

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC CAUSE NO. E257 OF 2022
(Before Hon. Justice Abuodha Jorum Nelson)

LILY AMAKOBÉ.....
CLAIMANT

-VERSUS-

MAJOREL KENYA LIMITED.....
RESPONDENT

JUDGMENT

1. The Claimant through a Statement of Claim dated 26th April, 2022 pleaded inter alia: -

- i)** The Respondent on the 1st day of December, 2020 engaged the services of the Claimant as a Human Resource Manager at a salary of Kshs 180,000/ - per month. This engagement was done through HAP Africa a consultant firm that was assisting the Respondent recruit the first employees since the Respondent did not have a licence to work in Kenya when it first commenced business.
- ii)** The Respondent upon setting up its business officially and directly employed the Claimant on the 1st day of April, 2021 for the position of Human Resource manager.
- iii)** The Claimant avers that at the time of her employment, the Respondent had only commenced its services in Kenya and she was engaged to set up its human Resource department an act which she did.

- iv)** That in April 2021 the Respondent engaged the services of Mr. Sven De Cauter who was engaged as the head of the Kenyan Site a position which made him to oversee all of the Respondent's activities in Kenya.
- v)** The Claimant avers that among the Respondent's employees was Ms Judy Njeri Njiru who was the head of operations and who immediately after the engagement of the services of Mr. Sven De Cauter commenced an intimate relationship with her and on several occasions the Claimant found him in acts of physical intimacy with the said Judy Njeri Njiru.
- vi)** After the above encounters the said Mr. Sven De Cauter despised the Claimant to the point that he could shut her up in meetings by categorically informing her that whatever contributions she was making were silly.
- vii)** In June 2021 the Respondent advertised for Customer Service Representative (CSR) positions which were advertised through the Respondent's email address and through the company email (hrkenya@majorel.com) the respondent through the Claimant's office shortlisted 40 candidates who were each allocated a particular date when the interviews would be carried out in accordance with the Covid-19 regulations that were in place at the time.
- viii)** The Claimant avers that on the date for the interview/ unknown to her, people within the company had uplifted the advertisement from the email and 2nd parties adverts and placed it on social media seeking that any random person could appear for the interview on the date that had been set.
- ix)** To the Claimant's surprised on the 1st day for the interview/ she was surprised when she arrived at work to find over 500 people who had come for the interview and it became difficult for her to manage the people the circumstance being made hard by the fact that their presence not only violated the covid-19 regulations by the government but also disorganized the whole exercise.

- x)** The Claimant avers that her attempts to explain the same to Mr Sven/ failed and he together with her boss Mr. Santanu blamed the whole issue to the Claimant despite the fact that after investigations one of the employees who had placed the advertisement on social media informed us that they were told by one Selpha Akamuru the head of Wellness to advertise so that they could help in recruitment.
- xi)** The Claimant avers that at one point during the pendency of her employment Mr. Sven employed one Ezekiel Oketch Otuoma who was supposed to be her assistant but the Respondent gave him so much power that despite his position and qualifications being much lower compared to those of the claimant/ he behaved as though he was the head of the department and on several occasions he would call for meetings and make decisions at and from the said meeting without consulting her an act which made the rest of the employees undermine her and all calls for her bosses to intervene failed as she was instructed not to interfere with his work.
- xii)** The Claimant avers that the Respondent through Mr. Sven and Santenu made her work so impossible to the extent that they began to micro managing her in the department and would dictate what Human Resource decisions that she was making. And would on several occasions rubbish them.
- xiii)** The Claimant avers that she once again raised the issue with Mr. Sven and her supervisor Mr. Santanu Basu and one afternoon one employee by the name Alois Muiruri went for lunch with Mr. Sven and after the lunch at around 6 pm he came and informed her that he Mr. Sven had informed him that he was looking for someone else to head the Human Resource department in Kenya as he did not like the Claimant.
- xiv)** The Claimant avers that in July 2021 it was rumored that some of the Respondent's employees were receiving money to secure employment with the Respondent for a further advertisement of the position of Customer Services Representative and with the rumor, the Claimant

opted to bring the same to an end by engaging the new recruits seeking to know if anyone of them paid to secure employment with the Respondent and it emerged from one of the recruits that the person who was referring them to the person charging people money was Selpha Akamuru the head of Wellness and Social Media which information was accordingly relayed to Sven and the legal team that was present.

