and Risk Department.
8. Sometime in April, 2021 the respondents Direct messaging system (DMS) was hacked and a message left on how to retrieve their data. On investigation the same revealed: - Weak password and Unrestricted access, which are the same issues that the claimant had found in the company when he joined and tabled the same in his report of April, 2019.
9. Following the investigation, the claimant was issued with a NTSC and he responded to the same. The claimant was then invited for a Disciplinary hearing and then he was terminated vide the letter dated.
10. The claimant appealed against the decision and the respondent was then expected to constitute a committee for hearing of the appeal but none was constituted and no hearing was conducted. He was only issued with an email responding that his services were terminated and the appeal having been considered by a single individual person.

The Respondent's case

11. The Respondent opposed the claim vide a statement of response dated 29th September 2022.
It is the Respondent's position that the Claimant was incompetent and negligent in the

discharge of his duties culminating in the dismissal founding this suit. Further the Respondent contends that its Human resource manual expressly states that the negligence of duty by an employee shall amount to gross misconduct for which an employee shall upon been accorded a disciplinary hearing possibly be summarily dismissed from employment.

12. The Respondent contends that the Claimant was accorded a fair hearing and procedural disciplinary hearing and Claimant found to have negligently performed his duties resulting in the respondent suffering a financial injury. The respondent thus prays for the entire suit to be dismissed with cost.

Written submissions

13. The claimant filed his written submissions dated 29th July 2025 on closure of the respondent's case. The respondent filed written submissions dated 3rd October 2025, and the claimant filed reply submissions dated 7th October 2025.

DETERMINATION

Issues for determination

14. The court on perusal of the issues outlined by the parties was of the considered opinion that the issues for determination in the suit were-
 - a. Whether the termination of the employment of the claimant by the respondent was lawful and fair
 - b. Whether the claimant was entitled to relief sought.

Whether the termination of the employment of the claimant by the respondent was lawful and fair

15. The court agreed with authorities cited by both parties that, in terms of sequence, the employer had to demonstrate a valid reason (substantive fairness) for the termination, and then the termination had to comply with procedural fairness. In the case of Meru ELRC Appeal E002 of 2023, Wanyera v Central Isiolo Investment Limited [2024] KEELRC 596 (KLR) (8 March 2024) (Judgment), the court held that:-

"A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the Employment Act or both." Similar decision in George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR which stated that: "14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the Employment Act or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the

employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

16. The prove of employment claims is as according to the provisions of section 47 of the Employment Act to wit- *‘(5)For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer’*’

The appellant’s submissions on the validity of the reason

17. The termination letter dated 17th September, 2021 (P. Exb 6 page 25-27) We find that the claimant was terminated on grounds of:- Data stolen -Negligence of duty -Weak password. On the issue of i) Data Stolen - it is our humble submission that there was no loss of data during the hacking incidence of April 2021 that led to the claimant's dismissal. Infact the respondent's witness DW1 & DW2 both echoed the same that there was no financial loss, data loss or any business loss during the incidence of April, 2021 or at all. Further, there has never been any data loss, financial loss or any loss during the employment of the claimant. In other words there was no evidence of loss even in the documents produced by the respondents. The allegation of data loss were therefore out to malice and unfounded and it is indeed unfair to have terminated the claimant on such an unfounded ground.

18. During the hearing, the defendants relied on the forensic report on page 19 and stated that there was hacking. However this was just a mere ransom note which anyone can write in a

system. It is a kin to stating that the thieves were seen walking around in CBD but that does not amount to any theft taking place. Similarly placing of a ransom note in the system did not mean hacking or entry into the respondents system. It is the claimant's case that the system was not interfered with by the hackers.

19. On the issue of tracing the hackers, DW2 testified that he did not trace the origin of the ransom note. On the other hand the claimant maintains that in the IT systems all activities on a system are like footprints and their origin can all be traced. DW2 testified that he only employed one method of searching for the route origin of the hackers an issue which the claimant testified that had all the operation logs been utilized, he would have found it to be an internal note and not an external note. Meaning that there were no hackers into the system in the first place. The key point is that the claimant was terminated on grounds of loss of data yet there were no such losses thus the same was unfair and we pray that this honourable court finds as much.
20. ii) On the issue of Negligence of duty - it is our humble submission that the respondent did not prove these allegations of negligence of duty thus the termination was unfair. He has always been present at work and received great appraisals from the CEO over the years. The IT department supported all the functions of the core business of the respondent and there was no financial, business or data loss. As such the claimant was indeed a faithful and hard working employee.

