

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E243 OF 2024**

**DENNIS WENANI.....CLAIMANT**

**VERSUS**

**SAFARICOM LIMITED.....1<sup>ST</sup> RESPONDENT**

**JOAB OGWAYO KHAMALA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant avers that he was employed by the 1<sup>st</sup> Respondent in October 2023 as a Customer Experience Executive in the Regional Operations Department – Rift. He further states that from 9<sup>th</sup> April 2018 to 1<sup>st</sup> March 2020, he served as a Stock Controller in the same department. Additionally, he worked in the Sales Department and later as a Team Leader, Retail Center Financials, in the Retail Sales Department from 17<sup>th</sup> January to 16<sup>th</sup> October 2022.

2. According to the Claimant, he rose through the ranks within the 1<sup>st</sup> Respondent’s company through hard work and dedication, until 9<sup>th</sup> February

2024, when his employment was terminated unprocedurally, unfairly, and unlawfully.

3. It is the Claimant's case that the reasons advanced by the 1<sup>st</sup> Respondent for his termination were fabricated, did not constitute gross misconduct, and did not warrant the termination of his employment. Consequently, he seeks the following reliefs:

- a) A declaration that the Claimant's termination was unfair;*
- b) A Declaration that the 2<sup>nd</sup> Respondent contributed towards the unfair termination of the Claimant's employment;*
- c) Payment for Kshs. 1,326,000/= being damages for unfair termination;*
- d) One Month's salary in lieu of Notice (Kshs. 102,000/=);*
- e) Costs of the Suit; and*
- f) Interests on prayers (a), (b), (c), (d), and(e) above at Court rates from the date of filing claim until payment thereof in full.*

4. In its response to the Memorandum of Claim, the 1<sup>st</sup> Respondent acknowledges the employment relationship and the Claimant's employment history but disputes his assertion that he was denied a fair opportunity to defend himself.

The 1<sup>st</sup> Respondent asserts that the Claimant's summary dismissal was fair, lawful, procedural, and based on valid grounds. Accordingly, the 1<sup>st</sup> Respondent has urged the Court to dismiss the Claimant's suit with costs.

5. The 2<sup>nd</sup> Respondent neither entered appearance nor filed a defence hence did not participate in the proceedings herein.
6. The matter proceeded for hearing on 29<sup>th</sup> May 2025 and 24<sup>th</sup> September 2025, during which both parties called oral evidence in support of their respective cases.

### **Claimant's Case**

7. The Claimant testified in support of his case as CW1 and, at the outset, adopted his witness statement as his evidence in chief. He further produced the list and bundle of documents filed together with the Memorandum of Claim as exhibits before the Court.
8. The Claimant testified that on 31<sup>st</sup> January 2024, he received a show-cause letter from the 1<sup>st</sup> Respondent alleging that he had given unauthorized access to a customer's M-Pesa account, number 0724\*\*78, on 10<sup>th</sup> January 2024.

9. He further stated that on 29<sup>th</sup> January 2024, he had been issued with a suspension letter on allegations that he had irregularly accessed the 2<sup>nd</sup> Respondent's M-Pesa account without permission.
10. The Claimant further averred that on 5<sup>th</sup> February 2024, he was summoned to a disciplinary hearing through a notification dated the same day, but was denied adequate time and a fair opportunity to defend himself against the allegations. Subsequently, he was summarily dismissed on 9<sup>th</sup> February 2024.
11. According to the Claimant, the reason cited for his summary dismissal, namely that he accessed the 2<sup>nd</sup> Respondent's M-Pesa account on 10<sup>th</sup> January 2024, was fabricated and did not amount to gross misconduct.
12. He further stated that the disciplinary hearing, which he described as a sham, did not accord him a chance to respond to the issues raised. He maintained that no substantive charges were read out to him, no witnesses were called to testify against him, and he was not allowed to present any witnesses of his own.
13. The Claimant further contended that the nature of the disciplinary process was conclusive, and that the 1<sup>st</sup> Respondent's senior management had already

decided to terminate his employment without valid cause, allegedly to satisfy the 2<sup>nd</sup> Respondent's ego.

14. He further stated that the 1<sup>st</sup> Respondent proceeded with the disciplinary hearing in the absence of the 2<sup>nd</sup> Respondent, whom he was not afforded an opportunity to cross-examine.

15. It was the Claimant's further contention that he was not given an opportunity to appeal the decision of the disciplinary team which further violated his right to defend any allegations leveled against him.

