

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

CAUSE NO. E097 OF 2024

**YVETTE NYATICHI TAFIRI
CLAIMANT**

VERSUS

JAMES FINLAY'S MOMBASA LIMITED RESPONDENT

JUDGMENT

The issue in dispute is the respondent's alleged unlawful termination of the claimant.

The claimant is seeking the following:

- a) *A declaration that the termination of employment was wrongful, unfair, and in breach of the Employment Act.*
- b) *A declaration that the actions of the respondent violated the claimant's constitutional rights.*
- c) *Payment of all the claimant's benefits;*
 - i) *Gratuity for 13 years worked at Ksh. 282,000 per year Ksh. 3,666,000.*
 - ii) *12 months' compensation Ksh. 282,000 x 12 months Ksh. 3,384,000.*
 - iii) *Damages for loss of years and taking into account the exigencies of life (282,000 x 12 months x 22 years x 2/3) Ksh. 47,376,000.*
 - iv) *Damages for defamation for the printed articles.*
 - v) *Damages for grave mental anguish and psychological torture the claimant underwent.*
 - vi) *Damages for discrimination.*
 - vii) *Costs of the suit.*
 - viii) *Interest on the awards.*

Claim

The claimant is a female adult. The Respondent is a limited liability company incorporated in Kenya under the Companies Act.

The respondent employed the claimant on 24 September 2010 as a management trainee. She rose through the ranks, ending as the departmental manager for safety, health, environment and quality, SHEQ manager, earning Ksh. 282,000 per month.

The claim is that the respondent terminated the claimant's employment on 20 March 2024. In a notice to show cause dated 4 March 2024, the respondent alleged that the claimant had committed fraud by colluding with Kawaga Service Limited (Kawaga) to sell the respondent's waste materials to third parties. Kawaga is a waste management company which the respondent had contracted to dispose of the respondent's waste materials.

The claimant responded, denying the allegations. The respondent established a disciplinary hearing committee to hear the matter, but fundamental flaws and irregularities marred the proceedings. The resulting decision terminating the claimant's employment was wrongful and unfair.

The respondent indicated in the notice terminating employment that it had relied on relevant information contained in documents and presentations that were not presented at the disciplinary hearing. No witness testified or produced any exhibits. The disciplinary committee asserted that its decision was based on a report from an internal investigations team regarding the alleged misconduct. The report, prepared by the respondent, was neither served upon the claimant nor produced at the disciplinary hearing. The claimant had no opportunity to cross-examine the maker of the investigation's report or the records relied upon.

At the disciplinary hearing, the claimant produced documentary evidence and oral recordings in her response to prove innocence. She presented a written statement and made oral presentations, which were not challenged.

The claim is that, Contrary to company policy, some members of the disciplinary committee were not physically present and conducted the hearing virtually. Although the respondent made grave allegations accusing the claimant of fraud, it produced no evidence against the claimant, and it was untenable for the disciplinary committee to find the claimant guilty of the allegations.

Under clause 8.1.2 (3) of the respondents' Staff Manual, the officer mandated to convene the disciplinary procedure is the managing director. Contrary to the set policy, the disciplinary committee was not conducted by the managing director, thus rendering the process null and void for want of legality.

Aggrieved by the termination of employment, the claimant filed an appeal. While the appeal was pending, the respondent took various actions against the claimant, which indicated that the appeal had been predetermined.

The claim has been removed from all official company WhatsApp chat groups. The medical card was cancelled. Terminal dues were remitted to the bank account before the claimant could go through the clearance process. When the claimant asked former colleagues to accompany her to the appeal hearing, they declined and indicated that, through an internal memo dated 4 April 2024, the respondent informed all employees that she had ceased her employment.

The disciplinary process was a mere fallacy.

The claim is that while the claimant was on suspension and pending a disciplinary hearing, she was shocked to discover newspaper articles published in the Citizen Weekly and Taarifa News alleging that she was involved in a sex scandal with a senior staff member of the company, which was the main reason why the respondent suspended her. The newspapers quoted Patrick Langat, a senior employee of the respondent, as their source. Going by the detailed publications, including highly confidential information held by the respondent, it was clear that the respondent shared the information to destroy the claimant's reputation and character in the social standing, particularly within the tea industry.

The claim is that the claimant's close family members were gravely affected by the publications, which were easily accessible to the public; the claimant underwent great mental anguish and psychological torture. Her family suffered anguish, and public ridicule as close relatives shunned her and refused to associate with a person portrayed to be sexually immoral by the media reports. The claimant lost her employment due to baseless allegations.

The claim is that the respondent violated the claimant's constitutional rights and degraded her personality. The respondent maliciously used the local media to tarnish her name by fabricating and printing lies.