- xv)** That on the 1st February the Claimant avers that she had reported to work after covid-19 restrictions had been relaxed and on arriving at work, she was informed by Mr. Sven that Penninah and others who were representative of the Respondent's outside legal lawyers wanted to see her.
- xvi)** The Claimant avers that after the meeting with Penninah, and as she walked to her office, Mr. Sven summoned her into his office and in the office he informed her that she was being placed on suspension for reasons that were not given to her and he immediately asked her to leave the organization premises and even insisted on escorting her out of the premises.
- xvii)** The claimant averred that she had no choice than comply with the directive and it is only after being suspended that she was on the 2nd day of February, 2022 that she was issued with a letter headed "*Letter confirming suspension*" which informed her of the reasons of her suspension as being negligence and oversight with respect to recruitment of staff.
- xviii)** The Claimant avers that after the suspension/ she was later served with a show cause and disciplinary hearing letter which stated the reasons to be;
 - a) Hallowing and/or failing to arrest instances where candidates were employed despite scoring less than 50% during interview.
 - b) Permitting a relative to sit in an interview for a fellow relative.
 - c) Conducting interviews with only one interviewer contrary to the

policy.

- d) Failing to deconflict instances where relatives are working together.
- e) Failing to keep proper checks allowing candidates to attempt test more than once
- f) Failing to inform management regarding complaints relating to payment being made to secure placement.

xix) The Claimant averred that after the show cause and disciplinary meeting which was attended by Sven De Cauter, Santanu and some two legal officers the respondent made a decision to terminate her services and an attempt to appeal by the Claimant was equally rejected.

2. The Claimant in the upshot prayed for the following against the Respondent;

- i.* A declaration that the respondent unlawfully terminated the services of the claimant.
- ii.* An order for payment of the claimant's terminal dues and compensatory damages totaling to Kshs. 4,320,000/-
- iii.* Costs of the suit.

3. The Respondent filed their Statement of Defence dated 7th July, 2022 and pleaded among others:

a) The Respondent is a Business Process Outsourcing (BPO) firm carrying on business in Kenya and around the world. The Respondent is internationally renowned owing to its values, rules, regulations and systems developed over the years. Professionalism, Integrity and honesty are vital to the Respondent, as it is how it has built its brand over the years.

- b)** The Claimant was employed in the position of Human Resources Manager effective 1st of December 2020.
- c)** The Claimant's employment was, at all material times, governed not only by her employment contract but also by the Respondent's Employment Handbook and applicable policies.

According to her job description, the Claimant was responsible for inter alia: -

- a. Recruitment and selection of employees;
- b. Conclusion, amendment and termination of employment contracts, imposing disciplinary punishments, organization and assurance of the performance of personnel work;
- c. Keeping personnel records and corresponding reporting;
- d. Launching and management of personnel projects;
- e. Implementation of personnel accounting systems;
- f. Communication with institutions related to personnel work (Health Insurance Fund, Labour Market and Dispute Offices etc.);
- g. Planning of need for the personnel, and assuring the availability of necessary manpower in cooperation with the Group Managers;
- h. Supporting the implementation of corporate guidelines according to local legal requirements;
- i. Consulting managers in all legal matters in regards to employment relationships
- j. Operating as counselor in conflict situation for appropriate solutions;
- k. Acting as strategical partner in business critical decision making processes;
- l. Fulfilling the tasks deriving directly from her position without being directly ordered so;

m. Informing immediately the direct supervisor about possible threats and incidents impacting normal workflow and data processing

d) It was a term of the Claimant's employment that she would, at all times,

inter alia: -

- a. Be honest in her dealings with the Respondent;
- b. Adhere to the Respondent's Human Resource Policies including the Anti-fraud & Bribery Policy;
- c. A violation of the Respondent's policies amounted to a fundamental breach of the terms and conditions of employment which entitled the Respondent to summarily dismiss the Claimant in accordance with Section 44 of the Employment Act 2007.

e) The Claimant's employment with the Respondent was terminated upon discovery of repeated breaches by the Claimant of the terms and conditions of her employment and abrogation of her duties as the Head of Human Resource.

f) On diverse dates during the course of her employment, the Claimant, without any justifiable reason: -

- a. Oversaw the recruitment of candidates who failed to attain the requisite pass mark during interviews;
- b. Allowed and/or failed to stop candidates from attempting interview tests severally after a failed first attempt;
- c. Conducted interviews without constituting proper interview panels;
- d. Permitted candidates to be interviewed by their relatives;
- e. Failed to deconflict instances where relatives are working together;
- f. Failed to take any steps, including informing management, after learning that there were individuals who were demanding money

from candidates to secure employment with the Respondent.

g)The Respondent's Customer Relation Agents Recruitment process supervised by the Claimant