#### **1<sup>st</sup> Respondent's Case**

16. On its part, the 1<sup>st</sup> Respondent called **Odhiambo Ooko**, who testified as RW1. Mr. Ooko introduced himself as the Chapter Lead-Employee and Labour Relations for the 1<sup>st</sup> Respondent. Equally, RW1 adopted his witness statement as his evidence in chief and produced the initial and supplementary lists and bundles of documents filed on behalf of the 1<sup>st</sup> Respondent as exhibits before the Court.

17. RW1 stated in his testimony that the 1<sup>st</sup> Respondent received a complaint from a customer alleging unauthorized access to his M-Pesa account.

18. He further averred that the 1<sup>st</sup> Respondent's Ethics and Compliance Department commenced investigations, which revealed that the Claimant had accessed the customer's M-Pesa account without recording any interactions or providing the prescribed justification for such access.

19. RW1 further indicated that the investigating team scheduled an interview with the Claimant on 25<sup>th</sup> January 2024 at around 3:00 p.m. via Microsoft Teams, but during the interview, the Claimant was unable to explain why he had accessed the customer's account.

20. Following the interview, the Claimant was sent an email requesting additional information, to which he did not respond.

21. RW1 further testified that the Claimant eventually replied after a follow-up email was issued on 29<sup>th</sup> January 2024, explaining that he had forgotten to capture the required interactions and was unable to account for his physical location vis-à-vis that of the customer. The Claimant was thereafter suspended for 30 days to allow for conclusive investigations into the allegation of irregular access to the customer's M-Pesa account without lawful work-related cause.

22.RW1 added that during the suspension period, the Claimant remained an employee of the 1<sup>st</sup> Respondent and continued to receive his full salary and benefits.

23.He further averred that on 31<sup>st</sup> January 2024, the Claimant was issued with a show cause letter requiring him to explain, in writing, why *he had accessed a customer's M-Pesa account without authorization; interfered with the investigations by contacting the customer; benefited from the unauthorized access by receiving KES 12,200; and shared the customer's M-Pesa details with an unauthorized third party.*

24.RW1 testified that the Claimant was furnished with the investigation report and afforded adequate time to respond, with his response due by 5<sup>th</sup> February 2024.

25.He further stated that on 5<sup>th</sup> February 2024, the Claimant was invited to attend a disciplinary hearing scheduled for 8<sup>th</sup> February 2024 at 11:00 a.m. via Microsoft Teams.

26.RW1 further averred that the disciplinary hearing notice outlined the specific charges against the Claimant and informed him of his right to be accompanied by a fellow employee.

27.That on 9<sup>th</sup> February 2024, following deliberations by the disciplinary panel, it was recommended that the Claimant be summarily dismissed for violating his terms and conditions of service, the 1<sup>st</sup> Respondent's Code of Conduct, the Data Privacy Policy, and the applicable Work Instructions and Operational Procedures.

28.Subsequently, the Claimant received a letter of summary dismissal wherein he was notified of his terminal dues and advised of his right to appeal the decision within 10 working days.

### **Submissions**

29.The Claimant submitted that the reasons given for his summary dismissal were neither valid nor justified. In the same vein, he argued that the 1<sup>st</sup> Respondent relied solely on an alleged breach of the Data Protection Policy to summarily dismiss him.

30.The Claimant further contended that, whether by design or default, the 1<sup>st</sup> Respondent engaged in a witch-hunt driven by malice and victimization, leading to his dismissal without sufficient cause. In his view, the 1<sup>st</sup> Respondent lacked a genuine reason for terminating his employment as required under Section 43 of the Employment Act.

31.In support of his position, the Claimant invited the Court to consider the decisions in **Bamburi Cement Limited v. William Kilonzi [2016] eKLR** and **Pius Machafu Isindu v. Lavington Security Guards Limited [2017] eKLR**.

32.On the other hand, the 1<sup>st</sup> Respondent argued that the Employment Act does not require an employer to secure a criminal conviction before exercising managerial prerogative in matters involving a trust-based breach. According to the 1<sup>st</sup> Respondent, the applicable test is whether the employer held a genuine and reasonable belief at the time.

33.It was the 1<sup>st</sup> Respondent's position that it had established a valid and fair reason related to the Claimant's conduct as required under Sections 43 and 45(2)(b)(i) of the Employment Act.