Under Article 41 of the Constitution, the claimant is entitled to fair labour practices. Termination of employment using unsubstantiated allegations violated the right. The claimant was denied the right to natural justice under Article 50 of the Constitution when the disciplinary committee failed to adhere to the set polices. The claim was dismissed on the grounds of her socio-economic rights under Article 43 of the Constitution, following the unlawful termination of her employment. The publication of defamatory media articles violated her right to dignity, as protected under Article 28 of the Constitution.

Upon loss of employment and being branded a scandalous person through the media, the claimant suffered mental anguish and ridicule. This has caused the claimant's depression, which she is currently under treatment for. The claimant has been shunned by persons she used to relate to easily and considered friends because of the false publication in the newspapers.

The respondent treated the claimant discriminatorily throughout the matter, resulting in the unlawful termination of employment. This was because, when the alleged fraud arose, she was on annual leave when the managing director, Wesley Bosuben, informed her about it. This meant that the Managing Director was aware of the allegations in advance.

The claimant shared with the Managing Director a copy of the letter sent to her by the whistleblower, yet during the disciplinary meeting, the Managing Director acted as if it were the first time he had heard of the matter.

During the investigation of the alleged fraud, some employees were implicated. The claimant became aware that one such male employee, Alphonse Adoyo Ojwang, was granted an officer's early retirement and gratuity, while she was harshly judged without evidence. This was discriminatory.

Following the unlawful termination of employment, the claimant has suffered mental anguish and psychological torture. The claimant had worked for the respondent for 13 years without a disciplinary record. The claimant was 38 years old and expected to work until retirement at 60, and was therefore denied 22 years of employment by the respondent. The information published by the respondent in the newspapers has tarnished her character and reputation, thereby minimising her chances of ever obtaining employment with any company. The claimant's family, including her mother, were significantly affected by the false information published in the local media. The mother has since developed serious health issues, including high blood pressure.

The claimant's employment opportunities have been reduced by the act of unlawful termination of her employment by the respondent. She has worked consistently for the respondent since her graduation. She was promoted to the SHEQ Manager position on merit. At 38, she is at a disadvantage in seeking new employment, especially in her area of specialisation, SHEQ.

The claim, therefore, seeks compensation for the lost working period leading to retirement. She is seeking the following:

- a) Gratuity for 13 years Ksh. 3,666,000.
- b) 12 months' compensation Ksh. 3,385,000.
- c) Damages for the loss of 22 years Ksh. 47,376,000.

The claimant is seeking general damages on an aggravated and exemplary basis against the respondent for the violation of her constitutional rights. The claim for payment of damages for mental anguish and psychological torture for unlawful termination of employment, and for the defamatory articles published in the print media.

The claimant is seeking that her claim be allowed with costs.

The claimant testified that she was employed on 24 September 2010 and was promoted to SHEQ manager on that date. On 1 February 2024, while on annual leave, she was served with a letter of suspension and directed to stay away from the office pending investigations of alleged fraudulent disposal of waste materials. On 4 March 2024, the claimant was served with a notice to show cause, and she replied on 5 March 2024. On 10 March 2024, the claimant was invited to attend a disciplinary hearing on 11 March 2024 at the respondent's premises. The claimant attended, but the disciplinary panel was not properly constituted and was convened contrary to the set policy.

The claimant testified that, after the disciplinary hearing on 20 March 2024, she was served with a notice of termination for alleged gross misconduct. She lodged an appeal, which was heard on 15 April 2024 and dismissed by Julian Rutherford on 19 April 2024. However, while the appeal was pending, the claimant was removed from the official WhatsApp group, terminal dues were remitted to the bank account, and on 4 April 2024, the respondent circulated a notice to all employees stating that the claimant had ceased her employment. The respondent also published with two weekly newspapers a story relating to the claimant's

termination of employment, intimating that it related to a sex scandal that almost brought the respondent down.

The claimant testified that, as the SHEQ manager, she was responsible for waste management under the respondent's policy. The procedures for the disposal of broken pellets donated to the community, together with firewood. There was a set procedure for the disposal of waste in proper sacks. For the broken wood pellets, approval from the directors was necessary, and the NEMA panel also had to approve.

The claimant testified that, in January 2024, while on annual leave, the respondent's investigations team called her regarding waste disposal. She asked Kawaga to get the letters from the schools where the pellets and sacks had been donated. At the time, the claimant was on leave and was therefore unaware of which schools had been involved. Only Kawaga had the contacts. However, Kawaga was not responsible for charitable donations, as the claimant was accountable and required to authorise such contributions to the schools and the community. The board decided to allocate the role to Kawaga, but there is no written authority for it.

During the internal audit of internal risks, Kawaga needed to obtain contact information for schools that had reportedly received donations. The claimant asked Kawaga to get letters from the schools confirming receipt of donations.