- a. The Respondent, as noted above, is in the business process outsourcing industry. One of the business processes outsourced to the Respondent is customer care support services. In this regard, and owing to the nature of clients that the Respondent supports, the Respondent employs approximately 700 customer care representatives;
- b. The Claimant was in charge of recruiting customer care representatives;
- c. The recruitment process was meant to be commenced with an advert notifying the general public about vacancies. The Claimant, however, would ordinarily not place such adverts;
- d. Applications for these roles were meant to be sent to a designated email. Applications would, however, also be physically delivered to the Respondent's office or the Claimant's direct email. Referrals from staff were also allowed and such referrals would be shared with the Claimant;
- e. Once the applications are received, the Claimant was required to review and shortlist suitable candidates. A table of the shortlisted candidates was supposed to be prepared indicating the reasons for being shortlisted. This was, however, never done;
- f. The shortlist was then supposed to be forwarded to the Claimant's assistant to contact the candidates and share with them the email links to online tests. The tests consist of an online speech test and a typing test;
- g. Results of the tests would be sent to the Claimant directly to analyse and generate a list of successful candidates. This list would then be shared with the Claimant's assistant to arrange

- for interviews. The interviews would either be physical or virtual;
- h. Interviews were supposed to be conducted by the two members from the team / department requisitioning staff and a representative of the HR office;
 - i. Candidates who scored 50% and above at the interview were supposed to be recommended for employment.
- h)** The Claimant did not follow the above laid out process. In addition to the matters already listed above, she: -
- a. Failed to record where she obtained CVs for shortlisted candidates; it was, therefore, not possible to ascertain where she generated a shortlist of candidates from;
 - b. Allowed candidates to undertake the online tests severally;
 - c. Sat in interviews by herself;
 - d. Issued employment contracts to candidates who scored less than 50% during interviews;
 - e. Never prepared reports indicating how shortlists were done. It was, therefore, not possible to tell whether shortlisted candidates had actually submitted applications. She also never prepared any report post recruitment to illustrate how candidates had fared through the process;
 - f. Allowed existing employees who are related to candidates to sit in interviews of their relatives. This happened even after the Claimant was informed of the relationship between the candidate and the interviewer.
- i)** Sometime in the month of January 2022, a whistle blower contacted the Respondent intimating that there were employees of the Respondent who were demanding funds from candidates in order to secure work placement with the Respondent.
- j)** According to the whistle blower, there were employees who were employed after acceding to such demands.
- k)** The report triggered investigations into the allegations which extended

to the Human Resource office in charge of recruitments.

- l)** In the course of the investigations, gaps were noted in the recruitment process, which process the Claimant was squarely responsible for.
- m)** The gaps revealed that the recruitment process was not being followed by the Claimant as highlighted hereinabove.
- n)** Vide a letter dated 2nd February 2022, the Claimant was sent on suspension on full pay pending investigations.
- o)** Upon conclusion of the investigations, vide a letter dated 18th February 2022, the Claimant was asked to show cause why disciplinary action should not be taken against her for the gaps and contraventions which had been noted in the recruitment process.
- p)** The Claimant responded to the show cause vide an email dated 18th February 2022. She stated *inter alia* that she was aware about the demands for bribes during recruitment and she was in the process of conducting investigations. She, however, did not detail what steps she had taken to investigate the matter. She denied the rest of the allegations.
- q)** The Respondent considered the Claimant's response and found it to be unsatisfactory. Consequently, in accordance with Section 41 of the Employment Act, 2007, vide an email dated 10th March 2022 the Claimant was invited to a disciplinary hearing on 15th March 2022.
- r)** The Claimant was accompanied to the hearing by her advocate and she was given an opportunity to respond to the allegations in the show cause.
- s)** During the hearing, the Claimant;
 - a. Admitted that due to the number of employees recruited by the Respondent, some recruitment processes were not being observed;
 - b. Did not indicate what mitigation steps she would take where processes are skipped;
 - c. She also intimated that she never communicated to

management or sort approval for skipping laid down processes.

- t)** Upon conclusion of the hearing, the Respondent considered the Claimant's oral and written representations and found the same to be unsatisfactory. Therefore, vide a letter dated 24th March 2022, the Claimant was notified of her summary dismissal from employment.
- u)** The Claimant's appeal against the summary dismissal was heard on 1st April 2022 whereafter a decision was made upholding the summary dismissal due to a lack of compelling reasons to change the original outcome.
- v)** The Respondent denies the contents of paragraph 8 of the Memorandum of Claim and in particular that the Respondent's Country Director has or had inappropriate relations with any employee and puts the Claimant to strict proof thereof. The said averments are meant to scandalize the matter herein in an attempt to shift focus from the issues at hand particularly that the Respondent abrogated her duties as the Head of Human Resource.
- w)** Paragraphs 10, 11, 12 and 13 of the Memorandum of Claim are denied *in toto* and the Claimant put to strict proof thereof. If, which is denied, candidates other than those who were shortlisted showed up at the Respondent's office for interviews owing to a social media post, that could only have happened through the acquiescence of the Claimant who was responsible for placing notices for vacancies. In addition, shortlisted candidates were to be contacted through her office.
- x)** The contents of paragraph 14 of the Memorandum of Claim are denied and Claimant put to strict proof thereof. If, which is denied, the said Ezekiel Otuoma acted beyond his mandate and usurped the Claimant's responsibilities;
 - a. The Claimant had the option of escalating the matter to the Respondent's Head of Human Resource who was overseeing the Kenya office;
 - b. Weekly departmental meetings were normally held with the