34.The 1<sup>st</sup> Respondent further submitted that it not only complied with Section 41 of the Act but also adhered to the principles set out in **Kenya Revenue Authority v. Reuwel Waithaka Gitahi & 2 others (2019) eKLR**.

35.Referring to the decision in **Evans Kamadi Misango v. Barclays Bank of Kenya Limited (2015) KEELRC 1189 (KLR)**, the 1<sup>st</sup> Respondent contended that an employer's disciplinary hearing is not a court of law and need not meet the evidentiary standards applicable in criminal proceedings.

36.The 1<sup>st</sup> Respondent further submitted that the Claimant was accorded all procedural safeguards under the law, including the right to representation. In support of this position, it relied on the case of **Thairo v. SAP East Africa Limited (2024) KEELRC 2048 (KLR)**.

### **Analysis and Determination**

37.Having reviewed the pleadings by the parties, the evidentiary material on record, and the rival submissions, the Court has isolated the following issues for determination:

- a) Whether the 1<sup>st</sup> Respondent has demonstrated that there was a valid and fair reason for terminating the Claimant's employment;**

- b) Whether the Claimant was afforded procedural fairness prior to the termination of his employment;**
- c) Whether the Claimant is entitled to the reliefs claimed.**

### **Valid and Fair reason for termination of employment?**

38. The resolution of this issue is guided by Sections 43 and 45 of the Employment Act, which enjoins an employer to prove substantive justification for terminating an employee.

39. Specifically, Section 43(1) requires an employer to prove the reasons for termination of employment, failure to which the termination is rendered unfair. It is worth pointing out that under Section 43(2), reasons for termination are matters the employer genuinely believed to exist at the time of the termination.

40. Further, Section 45(2)(a) and (b) provides that a termination of employment is unfair if the employer fails to prove that the reason for termination was valid, fair, and related to the employee's conduct, capacity, or compatibility, or based on its operational requirements.

41. In the instant case, the record bears that the Claimant was summarily dismissed from employment on grounds of gross misconduct, in that he performed his

duties carelessly and negligently, and failed to adhere to established policies and procedures.

42. Specifically, it was alleged that on 10<sup>th</sup> January 2024, the Claimant accessed a customer's M-Pesa account (072\*\*-Joab Ogwayo Khamala) without authorization. Additionally, it was alleged that the Claimant failed to record the required interaction in accordance with his work instructions and shared the customer's details with an unauthorized third party, identified as Gordon Otieno Opidi.

43. The Claimant has denied the foregoing allegations, describing them as fabricated and contending that they do not amount to gross misconduct.

44. In his response to the Notice to Show Cause, submitted vide an email dated 5<sup>th</sup> February 2024, the Claimant admitted that he had accessed the customer's (Joab) account, albeit inadvertently. He explained that another customer, Gordon, had requested his statement to verify whether he had sent money to Joab. The Claimant stated that on 10<sup>th</sup> January, 2024, Gordon had intended to check his statement in person, but due to a long queue, he called the Claimant as a friend, who then went to the back office to retrieve the statement.

45. The Claimant further admitted that he failed to record the interaction, citing that he was in a hurry and was multitasking. The Claimant added that he had no ill motive in accessing Joab's statement, sought forgiveness, and denied receiving any money from Gordon.

46. In the same response, the Claimant stated that after realizing he had accessed Joab's statement, Gordon reassured him that there was no issue, as they knew each other and that they were going to check on the money transactions.

47. Under cross-examination, the Claimant admitted that Gordon had requested him to access the M-Pesa account and further confirmed that he failed to record the interaction.

48. In support of its case, the 1<sup>st</sup> Respondent exhibited its Information Security Acceptable Usage Policy, signed by the Claimant on 25<sup>th</sup> September 2013. Under clause 3.1 of the policy, the Claimant undertook to ensure that all access to information was authorized. Further, under clause 6.1 the Claimant committed not to share information with any individuals or organizations lacking proper security clearance.

49. The 1<sup>st</sup> Respondent further exhibited its Standards of Business Conduct, which stipulate that breaches of law or company policy may result in disciplinary action, including termination of employment.

50. Further exhibited by the 1<sup>st</sup> Respondent was its Data Protection Policy, which at clause 14.0, permits sharing personal data only with employees, agents, or representatives who have a job-related need to know the information, and where transfer complies with any applicable cross-border transfer restrictions.

51. Worthy to note is that under the Data Protection Policy, all personal information relating to customers and staff, including call data records and M-Pesa transactions, is to be treated as confidential.