21. iii)With regard to the issue of a Weak password, it is our humble submission that it was unfair for the respondent to terminate the claimant on this ground yet it is not the weak password that caused the hacking. The cause was lack of a firewall (poor infrastructure) as shown in the respondent's investigation report at page 19. The report stated as follows:-
"The password of the user root, in as much as it was available, was not complex. However, this was not the cause of the breach, The cause was lack of or poorly configured firewall to ward off external attacks. The best practice in the industry dictates that IT infrastructure must have at least one firewall as a bare minimum requirement. In this case, there was no firewall, or the firewall was poorly configured hence the exposure. The Vendor (respondent) being the custodian and administrator of the firewall, is wholly liable for this exposure. The hacking was therefore due to lack of proper infrastructure thus it was not fair to heap such blame on the claimant. It is our humble submission that the claimant does not purchase the infrastructure of the respondent company, he can only work with what is provided. The respondent had been notified of the same but failed to apply a stronger infrastructure to support the IT department to a more upgraded system but the same was not purchased. The claimant therefore did his level best work the IT department with the shortcomings that were there and hence the same was no loss of business or date or client's finances. The issue of weak password is therefore an unfair ground to terminate the claimant yet the password that was there was for the level of the infrastructure provided and more so that he had found the company like that in 2019.
22. Further, at the beginning of this employment the claimant had done a report dated April 2019 (P. Exb. 14 supp list page 4-14) and from a perusal of the same at page 23 thereof it is

evident that the issue of weak passwords is the same issue he found pre-existing in the company at the time he joined the company. It was his recommendation on high priority that a third party risk assessment undertaken and the same to include internal and external penetration test. In the same page 23 the claimant had lamented that the last penetration test had been done in the year 2016. It is the claimant's testimony that despite flagging these items as high priority the same were not looked into which is a function of the risk department and top management. Nonetheless, despite this, the claimant still managed to work under the conditions given to ensure that no data was lost or stolen an issue which is highly commendable. It is therefore the claimant's submission that was unfairly terminated and without valid reason as the allegations against him were not substantiated. In actual fact he faced victimization for failing to take up the Voluntary Early Retirement. There was therefore no basis for terminating the claimant and the termination was therefore unfair and unlawful and we pray that this honourable finds and holds as much.

The Respondent's submissions on the reason for termination

23. It is the Respondent's position that the reasons for dismissal of the claimant from employment were valid since during the hearing it came out clearly that there was hacking on the system of the Respondent. That the said hacking was a result of weak password to which the Claimant was negligent on his duty as the IT officer. That during the hearing the Claimant confirmed that it was his responsibility to ensure that the password was strong and that the same was not a responsibility of the risk department. Further on the filed forensic report it was clearly captured that the document management system was blocked by the hackers and as such no one had access to the same and as a result there was loss of data to

unknown people. As such the reasons adduced for dismissal of the claimant were justified as the same said lapses exposed the Respondent's business to hackers.

Decision on substantial fairness

24. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- *'45(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 employees 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.' To pass

the fairness test the termination must pass the substantive (in terms of reasons)

fairness and the procedural fairness under section 41 of the Employment Act (Walter

Ogal Anuro v Teachers Service Commission[2013] eKLR).

25. The court found it was not in dispute that there was termination of the employment services of the claimant vide letter dated 17th September 2021 of which the reason for the termination were stated as follows- *'Based on your explanation and the evidence provided during the disciplinary committee hearing , the committee deliberated and agreed that Based on your*

explanation and the evidence provided during the disciplinary committee hearing, the Committee potential risks.

a) You neglected your duty as the Chief technology Officer which exposes Musoni Microfinance to huge potential risks.

b) Management had not been able to run the business as expected since April 20.21 for reasons that could have been mitigated. The Risk Department had raised the system issues severally but the same was not

c) in reference to your Job Description, some of your responsibilities include:

Conduct on going Risk assessment and course correction on current and future IT systems and infrastructure.

Review vendor proposals and make decisions based on things such as price, what they offer, and how the vendor product may fit into the organization.

Ensure the Musoni's data remains secure by keeping up to date on the latest cybersecurity threats and finds ways to guard against them on an organization-wide scale.

According to the committee, you did not fulfil your responsibilities as the Chief Technology Officer.

d) You take full responsibility of the weak password. The vendor used the root password which simplifies the aspect of depicting the system. It was expected that you would change the password to a more complex password at go live and adhere to the password policy guideline. The matter of the weak password had been flagged

severally by the Risk Department. However, the password was not changed which made the system vulnerable.) The password policy was not implemented which was a breach of duty. The maximum password age is set to 60 days.

f) Unrestricted access to the database service from the Internet was a serious breach which could have been avoided.

g) You were expected to monitor whether the firewall was working or not and there were several ways to confirm. However, you did not confirm which left the system vulnerable.

h) During the hearing you agreed that the hacking was a huge risk to Musoni due to reputational risk, financial loss, potential litigation by 3rd parties due to clients' data loss amongst other risks.

i) There was a fundamental breach of contract which undermine the duty of trust and confidence between you and Musoni Microfinance Limited.