Regional Head of Human Resource overseeing the Kenya office; the Claimant, therefore, had an avenue to address any concerns.

y) The contents of paragraphs 17 and 18 of the Memorandum of Claim are denied *in toto*. The Respondent avers that: -

- a. The Claimant never took any steps to investigate the allegations of bribery;
- b. In the Claimant's response to the show cause letter, she intimated that she knew about the bribery but she did not indicate what steps she had taken to look into the matter;
- c. During the disciplinary hearing, the Claimant admitted that she had not informed the Respondent's management about the bribery;
- d. The fact that the Claimant never informed the Respondent's management of the bribery is indicative of her acquiescence to the practice.

4. The Respondent in the upshot prayed that the claimant was not entitled to any of the reliefs sought and prayed for the claimant's suit to be dismissed with costs.

EVIDENCE

5. At the hearing the claimant adopted his statement dated 9th December, 2024 as her evidence in chief and further relied on the documents filed with the claim.
6. She stated that she received a Notice to Show Cause on 2nd February, 2022 after being suspended and that she was invited for a show cause meeting in July, 2022 and further that the disciplinary meeting was virtual.
7. It was her evidence that she was never furnished with any documents in support of the allegations against her and that

she saw the documents for the first time when the respondent filed their response to the suit. She therefore denied knowledge of reasons for termination of her service.

8. In cross-examination she stated that she had no evidence of intimate relationship between Ms. Njiru and De Cauter and that she did not file any complaint about De Couter shutting her down at management meetings. She however had raised the issue with her supervisor and that the evidence was in her work computer which was retained by the respondent.
9. The claimant stated that she could not talk to anyone in the company and that she was prohibited from talking and that she neither asked for information nor sent an email seeking information. Regarding the large turnout for the interview yet not everyone who turned up was invited, she admitted not filing any complaint regarding the same but that she was informed that it was Selpha who told someone to put the advertisement on social media. She however did not file any evidence of communication with Selpha and that she was suspended before she could complete the investigation.
10. Concerning bribery, it was her evidence that when the rumour arose, she called a meeting and asked who paid to be employed. The claimant further stated that she had no evidence Mr. De Cauter wanted to replace her. Regarding her job description, she stated that it was as per annexure C (pages 52 to 63 of RBD) and that she was requested to comply with the respondent's rules and regulations and that she was

terminated on six grounds stated in the letter of termination found at page 75 of CBD and that she did not respond to the issue of hiring candidates who scored less than 50% and that there was nowhere written that a candidate must score more than 50% in order to be employed and that the scoresheet produced at page 81 of RBD was not hers and that he did not sign the same.

11. The claimant denied knowledge of the minutes and that they were never shared with her and that the disciplinary hearing was virtual. It was her evidence that relatives could be employed but there was possible conflict of interest and that potential employees were asked to declare possible conflict of interest. She further stated that it was not her responsibility to supervise tests and that it was the responsibility of the IT person to do so. It was not the work of HR and that she did not realise the multiple test until she was terminated.
12. The claimant conceded that the letter of invitation to disciplinary hearing informed her of her right to be accompanied by a colleague of her choice. She was thereafter issued with a termination letter and that she appealed the termination but was unsuccessful.
13. In re-examination she stated that during suspension she was instructed not to contact any of his colleagues over the matter and that she was asked to either email or call. On employment of relatives, she stated that the respondent did not object to

employment of relatives provided it did not create conflict of interest

14. The respondent on its part called as witness Mr. Santanu Basu who stated that he was the respondent's Senior Director for HR for Kenya and India and that he relied on the witness statement dated 13th October, 2023 as his evidence in chief and also relied on the documents filed by the respondent in support of the defence. He further stated that the claimant was not barred from contacting the respondent and that she could call or email. Regarding allegations of bribery, he stated that they conducted a 3rd party investigation on the matter and that the termination letter gave reasons for the termination and that the claimant never raised any complaints during the disciplinary hearing

15. In cross-examination Mr. Santanu stated that the claimant could contact management and not the management over the issues and on the allegations of bribery the claimant's name was not mentioned in the email found at page 64 of RBD and that the email was sent on 26th January, 2022 by one Mercy Benjamin and that Mercy was a member of staff. He admitted that there was no written provision that a potential employee had to score more than 50% at the interview to be employed and that it was an internal policy. Shown the scoresheets at page 79 of RBD, he stated that there was no evidence that the persons named therein eventually became employees of the respondent and that the scoresheets were not proof of

employment. Regarding the disciplinary hearing, he stated that the same was virtual and that the claimant was not provided with any documents during the disciplinary hearing. He further confirmed that employment of relatives was not prohibited provided there was no conflict of interest. Existing employees were to disclose conflict of interest and that it was the responsibility of HR and that the respondent's policy did not allow interviews to be conducted by only one person.