The claimant testified that she did not know the beneficiaries of the paper pellets. She had not met Destiny Garden and Kelvin Homes. Jacob Boaz withdrew his letter. Waste paper materials and pellets were donated to various community groups following a management team meeting chaired by the department head. No minutes were taken.

The claimant testified that there was internal information given by Lang'at to various persons who published defamatory information about her. The publications questioned her integrity and character. This has caused harm and anxiety because the information published was not accurate. The effect of the publication was harmful and indicated that she had an affair with her boss and had a child with him. This contributed to the termination of employment. This led to the claimant being distressed. Friends had to intervene and ensure she got medical attention. Friends noticed that the claimant had become withdrawn and recommended that the claimant see a doctor. A medical report is filed to this effect.

Upon cross-examination, the claimant testified that Kawage was contracted and authorised by the respondent for waste management. The contract went through the procurement process. They were to dump the waste in accordance with County Regulations. They said the paper could be donated to charitable institutions, and the respondent did not object. Three directors attended the management meeting.

There is no letter granting Kawaga authority to donate the waste. The approvers were part of the disciplinary hearing against the claimant. It was noted that Kawaga had the general authority to dispose of waste by donating it.

The allegations of gross misconduct were not corrected, as the claimant acted in accordance with the management team's guidance. The termination of employment caused distress, and she had to see Dr Mwinga post-employment due to anxiety.

The claimant called Dr Edwin Mwinga Githire a specialist in psychiatry practice since 1987. The witness examined the claim on 15 July 2024 and filed a report on her mental health assessment. He took the claimant's history and stated that she was suffering from headaches and distress after the respondent terminated her employment.

Upon cross-examination, Dr Mwinga testified that this was the first time he had seen the claimant. He did not have her medical history apart from what the claimant told him. Any other medical practitioner had not seen her. He relied on what he was told and a psychiatric examination. It was evident that certain events had occurred, prompting the claimant's visit for assessment. Even before her employment was terminated, the claim was under stress. Post-employment, there was depression, and this affected the brain, leading to social isolation.

Response

In response, the respondent admitted that the claimant's employment was terminated on 20 March 2024 for justifiable cause. The claimant was issued a notice to show cause letter dated 4 March 2024, listing specific adverse allegations against her. A disciplinary hearing was held, and the claimant attended, whereupon a decision was taken to terminate employment.

The allegations against the claimant were a culmination of investigations conducted by the respondent, which were prompted by information received from a whistleblower suggesting that the claimant, together with other employees and third parties, were engaged in misappropriation of wastepaper bags, the property of the respondent, their sale, and failure to

account for the proceeds of such sale. Pursuant to investigations, it became apparent that the claimant had colluded with Kawaga and one Jacob Boaz in trying to cover the disposal of wastepaper bags by depicting the disposal items as donations to certain educational institutions.

The claimant's irregular conduct in disposing of the wastepaper bags was that, as the officer mandated for collection and disposal and charged with the duty of ensuring that the same was done in accordance with the set policy, she failed to keep proper records of such disposal and to ensure that the same was done in accordance with the policy. The claimant continues to involve Kawaga in the disposal of waste paper bags, despite the contract with the respondent for the disposal of waste having expired. The claimant allowed waste products to leave the respondent's premises without ascertaining their end destination or subsequent use, an obligation that it was her duty to establish, as a matter of accounting, in accordance with the respondent's social responsibility.

The claimant was also charged with having relied on the contracted company involved in the disposal of wastepaper to solicit letters from various educational institutions to justify and camouflage the end use of the disposed wastepaper material.

The claimant was charged with abdicating her managerial responsibility to ascertain the destination of the waste products personally. One of the educational institutions the claimant presented as a beneficiary of the allegedly donated wastepaper bags, and which she produced a letter purportedly written by the institution, later disowned it, maintaining that it did not receive any donations.

The response is that the respondent relied on oral and documentary evidence presented during the disciplinary hearing to conclude that termination of employment was warranted. The investigation report was made available to the claimant, and the contents thereof were highlighted during the disciplinary hearing. She was allowed to respond to the allegations but failed to provide convincing explanations to exonerate herself from wrongdoing.

The disciplinary hearing is not similar to a judicial hearing. The claimant doesn't need to cross-examine persons who provided information relied upon by the respondent. The claimant was made aware of the investigations and the allegations made against her, and was allowed to respond. Currently, technology enables virtual hearings, including disciplinary hearings.

Upon the termination of the claimant's employment, she ceased to be an employee and was therefore not entitled to the benefits of an employee. However, if the appeal were successful, the benefits would have been reinstated. The actions taken by the respondent post-employment were necessary and valid.

The respondent is not aware of or a party to the publication of the article referenced by the claimant. It is not liable for any third-party activities. The alleged breach of constitutional rights is denied.