The above amounts to gross misconduct and is a serious breach of our terms of service. The Disciplinary Committee decided that you neglected your duty as the Chief Technology Officer for Musoni Microfinance Limited. Considering that you hold a position of trust in our organization, your continued employment with us is no longer tenable and the Disciplinary Committee has decided to summarily dismiss you from employment with effect from Friday 17th September 2021. Any amounts entitled to you will be calculated and settled after submitting a duly executed clearance form. Musoni Microfinance reserves the right to offset any cash losses or staff loan associated with you from your final dues. Please arrange to handover any company records and any

other property under your custody to your immediate supervisor. The discharge from Musoni's employment does not exonerate you from taking full responsibility for any fraudulent activities or misappropriation of Musoni's assets during your tenure of employment that may be discovered after your discharge.'

25. On the validity of reasons, the Court of Appeal in Ondari v National Hospital Insurance Fund [2025] KECA 687 (KLR) elaborated on how the court is to determine the validity of the reasons in termination of employment as follows- *'The grounds of appeal are as follows: that the learned judge erred in law and fact: by holding that the termination of the appellant's contract of employment was lawful and fair contrary to the evidence adduced and the provisions of sections 41, 43 and 45 of the Employment Act (the Act); in holding that it was not for the court to audit the truth of the reasons for termination of employment contrary to the requirements of section 45 of the Act and in failing to appreciate the law in evaluating the pleadings and evidence placed before him and consequently arrived at wrong conclusions; in dismissing the appellant's claim on the basis of not having been proved contrary to the evidence on record; in finding that the court was persuaded that there existed reasonable grounds for termination of the appellant's contract of employment contrary to the legal requirement of proof of valid reasons for termination and in finding that the appellant was given a fair hearing before termination thus arriving at an erroneous conclusion.*

Decision at appeal

The appellant complained that the termination process was unfair; he also blamed the trial court for finding that the court's duty was not to verify the truth of the reasons advanced for

terminating employment. According to him, the trial court's reasons are contrary to and contradict Section 45 of the Act. In several of its decisions, this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed.....

30. In the case of Kenfreight (E.A.) vs. Benson K. Nguti Civil Appeal No 31 of 2015 2016 KECA 688 (KLR), this Court had this to say: “The next and more critical question is whether the termination was unfair. It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee’s conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. Section 43 specifically places the burden to prove that the termination was fair on the employer”.

From the above chronology of events, starting with the interim audit report, which was discussed in the presence of the appellant, the appellant was given opportunities to make representations and to be heard on the allegations. In the end, the respondent found the appellant had not exonerated himself and believed that there were reasons to terminate his services. We agree with the trial court that indeed it is not for the court to interrogate the said reasons. Further, we are satisfied that the processes leading to the appellant’s termination were fair.” The court will apply the foregoing jurisprudence in the determination of the validity of the reason in the termination of the claimant’s services.

26. The court found that the respondent’s reason for termination was on the basis of neglect of

duty based on a weak password. The court found that the failure to adhere to the password policy by the claimant was proved during the hearing. The claimant in submissions contended that the weak password was not the cause of the breach and relied on the computer forensic report to that effect. During cross-examination, the claimant admitted he was aware that the password was not to the required standard in April 2019. He confirmed the password change was by the ICT. He admitted the ICT account had a weak password. The claimant admitted he was responsible for a strong password. The court found that the reason for termination related to negligence regarding the password was proved to be true.

27. The claimant submitted that, as per the computer forensic report, it was a lack of firewall that led to the hacking and not the weak password; hence, that was not a valid reason for termination, as the employer was responsible for the infraction. The dismissal letter gave a further reason for termination besides the weak password as *‘in reference to your Job Description, some of your responsibilities include:*

Conduct on going Risk assessment and course correction on current and future IT systems and infrastructure.

Review vendor proposals and make decisions based on things such as price, what they offer, and how the vendor product may fit into the organization.

Ensure the Musoni's data remains secure by keeping up to date on the latest cybersecurity threats and finds ways to guard against them on an organization-wide scale.

According to the committee, you did not fulfil your responsibilities as the Chief

Technology Officer’’ During cross-examination, the claimant admitted that he

brought the ICT system, he tested the user compatibility, risk assessment, and then put it to use. He confirmed he tested whether it aligned with the organization. He further confirmed he checked whether the system met the ICT standard of organisation. He did not have the evidence of the foregoing. The claimant told the court that he relied on the vendor's report that the system had firewall. When asked whether he verified what the vendor said, the response was 'it was in the vendor's contract'. The claimant was asked the following question – *'You were the technology expert in the change of the supply of system, you were not to confirm yourself, or relied on what the report just said?'* The claimant did not give a direct answer. The court concluded that the claimant was negligent in accepting a new ICT system from a vendor and installing it for use by the respondent without confirming the existence of a firewall, which was critical in the prevention of cyber threats, and was missing as per the computer forensic report. The court noted that the job description of the claimant was not in dispute, and part of it was stated in the letter of dismissal, which was – *'Review vendor proposals and make decisions based on things such as price, what they offer, and how the vendor product may fit into the organization.'*