16. Regarding the recruitment process, it was his evidence that HR alone could not interview a candidate and that the test had a link to HR which it would send to all prospective candidates and those who show interest would apply and it would be populated on the excel sheet. From there, duplicates could be detected. This link was provided by the tool administrator who was not an employee of the respondent.

17. In reexamination he stated that he was in India when he responded to the email from Mercy and that the claimant did not deny the requirement of scoring 50% and above in order for one to be employed and on the scoresheet found at pages 78-79 of RBD, he stated that the claimant did not dispute that the persons named therein were not employees of the respondent and that HR was in charge of recruitment and keeping of employee records and that HR Manager was not allowed to single handedly interview potential employees and if there was a problem with the link it was to be raised with HR.

CLAIMANT'S SUBMISSIONS.

18. Ms. Muhando for the claimant submitted that the claimant's case was based on the fact that the reasons for termination were not true and that respondent relied on documents that were not placed before her during the hearing but were presented before the court in support of the defendants case and thus was wrongfully and unfairly terminated. According to counsel, no evidence was presented to the claimant to justify the allegation during the virtual hearing and further the respondent did not have a precise rule that candidates must score more than 50% to be employed. According to counsel, the respondent relied on annexure K at page 79 of RBD which was an interview scoresheet as a sample of individuals with less than 50% employed by the claimant yet did not produce any evidence that the said individual was its employee and that the total marks showed on the scoresheet was 64 marks but the percentage put at 45% which was unjustifiable.
19. On the issue of permitting relatives to sit in the interview panel, counsel submitted that her client stated that while carrying out the interviews she had no means of knowing who was related to who and besides the Human Resource Policy at clause 3.24 provided that the respondent did not object to the employment of relatives as long as the employment does not in the opinion of the management create a situation of conflict of interest. Further, the respondent relied on annexure M in the RBD which showed the candidates name as Benard Nyabuto while the interviewer was Vincent Nyabuto to demonstrate the

allegation that the claimant allowed relatives to interview their relatives as potential employees but did not show that apart from similarity in names, the two were related.

20. Concerning the allegation of conducting interviews with only one interviewer contrary to policy, counsel submitted that the respondent failed to present evidence of the same during the hearing but relied on the respondent's HR Policy and Procedure Manual clause 3.10 which provided that:

“...following the completion of the interview, HR/recruiting together with the assigned interviewer/s as applicable shall assess the ability...”

The above, according to counsel yielded the meaning that the respondent recognised a possibility where an interview could be conducted by one or more than one individual.

21. Concerning the allegation that the claimant failed to keep proper checks thereby allowing individuals to attempt a test more than once, counsel submitted that the claimant at the hearing indicated that the test was taken online and the same was set up by the IT system which she had no control over and which the respondent admitted was operated by a third party who was not an employee of the respondent.

22. Concerning the allegation of failing to inform management regarding complaints being made on secure placement, counsel submitted that the respondent relied on email trail dated 26th January, 2022 found at page 64 of RBD which were mere allegations by an employee and the evidence of the same was not provided as to whether money was actually paid.

Besides, the email relied on showed discrepancy in the timing in that the whistle-blower purportedly sent it at 16:32 and the email was received by the respondent at 16:09 which was evidence that it was manufactured by the respondent.

23. Regarding procedural fairness, counsel submitted that the claimant was invited for a disciplinary hearing which was held virtually but was not provided in advance with documents the respondent would be relying on during the hearing and that the show cause letter was given to her client during the hearing. The documents relied on by the respondent were only shown to the claimant during the disciplinary hearing. In this regard counsel relied on the case of **David Wanjau Muhoro vs. Ol Pajeta Limited [2014]eKLR** and submitted that denying the claimant prior access to the documents the respondent was relying on denied her client a fair hearing. In conclusion the counsel therefore submitted that the claimant was entitled to the reliefs sought in the statement of claim.