On the alleged discrimination, such particulars are denied. Where fraudulent activities involving wastepaper disposal involved other employees, each case was addressed on the merits and does not constitute a discriminatory practice against the claimant as alleged. The claim was issued with a notice of termination of her employment, and the reasons were that this had nothing to do with her as a female employee, but only as an employee.

The managing director, upon becoming aware of the incidents of fraud, had a duty to commence investigations through both internal and external mechanisms to verify authenticity. The investigations had to cover the claimant's role and her possible involvement in the matter, as she was the one directly in charge of the subject matter.

Alphonse Adoyo Ajwang, although not a party to these proceedings, was employed as the commercial manager at the relevant time. He was also subjected to the investigation process but was cleared of any liability by the investigators. The termination of his employment was based on the terms of his contract, which the claimant was not privy to and cannot be disclosed due to the protections he enjoys under the Data Protection Act.

On the allegations that the respondent did not have cogent evidence against the claimant that she had committed fraud, the response is that there were reasonable and sufficient grounds to suspect the claimant of having been a party to the fraud to the substantial detriment of the respondent's property. That suspicion was not because of her gender but because of her role in an office responsible for the disposal of waste from the respondent's premises.

The managing director's evidence is based on findings arrived at through investigations, not on what the claimant would have wanted him to believe. The claimant's claims are not justified and should be dismissed.

The respondent had no obligation to employ the claimant until retirement age, as alleged. The employment was terminated for a justified cause.

The claimant's contract with the respondent did not provide for the payment of gratuity. Such a claim is misconceived.

There is no basis for the award of aggravated or exemplary damages. The alleged defamation cannot be sustained against the respondent, and no damages can ensue in this case. The claims for payment of damages are not justified.

The respondent called Wesley Bosuben, the managing director. He testified that the claimant was the SHEQ manager and the central coordinator for handling waste movement from the company and its disposal. Part of her duties was to authorise waste collection and ensure it was disposed of in line with the Respondent's Waste Management Disposal Policy and relevant regulatory requirements. The specific responsibilities were:

- a) Providing advice and guidance in all matters related to Waste Management as the respondent.
- b) The development, upkeep and implementation of the Waste Management and associated procedures throughout the respondent.
- c) Audit and review of vehicles for transportation of waste.
- d) Ensuring only contracted items are disposed of in accordance with waste legislative requirements.
- e) Maintaining an up-to-date list of waste contractors and statutory licenses for waste disposal.
- f) Ensuring that all relevant new and upcoming waste legislative requirements are identified and, when appropriate, communicated to managers and staff promptly to ensure the respondent always remains compliant.
- g) Liaising with procurement to procure waste management services contracts in a suitable and legally compliant manner.
- h) Managing all waste contractors commissioned by the respondent.
- i) Conducting a rolling schedule of waste audits/inspections at the respondent.
- j) Responsible for the approval of donations of broken pallets to the community if need be.

Bosuben testified that the respondent has a waste management policy, which the claimant was supposed to apply but failed to do so. As a result, in 2023, the respondent received various allegations from whistleblowers regarding the inappropriate handling of waste products at the Mombasa warehouse. This includes the illegal sale of waste paper sacks, which should have

been donated to nearby schools. The illegal sale of damaged pallets, which should have been donated as charitable gifts. The illegal sale of waste tea, which should have been incinerated.

The respondent conducted internal investigations through the Group's internal audit unit, which identified the claimant as one of the employees who was involved in the malpractices. It was also established that the involvement included other employees and external stakeholders who interacted with the respondent.

The respondent's board decided to engage an external consultancy firm, Control Risk, to conduct in-depth investigations into the matter.

Bosuben testified that the Control Risk was to identify the extent to which possible individuals were involved in the malpractices and to determine the evidence to substantiate or refute the whistleblowers' allegations. They were also to determine the probable extent of the *modus operandi* of the malpractices.

The investigations confirmed that the claimant, as the coordinator responsible for handling the company's waste for disposal, did not maintain proper documentation of donations to third parties. The claimant tried to cook the evidence to defeat the investigators' findings when it became apparent that she had failed in her duties. In an effort to cover up the failure, the claimant instructed Edwin from Kawaga, an official of the company subcontracted for waste disposal, to approach the institutions and write to the respondent stating that they had received donations for charity. It turned out that Kawaga initiated the alleged disposal of waste material to educational institutions and not the respondent.

The letters from the beneficiary schools contained little detail, and the student letters were intended to circumvent the investigations. One representative from Destiny Gardens Education Centre, which allegedly received a donation, wrote an email on 16 December 2023 denying that the school received any waste donations from the representative, as alleged by the claimant.