Ensure the Musoni's data remains secure by keeping up to date on the latest cybersecurity threats and finds ways to guard against them on an organization-wide scale.' The court has no role in substituting its thoughts with those of the employer, including substituting the reasons (*Ondari, Supra*). The reasons for the lack of strong passwords and adherence to password policy and failure to protect the employer from cyber attacks by the claimant were proved to have existed before the

termination. The court found that the reason for termination based on misconduct or negligence was proved to have existed (section 43 and 45 of the Employment Act) on a balance of probabilities.

Procedural fairness

28. The procedural fairness is as per section 41 of the Employment Act, to wit- *'41. Notification and hearing before termination on grounds of misconduct*

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

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.'

29. The claimant produced the minutes of the disciplinary proceedings, which the court noted disclosed the reason the employer contemplated the termination, the claimant made his representation, and in the dismissal letter, it was noted the representation was considered. During cross-examination the claimant told the court after the hacking there was investigation, he was issued with notice to show cause, he was invited to a disciplinary

hearing, he was infirmed of right to be accompanied by a fellow employee, he attended the disciplinary hearing with fellow employee, he was asked to explain himself, he got the decision, he appealed and got a response. The claimant told the court he was not invited for hearing on the appeal. The claimant produced the Human Resources manual (page 124 of the manual) and said a meeting was required at the appeal stage. The court confirmed the same was true. RW1 on being asked about the appeal meeting said the board chair gave the decision. The email on the appeal was dated 15th September 2021(C-exhibit 8) and reflected a one-man decision by the board chair who upheld the decision of the committee on review of documentation. The court finds that the employer manual provided for the claimant to be invited for a meeting on appeal. To that extent the respondent failed to adhere on its own manual hence did not fully comply with own procedural fairness.

Whether the claimant is entitled to relief sought

30. The claimant sought the following reliefs-

- a) A declaration that the termination of the Claimant's employment by the respondent was unfair, irregular, unjustified and in breach of the law, terms of employment existing between the parties and natural justice.
- b) Damages equivalent to 12 months' gross pay for unlawful termination.
- c) Payment equivalent to two (2) months' salary in lieu of notice and all other
- d) terminal benefits due to the Claimant.
- e) An injunction restraining the Respondent by itself, its agents, servants and/or employees from repossessing and/or interfering in whatsoever manner with the

claimant's possession of M/V Reg. No. KDA 694G pending the hearing and final determination of the subject matter.

f) Interests on (a) and (b) at court rates from the day each payment fell due and payable until payment in full.

g) Costs of this suit and interest thereof.

31. On finding unfair termination of which the court found the termination was procedurally unfair for failure to comply with its own human resources manual in failing to invite the claimant for meeting on the appeal, the court is to consider the remedies under section 49 of the Employment Act to wit- *'Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—*

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2)Any payments made by the employer under this section shall be subject to statutory deductions.

(3)Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a)reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or

(b)re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.”

32. The court found the termination was lawful, and the only issue was procedural unfairness at the appeal stage for non-compliance with the human resources manual by the respondent. The court will not reward an employee for own misconduct. For procedural unfairness the court was of the opinion that remedy under section 49(1)(b) was sufficient to wit- *‘(a)the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;’* The claimant asked for 2 months notice pay. On perusal of the contract of service, the court found the notice period under clause 11 was 2 months' notice. The gross salary as per payslip of August 2021 was Kshs. 467,100 /-. The court then awards notice pay for lack of procedural unfairness for total sum of Kshs. 934,200/-.

33. On prayer for terminal benefits due to the Claimant- The basis of the prayer not established.

34. On prayer for an injunction restraining the Respondent by itself, its agents, servants and/or employees from repossessing and/or interfering in whatsoever manner with the claimant's possession of M/V Reg. No. KDA 694G pending the hearing and final determination of the subject matter. This was an interim prayer and is thus overtaken by events.

CONCLUSION

35. The Court held the claim was merited on the basis of unfair termination for lack of compliance with procedural process under the Human Resources Manual of the respondent at the appeal stage. Judgment is entered for the claimant against respondent as follows-

a. Notice payment equivalent of 2 months gross salary for the total sum of Kshs.934200/- is awarded payable with interest at court rate from date of judgment.

b. Cost of the suit.

36. Stay of 30 days is granted.

37. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY
OF NOVEMBER, 2025.**

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant- Ms. Kimani h/b Wambua

Respondent- Mugo h/b Okeyo

ORIGINAL