RESPONDENT'S SUBMISSIONS

24. Mr. Koganga for the respondent on his part submitted that the claimant admitted during cross-examination that she failed to arrest instances where candidates were employed despite scoring less than 50% during interviews. According to counsel, on Amos Katenge for CSR position was recorded as scoring 36% and in another unsigned scoresheet the score was indicated by the claimant at 36% however in a different

scoresheet dated 9th July, 2021 the same person was stated to have scored 64%. Counsel further submitted that during the disciplinary hearing, the claimant admitted that the recruitment was done in a hurry and one could easily miss out on details and that the claimant conceded that as a result of the workload, she was not able to properly tabulate all interview results.

25. Mr. Koganga submitted that it was respondent's policy and practice that for recruitment to occur, a candidate must score 50% or more during the interview and this requirement was never disputed by the claimant in her response to the show cause letter, during the disciplinary hearing and in her letter of appeal against the dismissal.

26. Regarding the issue permitting relatives to sit in the panel for interview of a fellow relative, counsel submitted that whereas the HR Policy and Manual allowed for the employment of relatives this did not include allowing relatives to participate in recruitment decisions affecting each other. The claimant reliance on this provision in the HR Policy and Manual was therefore misplaced and further that the claimant had a fiduciary duty to ensure that all selection and recruitment of employees was free from bias. In this regard, counsel relied on the case of **Sospeter Kioko Munguti vs. Nestle Kenya Limited [2013]KEELRC 510 (KLR)** and the case of **Teachers**

Service Commission vs. Kenya National Union of Teachers & Another [2019] KEELRC 1230 (KLR). Counsel submitted further that clause 3.24 of the HR Policy stated that the respondent did not object to the employment of relatives as long as the employment did not, in the opinion of the management, create an actual or perceived conflict of interest.

27. Concerning the issue of conducting interviews by only one interviewer, counsel submitted that this happened but blamed it on lack of support from operations team and that clause 3.10 (b) of the HR Policy Manual that the claimant relied on did not give this interpretation. According to counsel, a close reading of that clause showed that it referred to the assessment conducted after the interviews have taken place and did not permit interviews by one person. Further, the claimant had no evidence that the operations team refused to provide her with the needed support.
28. Regarding failure to keep proper checks therefore allowing candidates to attempt tests more than once, the claimant admitted to this but sought to shift the blame by claiming that it was not her mistake yet as HR Manager she had oversight responsibility and that she failed to escalate the issue to the management before the show cause letter was issued to her. Counsel further submitted that during the disciplinary hearing, the claimant admitted that the assessment was conducted

through a link provided by HR which was sent to employees and once the employees had attempted the test, HR received the results in an Excel sheet and the screening was carried out. Mr. Koganga further submitted that the claimant never raised any complaint with the management over the reliability of the HR tool before she was issued with the show cause letter.

29. Concerning failure to inform management of complaints relating to payments being made to secure placements, counsel submitted that the respondent received an email on 26th January, 2022 regarding payments being made to secure placement and the claimant in her response to the show cause letter admitted that she was aware but said she could not escalate the matter since had no evidence. According to counsel, such omission amounted to breach of trust and was a valid ground for dismissal and relied on the case **of KRA vs. Reuwel Waithaka Gitahi & 2 Others [2019] KECA 300(KLR)** and **Indulah v. Platinum Outsourcing and Logistics (EA) Limited [2024] KEELRC 81 (KLR)**.

30. Concerning whether due process was followed prior to termination, counsel submitted that section 41 of the Employment Act provided for the procedure to be followed before termination of service and that the courts have emphasized that the purpose of this provision is to safeguard procedural fairness and that this position was affirmed in the

Court of Appeal case of **Oyombe v Eco Bank Limited [2022]KECA 540 (KLR)**. Counsel however contended that where an employee has admitted to the allegations of gross misconduct, the holding of a disciplinary hearing becomes unnecessary and in this regard relied on the case of **Mukenya v Vipingo Beach Limited [2024] KEELRC 2482 (KLR)**. Counsel further contended that in this case the claimant admitted some of the allegations against her including that she was aware that money was being exchanged to secure employment and that candidates were attempting selection more than once and that she never escalated these infractions to management despite the fact that she held a position of trust with supervisory responsibility over recruitment.

31. Mr. Koganga further submitted that the procedure undertaken by the respondent demonstrated that it complied with the provisions of section 41 that is to say, on 1st February, 2022, the claimant was suspended pending investigations and thereafter issued with a show cause letter dated 18th February, 2022. In her response to the show cause letter, the claimant admitted that she was aware of money exchanging hands to secure employment. The respondent convened a disciplinary hearing on 15th March, 2022 where the committee reviewed the allegations and the claimants response and confirmed that some of the allegations had been established. Consequently the claimant was issued with a termination letter mirroring the allegations against the claimant in the termination letter.