Bosuben testified that, as a result of the investigations, the claimant was invited to respond through a notice to show cause; she failed to provide satisfactory responses and was invited to a disciplinary hearing. Upon the withdrawal of the letter from Destiny Gardens Educational Centre, the claimant was unable to support her assertions. She did not know where the waste materials had been disposed of or donated. Her representations were not

satisfactory, leading to the termination of employment through notice dated 20 March 2024. The claimant has paid her terminal dues, including:

- a) 3 months' notice pay;
- b) Salary up to 18 March 2024.
- c) Payment in lieu of annual leave days not taken.

Upon termination of employment, the employee's benefits were withdrawn. The claimant was granted the right of appeal post-employment; hence, the claims that she was unfairly treated are not justified. The appeal was addressed and found without merit.

The Claimant submitted that her summary dismissal by the Respondent was unlawful, procedurally and substantively unfair, unconstitutional, and deliberately calculated to destroy her reputation and career. She contends that the termination violated Sections 41, 43, 45, and 47(5) of the Act, the Respondent's own Staff Manual, and various provisions of the Constitution of Kenya.

The Claimant avers that she joined the Respondent on 24 September 2010 as a management trainee and, over a continuous 13-year period, rose through the ranks to the position of SHEQ Manager, earning a net salary of Kshs. 282,308 per month. Throughout her employment, she maintained an exemplary record, received consistent promotions and positive performance appraisals, and had no prior disciplinary infractions.

While on annual leave, the Claimant was suspended on 1 February 2024 and subsequently issued with a Notice to Show Cause dated 4 March 2024, to which she responded. She was summoned to attend a disciplinary hearing on one day's notice and was thereafter summarily dismissed on 20 March 2024 for alleged gross misconduct relating to fraud. Her appeal was dismissed on 19 April 2024. The Claimant submits that even before the appeal was concluded, the Respondent treated her as dismissed by removing her from official communication platforms, paying terminal dues, circulating an internal email announcing her exit, cancelling her medical cover, and facilitating defamatory media publications linking her dismissal to a sexual scandal.

On procedural unfairness, the Claimant submits that the Respondent acted in blatant violation of its Staff Manual, which vests disciplinary authority exclusively in the Managing Director. She argues that critical disciplinary steps, including her suspension, issuance of the show cause letter, constitution of the disciplinary committee, conduct of the disciplinary hearing,

issuance of the termination letter, and determination of the appeal, were undertaken by persons who lacked authority under the Staff Manual and who were neither employees nor directors of the Respondent. She relied on the **decision of Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR), in which** the Court held that Section 41 of the Employment Act is mandatory and must be strictly complied with. Any termination carried out without observing these procedural requirements is automatically unfair.

On substantive unfairness, the Claimant submits that the Respondent failed to prove valid and fair reasons for termination as required under Section 43 of the Act. She argues that no investigation report was furnished to her, no witness testimony was presented to implicate her in fraud, and no documentary evidence was adduced to demonstrate any fraudulent transactions. She contends that allegations of fraud were based on mere suspicion and conjecture. She relies on the case of **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR**, in which the Court held that allegations of fraud must be firmly established. While the standard of proof does not need to reach the level of beyond reasonable doubt, it must exceed a simple balance of probabilities and on **Osire v Mega Pack (K) Limited [2023] KEELRC 1504 (KLR)**, where the Court held that an employer must have a genuine and reasonable belief, supported by prima facie evidence, before taking disciplinary action against an employee. Mere suspicion is insufficient for actions that could lead to serious consequences, such as dismissal. While belief assessment is partly subjective, the Court can intervene where the employer's action is unreasonable or lacks proper justification to ensure a fair and orderly workplace.

The Claimant further submitted that the Respondent violated her constitutional rights, including the right to equality and freedom from discrimination, human dignity, fair labour practices, socio-economic rights, and the presumption of innocence. She contends that she was subjected to discriminatory treatment compared to a male colleague allegedly involved in similar matters, who was treated more leniently. She also alleges that the Respondent orchestrated defamatory media publications falsely linking her to fraud and a sexual scandal, thereby gravely injuring her reputation. She relies on **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR**, in which the Court found that the plaintiffs provided sworn testimony supported by documentary evidence, establishing their claims on the balance of probabilities. In the absence of any evidence to the contrary, the Court concluded that the plaintiffs are entitled to succeed in the case.

The Respondent submitted and maintained that the termination of the Claimant's employment was both substantively justified and procedurally fair. She served as the SHEQ Manager until her contract was terminated on 20 March 2024 following findings of gross misconduct. Her role placed her at the centre of waste management and disposal processes, including record-keeping, compliance with waste legislation, supervision of contractors, and approval of donations of waste materials to third parties.