52. The thread running through the policies exhibited by the 1<sup>st</sup> Respondent is that the Claimant was prohibited from sharing confidential information with unauthorized third parties. Such confidential information included customers' M-Pesa transactions.

53. The Claimant indeed conceded under cross-examination that he was not authorized to share data with third parties.

54. By sharing a customer's (Joab) M-Pesa statement with an unauthorized third party (Gordon), who had no job-related need to know such information, the Claimant breached the 1<sup>st</sup> Respondent's Data Protection Policy as well as his obligations under the Information Security Acceptable Usage Policy. As per the Data Protection Policy, the customer's M-Pesa information constituted confidential information that was not to be disclosed to third parties without proper authorization.

55. Further to the foregoing, the Claimant admitted in his response to the Notice to Show Cause that, having realized he had accessed the wrong customer statement, he nonetheless shared it with a third party based solely on the reassurance that the two customers knew each other. Therefore, even if the Claimant's version that he accessed Joab's M-Pesa statement inadvertently is accepted, he ought to have known that he was not authorized to share it with a third party. The fact that he did so, despite the clear prohibition under the 1<sup>st</sup> Respondent's policies, demonstrates that the Claimant acted imprudently.

56. It is evident that, given the nature of the Claimant's role, he had access to customer data held by the 1<sup>st</sup> Respondent. As such, he was required to exercise due diligence in handling this information and to take all necessary measures to

safeguard it. This is bearing in mind that such a breach of data protection exposed the 1<sup>st</sup> Respondent to both reputational and legal risks.

57. The Claimant's actions, when considered alongside his role within the 1<sup>st</sup> Respondent company, leads this Court to conclude that it is more than probable that the 1<sup>st</sup> Respondent had a genuine reason to believe that the Claimant could no longer be entrusted with its customers' data or other confidential information in his possession.

58. In sum, the Court is satisfied that the 1<sup>st</sup> Respondent has established, on a balance of probabilities, that there existed a fair and valid reason to terminate the Claimant's employment based on his conduct.

#### **Procedural fairness?**

59. On the question of procedural fairness, Section 45(2)(c) of the Employment Act enjoins an employer to prove that the termination of employment was in accordance with fair procedure. As to what constitutes fair procedure, Section 41 requires that an employer inform the employee of the reason for which his termination from employment is being considered. In making his representations in response to the said allegations, the employee is entitled to

have another employee or a shop floor union representative of his choice present.

60. The record bears that the Claimant was suspended for a period of 30 days, effective 29<sup>th</sup> January 2024. He was subsequently issued with a Notice to Show Cause on 31<sup>st</sup> January 2024, requiring him to submit a response by 5<sup>th</sup> February 2024. Notably, the Notice to Show Cause was accompanied by the investigation report.

61. Thereafter, the Claimant was invited to a disciplinary hearing via a letter dated 5<sup>th</sup> February 2024 and was advised of his right to be accompanied by a colleague. He attended the hearing, after which he was summarily dismissed from employment.

62. In considering the significance of Section 41 of the Employment Act, the Court of Appeal stated as follows in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**:

*“Four elements must thus be discernible for the procedure to pass muster:-*

*(i) an explanation of the grounds of termination in a language understood by the employee;*

*(ii) the reason for which the employer is considering termination;*

*(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;*

*(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”*

63. Applying the foregoing binding precedent to the present case, I am persuaded that the 1<sup>st</sup> Respondent, in terminating the Claimant's employment, complied with the minimum requirements of a fair hearing as set out under Section 41 of the Employment Act.

64. Further, it is notable that, through the letter of summary dismissal, the Claimant was informed of his right to appeal within 10 working days, thereby discounting his assertion that he was not notified of this right.

65. To this end, the Court finds that the Claimant's termination from employment was carried out in accordance with the procedure contemplated under Section 41 of the Employment Act.

### **Reliefs?**

66. As the Court has found that the Claimant's termination from employment was for a fair and valid reason and in compliance with the procedure stipulated

under Section 41 of the Employment Act, the claims for notice pay and compensatory damages cannot be sustained.

**Orders**

67. Accordingly, the Claim is dismissed in its entirety with no orders as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>th</sup> day of December 2025.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant	No appearance
For the 1 <sup>st</sup> Respondent	Mr. Kiragu
For the 2 <sup>nd</sup> Respondent	No appearance
Court Assistant	Mohammed

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**