32. On the issue whether the claimant was entitled to the remedies sought, counsel submitted that the claimant was not entitled to the same and even if the court was to find otherwise, section 49 of the Act required that the Court takes into account the circumstances of the termination including the claimant's contribution. In this regard counsel relied on the case of **Musyoka t/a Jana Pestcon v. Mnyika [2025] KEELRC 376 (KLR)** and **Kamundia v National Cement Company Limited [2025] KEELRC 1927 KLR.**

DETERMINATION

33. The court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by counsel and thanks counsel for their industry in addressing their respective perspectives of the dispute before the court however in order to resolve the matter the court has framed two issues, namely:

- a. *Whether the Claimant unfairly terminated from employment by the Respondent and;*
- b. *Whether the Claimant is entitled to the reliefs sought.*

Whether the Claimant unfairly terminated from employment by the Respondent

34. To address this first issue framed, the court will endeavour to interrogate the reasons for termination of the claimant's service and the processes followed that concluded in the termination of the claimant's service and mirror them against the requirements stipulated in the Employment Act in order to establish if in sum total they constitute valid and justifiable reasons for termination of service of an employee.

35. In the instant case, the claimant's services as outlined in the termination letter dated 24th March, 2022 were on grounds among others that:

- a. Allowing and/failing to arrest instances where candidates were employed despite scoring less than 50% during interviews
- b. Permitting a relative to sit in an interview for a fellow relative
- c. Failure to deconflict instances where relatives are working together
- d. Failure to keep proper checks allowing candidates to attempt more than once
- e. Failure to inform management regarding complaints relating to payments being made to secure placement.

36. Through a suspension letter dated 2nd February, 2022, the claimant was informed among others that her suspension was to allow the conduct of thorough and speedy investigations and

did not constitute or carry any implication of guilt or prejudice nor any form of disciplinary action. Through an email sent on 4th May, 2022, the respondent issued the claimant with a show cause letter and notice of disciplinary hearing. The email albeit elaborate, contained the allegations against the claimant as eventually stated in the termination letter referred to above. The claimant responded to the show cause letter via an email dated 21st February, 2022 and stated among others as follows:

- i. *When carrying out interviews I had no idea that people are related until the time of collected documents and when you ask them they will deny. The HR policy clearly specify that we can employ relatives and I even asked you Santanu and you confirmed it. So why would I be disciplined for doing what is in the policy*
- ii. *The one person who has ever interviewed employees alone was me, Operations Team refused to give me a team to assist me and you Santanu and Sven were aware in fact it is Sven who told me to go ahead and interview.*
- iii. *I don't understand when you say that employee records are not kept properly yet they re filed in box files waiting to be transferred in their personal files for those who qualified.*
- iv. *Yes I was aware that money was being collected, the entire management is my witness including Sven I asked the employees to tell me who was collecting money from them nobody said anything, I have been carrying up investigations and once I narrowed down on a suspect I find myself suspended. What will it have helped if started spreading rumours without evidence*

- v. *Once you sent a link to a candidate and they continue attempting how is that my mistake? And some candidates Sven is the one who was telling prudence to let them redo tests.*

37. From the evidence it was common ground that the disciplinary hearing was virtual. The minutes of the disciplinary hearing were attached to the respondents bundle of documents running from page 89 to 93. The court observes that the minutes do not show who was present, does not show who recorded them and were further not signed by the chair or secretary of the session and the claimant to confirm if were a true record of what transpired during the meeting. The Court further notes that if the meeting was virtual, the minutes of the meeting ought to have been a transcription of the audio recording of the virtual meeting by a qualified person as stipulated in the Evidence Act and is usually the case where meetings are conducted virtually and sought to be relied on in proceedings before a court of law. In the suspension letter the claimant was informed that her suspension was to allow investigations. Further, the show cause cum letter of investigation to disciplinary hearing makes reference to

discoveries during investigation. No such report was availed to the claimant or the court to confirm the findings.

38. It is noted from the claimants response to the show cause letter, she implicates one Sven and Santanu to have been in the know about candidates attempting the test more than once and further that Santanu was aware that the Operations Team refused to assist her. Mr. Santanu in his evidence before the Court stated that the claimant was not implicated as one of the persons who asked for a bribe and that there was no documented requirement that one had to score more than 50 % to be employed by the respondent. He further conceded in cross-examination that the persons alleged to have scored below 50% eventually became employees of the respondent and that the scoresheets were not signed and did not constitute proof of employment.

39. Further, the claimant in response to the notice to show cause admitted that she was aware that there were allegations of bribery in order to secure placement, but defended herself that she could not act on the same until she came across concrete evidence and that the few employees she asked if

they paid bribes to secure employment obviously denied doing so.