The Respondent submitted that in late 2023, it received whistleblower reports alleging improprieties in the handling of waste products at its Mombasa factory. External investigation established that the Claimant failed to maintain proper records of waste disposal, attempted to generate documents retrospectively to conceal gaps in compliance, and instructed an official of a subcontracted waste disposal company, Kawega Services Limited, to procure letters from educational institutions purporting to confirm receipt of donated waste. It was further established that one such institution later disowned authorship of the letter attributed to it, and that any alleged donations were initiatives of the subcontractor rather than the Respondent. These findings gave rise to a reasonable and genuine belief that the Claimant was involved in a fraudulent scheme or had fundamentally failed in her duties.

On procedural fairness, the Respondent submitted that the Claimant was issued with a detailed show cause letter, to which she responded, and was subsequently invited to and attended a disciplinary hearing. The minutes demonstrated that she was accorded an opportunity to be heard but failed to adequately address key allegations, particularly breaches of internal policies and procedures. The Respondent contended that the disciplinary process complied with the requirements of fairness under employment law.

All correspondence and actions were undertaken expressly on behalf of the Respondent. The Claimant did not object to the officers' authority at the material time and fully participated in the process. The Respondent explained that, as a wholly owned subsidiary, matters involving alleged fraud appropriately attracted oversight by senior Group officials, and that the Staff Manual permitted the delegation of disciplinary authority. The Claimant also failed to demonstrate any prejudice arising from the involvement of those officers.

On the alleged violation of constitutional rights and discrimination, the Respondent argued that the Claimant failed to plead with precision the manner in which Articles 28, 41, 43, 50, or any discrimination provisions were violated. The Respondent relied on the case of **Dr Rev. Timothy Njoya v Attorney General**, where the court held that it can only address factual

disputes, not hypothetical or academic issues. A party must present clear facts showing a constitutional violation, specifying who violated it and under which provision, to obtain relief. The Court cannot be used as a tool to gather evidence for a case yet to be proven. See **Anarita Karimi Njeru v Republic, Trusted Society of Human Rights Alliance v Mumo Matemu**, and **Mohamed & Another v Attorney General & 2 Others**. The Respondent further argued that the Claimant failed to demonstrate that she was treated differently from a comparator employee based on gender, noting that the alleged comparator was neither accused nor investigated for similar misconduct.

Regarding defamation, the Respondent denied responsibility for the alleged newspaper publications and submitted that the Claimant failed to enjoin the publishers or the alleged source of the information. The Respondent relied on the case of **Amina Mohamed v Standard Media Group Limited and Mukolwe v Radio Africa Group Limited**, where the court held that to argue that liability for defamation lies with the publisher or person who caused publication, and that the burden of proof was not discharged. The Respondent further submitted that the Claimant failed to plead the mandatory particulars required under Order 2 Rule 7 of the Civil Procedure Rules and adduce evidence of reputational harm.

On claims for damages for mental anguish and psychological torture, the Respondent submitted that such damages are not awardable under the Employment Act. In **Sospeter Bangoya Oyange v Bob Morgan Services Limited and Darius Mwandisha Mwakuja v Tamarind Management Limited**, the court held that the Respondent argued that compensation for unfair termination is statutorily limited and does not extend to general damages for mental distress. The Respondent further challenged the probative value of the medical evidence tendered, contending that it was opinion evidence based solely on the Claimant's narrative, prepared months after termination, and unsupported by objective medical history or continuity of treatment. The Respondent relied on principles governing expert evidence as articulated in cases including **Muzeyi v Uganda, Shah v Shah, Kimani v Republic, and Stephen Kinini Wangonde v The Ark Limited**.

Determination

Through a notice dated 20 March 2024, the respondent terminated the claimant's employment because, during the disciplinary meeting:

- a) *You confirmed that you did not have another employee/witness of your choice present.*

- b) *You were reminded of the charges against you of being involved in fraudulent activity and breach of the company's policies and procedures;*
- c) *You were informed of the company's contemplated action;*
- d) *You were allowed to make any relevant statements and representations in relation to the above, and you proceeded to do so;*
- e) *You were informed that the company would consider your statements and representations and would notify you of its decision.*

...

The details of your misconduct are as follows:

- a) *Colluding with Kawage Services Limited to steal wastepaper products and passing them off as donations and fraudulently obtaining appreciation letters for the alleged donations from educational institutions; and*
- b) *Breaching the company's policy by committing fraud and being involved in fraudulent activity.*

...

Before the termination of employment, the claimant was issued a notice to show cause dated 4 March 2024. She was invited to respond to various allegations, including:

- a) Fraud;
- b) Breach of the company procedures and policies.

The allegations were that based on various correspondence dated between 14 November and 16 November 2023, from St. Kelvin Academy, Matterhorn School, and Destiny Garden Education Centre, thanking JFML for the donations, it was established that the claimant had colluded with Kawaga to steal waste paper sacks, which Kawaga later sold without any account for the funds raised being made to the respondent.

The other charge was that the respondent established the claimant was dishonest during the interview with Control Risks. She failed to disclose that she knew Jacob Boaz before his email and whistleblowing about the fraud. Contrary to policy and procedures, the claimant sought letters of appreciation from Jacob Boaz and others for the donation of paper sacks.

In this regard, the claimant was found to have been in breach of the company policy by committing or being suspected of committing a criminal offence to the detriment of

employment. Violating the company policies by committing fraud and being involved in fraudulent activities.

This conduct was found to be gross misconduct. This was in breach of the employment contract and the law.

The claimant replied to the notice to show cause on 5 March 2024. On the alleged fraud, her case was that the respondent contracted Kawaga to dispose of waste materials from the company premises. Since some waste products were helpful in certain institutions, Kawaga, on its own initiative, opted to donate them to a few schools.

On contact with Jacob Boaz, the claimant denied the allegations that she knew him and that she only received a thank-you letter upon the donations.

The claimant does not contest her core duties as the SHEQ manager.

These duties included providing, ensuring, maintaining, and conducting proper waste management procedures for the respondent, and the responsibility to ensure adherence to the policy, the law, and various regulatory waste management protocols.

Under the claimant, Kawaga was contracted to manage waste disposal. The waste went to community groups. The claimant received appreciation letters in this regard.

Under section 41 of the Act, the employer, upon notice to the employee, has the prerogative to constitute a disciplinary panel to hear the employee's representations. This power is emphasised in Waruhiu v Directline Assurance Company Ltd [2025] KEELRC 1940 (KLR), where the principle of managerial prerogative is described as the employer's inherent right and authority to direct and control its workforce and business operations as it considers best. This prerogative does not conflict with sections 12 and 13 of the Act, since the employer, based on the employee's rank, can constitute the disciplinary panel accordingly. This is to enable it to address the allegations made objectively and respect the subject employee.

The employer is therefore at liberty to make decisions that they deem necessary for the general well-being of the enterprise, as held in **Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation (KALRO) [2017] eKLR**. This power entitles the employer to constitute the disciplinary panel as appropriate. The claimant's challenge to the involvement of third parties in her disciplinary hearing must be viewed in this context. As the SHEQ manager, the claimant held a high position. Including junior

employees in the disciplinary panel would not suffice. Including the managing director as the supervisor would not be objective.

In **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, the court held that the general position in law is that courts should exercise utmost restraint in interfering with the exercise of this power. To do otherwise is tantamount to the court taking over the employer's position at the workplace. In **Miguna Miguna v Permanent Secretary, Office of the Prime Minister**, it is stated that this managerial prerogative includes the right to investigate employment offences and to impose disciplinary sanctions.

The court finds that the respondent appropriately exercised its disciplinary control over the claimant.

On the allegations of fraud, the claimant was invited to respond. Her case was that the respondent contracted Kawaga to dispose of waste from the company premises. It was its responsibility to dispose of the waste and, of its own initiative, opted to donate the proper materials to some schools. The claimant further responded that she did not know Jacob Boaz, but that she received letters of appreciation from the schools that received the donations.

Whereas the claimant admits that Kawaga opted to donate the waste materials to some schools, and she was not involved, the letter of appreciation was sent to her. The link to the letters of appreciation from Jacob Boaz, obtained from the beneficiary schools to the claimant and NT Kawaga, who allegedly opted to make the donations, creates a caustic link. Although the claimant presented the two letters of appreciation to the investigations team, the series of events, going back to her for the appreciation, indicated that she was aware of the waste disposal.

As the officer responsible, being the SHEQ manager, the claimant had the duty to arrange, coordinate and draw up safety and health disposal of waste materials. This was the core duty under the contract of employment.

Kawaga, as a service provider, was under contract with the respondent to provide waste disposal services. This included transporting general waste to County Government-designated points in accordance with NEMA requirements. Donation of material waste was not part of the contract.

Payments to Kawaga were agreed under clause (B) (1.4 to be upon successful completion of the assignment and upon re-signing the notice. Donations of the waste materials were not part of the contract.

Therefore, as the SHEQ manager, upon receipt of the appreciation letters, this should have been a concern for the claimant. Those materials meant for disposal were returned to the community. Indeed, as the SHEQ manager, this should have been addressed immediately.

As a safety, health, and environment expert for the respondent, the nature of Kawaga's waste disposal should have been addressed rather than celebrated through appreciation letters.

The internal audit and risk control investigations were therefore correct in finding fraud. Otherwise, the claimant should have noted the matter and brought it to the respondent's attention, so that the contract with Kawaga could be terminated for failure to properly dispose of its waste material in accordance with the policy and NEMA requirements.

One core duty under the claimant's contract was to manage all waste contractors commissioned by the respondent. This included Kawaga.

Effectively, the claimant exposed the respondent to serious breaches of policy, the law, and waste-disposal protocols.