40. The standard of proof in employment cases is governed by section 47(5) of the Employment Act where the employee has a duty to prove that termination was unfair, while the employer must justify the reasons for termination. In this case the claimant's service was terminated for reasons stated in the termination letter dated 24th March, 2022. Prior to the termination of service, the claimant was issued with a notice to show cause dated 4th May, 2022 to which she responded elaborately and in the court's view reasonably and further implicated some of her superiors over the infractions she was being blamed for. Further, as observed earlier in the judgment, the purported transcriptions of the minutes of the virtual hearing did not disclose who recorded them, who was in attendance and are not signed by the claimant and at least the chair of the disciplinary session to confirm they were a true record of what transpired during the virtual hearing. Further the purported transcription as observed earlier, do not meet

the requirements of the Evidence Act concerning electronic evidence. They are as a result of no probative value.

41. The courts have emphasized in among other cases the case of **Mary Chemweno Kiptui vs Kenya Pipeline Company Limited [2014] eKLR** that:

Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity of the employee.

42. The Respondent in support of the allegations against have not, in the court's view adequately demonstrated that there existed valid and justifiable reasons to warrant the termination of the claimant's service. Further, in the court's assessment, the infractions if at all existed were not proportional to the drastic action of terminating the claimant's service some other less drastic measure could have adequately addressed the claimant's fault if any.

43. In considering whether a termination should be upheld by the Court, the test is usually whether a reasonable employer would terminate the employee based on the same facts as was held by Lord Denning in the cited case of **British Leyland UK Ltd v. Swift [1981] IRLR 91** stated:

‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him’

44. It should be noted that this Court in appropriate cases is clothed with power to indulge in a merit review of the reasons for termination of service of an employee by dint of provisions of section 43 of the Employment Act. However the Court will not replace its subjective views of what constitutes a valid reason for termination of an employment contract with that of the employer. Justice Professor Ojwang’ in the case of **Kenya Revenue Authority Vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009** as cited in **Republic Vs National Police Service Commission Exparte Daniel Chacha Chacha JR 36 of 2016 (2016) eKLR** observed as follows:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed”

45. And the Court of Appeal in **Civil Appeal No 66A of 2017, Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR** stated as follows:

"...It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services..."

may not have dismissed him"

46. Drawing from the above cited cases and in relation to the present case, it presents itself as one of the few occasions where the court in exercise of its judicial authority and doing justice in the circumstances, is compelled to undertake a merit review of the management's decision to terminate the service of an employee, the claimant herein and finds and holds that the reasons for termination of the claimant's service have not met the threshold as set by section 43 of the Employment Act as read together with section 47. On the other hand, the claimant has adequately established a case of unfair termination as required of her by law.

47. Regarding the issue whether the claimant is entitled to the remedies sought, this goes without say, the court having found that the claimant's service was unfairly terminated. The Court will however proceed to analyse the prayers sought in order to establish if they are merited.

48. In the statement of claim, the claimant prayed for:

- a. A declaration that that the respondent unfairly terminated her service
- b. An order for payment to the claimant of terminal dues and compensatory damages totaling to Kshs. 4,320,000/-
- c. Costs of the suit.

49. The court having reached the conclusion that the respondent unfairly terminated the service of the claimant, considerations guiding the reasonable quantum of compensation in the circumstances is guided by the provisions of section 49 (4) of the Employment Act which are stated as:
and (3), take into account any or all of the following-

- a. the wishes of the employee;
- b. circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;
- c. the practicability of recommending reinstatement or re-engagement;

- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer;
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. any expenses reasonably incurred by the employee as a consequence of the termination;

50. The claimant was employed by the respondent on 1st December, 2020. The contract was open ended as opposed to fixed term. Her services were terminated on 22nd March, 2022. That means she had worked for approximately one year and three months. The claimant was engaged as an HR Manager meaning she was an HR professional implying that albeit with some difficulty she could either get another job or practice as an HR Consultant. Considering the reasons for which she was terminated and on which the court has reached a finding that they did not constitute valid and justifiable reasons for

terminating the services of an employee and that even if the allegations were proved, termination of service was disproportionate in the circumstances, an award of five months' salary as compensation for unfair termination would be reasonable in the circumstances.

51. **In conclusion the Court finds and holds that the respondent had no valid and justifiable reasons for terminating the claimant's service.**
52. **The Court awards the claimant the sum of Kshs. 720,000/- as compensation for unfair termination. This award shall be subject to taxes and statutory deductions but shall attract interest at court rates from the date of judgment until payment in full**
53. **The claimant shall further have costs of the suit.**
54. **It is so ordered.**

Dated at Nairobi this 19th day of December 2025
Delivered virtually this 19th day of December
2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