An employee who is in breach of a fundamental provision of the employment contract invites the sanction of summary dismissal under section 44(3) of the Act, as held in Harold Otieno v Securex Agencies (K) Ltd [2013] KEELRC 742 (KLR).

The claimant replied to the show cause notice that, as SHEQ manager, she had received appreciation letters from beneficiaries of waste paper that ought to have been disposed of, thereby directly breaching her employment contract.

A charge under section 44(4) (g) of the Employment Act allows the employer to terminate employment by summary dismissal for the offence of being suspected of committing a criminal offence against the employer's property.

An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property

In this case, the claimant admitted in her response that upon the investigation team contacting her about the fraudulent activities, she, in turn, contacted Kawaga to find out the recipients of the waste materials as donations. She received letters of appreciation from the beneficiaries.

To the claimant, the investigations team was involved in a witch hunt. However, the allegations against her were that, as the manager responsible for waste disposal, she failed to adhere to the policy and procedures. This action violated the employment contract, which required her to ensure proper waste disposal from the respondent's premises. In Godfrey Meso Komba v Inter Beauty Products Limited [2021] KEELRC 464 (KLR), the court held that an employee who is given the duty to oversee a company's operations and fails to address it cannot turn around and claim that she was victimised.

The claimant, as a long-serving employee of the respondent, was tasked with overseeing Kawaga waste disposal. The process was circumvented in violation of her employment contract. Whether there was a whistleblower or the email by Jacob Boaz, who called to respond to the show cause notice, the claimant admitted that Kawaga indeed failed to dispose of the waste paper. A donation of waste paper contrary to set policy, NEMA protocols, or County government procedures cannot be justified as a failure to sanitise or as the abdication of duty.

This cannot be a witch-hunt.

In the upshot, this court finds that the decision to dismiss the Claimant was based on valid and fair reasons. The decision and action by the Respondent were therefore substantively fair in terms of section 45 of the Act.

The remedy of reinstatement is not available to the claimant.

The claim is that there was unfair treatment after the claimant was removed from the employees' WhatsApp group, and that facilities and services were deactivated pending appeal. The termination of employment was pre-determined, and the appeal was not heard on the merits.

Employment terminated through notice dated 20 March 2024. Although the right of appeal is allowed under section 45(5) (a) of the Act, upon cessation of employment, the respondent was justified in ceasing employment benefits and shop floor attendance. The courts have emphasised that, pending other procedures, including the right of appeal, the employer has the right to immediately cease access to the workplace. In **Attorney General & another v**

Andrew Maina Githinji & another [2016] eKLR, the Court held that the act terminating employment ends the enjoyment of any employment benefits. See **Mufuma v British Army Training Unit Kenya (Employment and Labour Relations. Cause E980 of 2023) [2024] KEELRC**.

Regarding the claims of constitutional violations against the claimant, the basis is the procedures adopted by the respondent in terminating employment. As analysed above, upon the claimant committing a serious breach of her employment contract, the respondent was justified in issuing notice and taking her through the disciplinary process.

The claimant also asserts that the respondent engaged in discriminatory treatment against her. The case is made that other employees involved in the waste-disposal matter were treated differently, unlike the claimant, whose employment was terminated. The court has established that there was due process in the respondent's decision to terminate the claimant's employment. She cannot equate her case with that of other employees.

The fact that the employer applies different sanctions to other employees is not, in itself, discriminatory. Other than citing these other employees, the allegations they faced were not addressed. The abdication of a fundamental condition or provision of an employment contract by the claimant exposed her to summary dismissal.

The court finds no matter for the violation of the claimant's constitutional rights to justify the claim for damages.

The claimant's case is that there were defamatory matters published about her by weekly newspapers. Such issues have since affected her employability, reached her family and tainted her reputation. The case is that Langat disclosed the claimant's personal details to the newspapers. In Ndungu v Safaricom Limited [2024] KEELRC 1801 (KLR), the court held that defamation is the publication of a statement which reflects on a person's reputation and tends to lower her in the estimation of right-thinking members of society, generally or tends to make them shun or void him. In Odhiambo v Kisang & 3 others [2025] KEELRC 436 (KLR), the court held that defamation is a statement or representation "which is calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule.

Apart from making the claim, the claimant did not call any evidence that the persons who read the newspaper shunned or avoided her. The alleged exposure to hatred or ridicule is not gone into.

In this regard, no damages are due.

Regarding the claim for payment of gratuity, this was not a term benefit under the employment contract. Employment terminated for just cause. Gratuity pay is not due.

As the claim was unsuccessful, the claimant has since been paid the terminal dues in accordance with the notice dated 20 March 2024. Costs are due to the respondent.

Accordingly, the claim is dismissed. Costs to the respondent.

Delivered in open court at Mombasa, this 15th day of December 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

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