

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NUMBER E308 OF 2024**

**CAREPAY LIMITED.....APPELLANT**

**-VERSUS**

**TEDDY AYODI AFUNDI.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. T. B. Nyangena (SPM) delivered on 26<sup>th</sup> September 2024 in Nairobi MCELRC No. E1354 of 2020)*

**CORAM**

*Before Lady Justice J.W. Keli*

*C/A Otieno*

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. T. B. Nyangena (SPM) delivered on 26<sup>th</sup> September 2024 in Nairobi MCELRC No. E1354 of 2020 filed a Memorandum of Appeal dated the 24<sup>th</sup> of October 2024 seeking the following orders: -
  - a) The Appeal herein be allowed.
  - b) The judgment of the Chief Magistrate's Court delivered on 26<sup>th</sup> September 2024 be set aside.
  - c) This Honourable Court be pleased to order that Respondent's termination was fair, lawful, and for a valid reason.
  - d) This Honourable Court do order that the Respondent is not entitled to the prayers sought in the Amended Statement of Claim.
  - e) Costs of the Appeal and the cause in the Chief Magistrate's Court be awarded to the Appellant.

## GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law by awarding general damages equivalent to 26 months' salary contrary to the provisions of section 43 of the Employment Act that the maximum awardable compensation is the equivalent of 12 months' salary.
3. The Honourable Magistrate erred in law by awarding the Respondent arrears of salary till completion of the contract contrary to the provisions of the Employment Act and employment law practices.
4. The Honourable Magistrate erred in law by awarding double compensation to the Respondent and thereby unjustly enriching the Respondent contrary to the principles governing the award of damages.
5. The Honourable Magistrate erred in law in awarding general damages contrary to the general principle that general damages are not awardable in employment matters.
6. The Honourable Magistrate erred in fact and in law in holding that the Respondent was discriminated against and unfairly terminated against the weight of evidence produced before the court.
7. The Honourable Magistrate misapprehended the facts and the issues in dispute between the parties thereby arriving at a wrong decision based on the following:
  - a. The Honourable Court determined the criminal culpability of the Respondent.

- b. The Honourable Court failed to consider the Appellant's evidence that the Respondent was taken through a fair disciplinary process.
  - c. The Honourable Court failed to consider evidence that the Appellant dismissed the Respondent for a valid reason recognized under section 44 of the Employment Act as a ground for summary dismissal.
8. The Honourable Magistrate erred in fact and in law in applying a standard of proof that is beyond reasonable doubt in an employment matter.
9. The Honourable Magistrate erred in fact and in law in failing to consider the issues and the submissions of the parties leading to an erroneous conclusion.

#### BACKGROUND TO THE APPEAL

10. The Respondent filed a suit against the Appellant vide an amended statement of claim dated 4<sup>th</sup> July 2022 seeking the following orders: -
- a) A declaratory order that the termination of the Claimant from service was illegal, wrongful and unfair.
  - b) An order that the Respondent pays;
    - i. For arrears of salary till completion of the contract.
    - ii. One (1) months' salary in lieu of notice.
    - iii. Severance pay 1 months' pay for every year worked for Ten (10) months.
    - iv. General Damages for unlawful dismissal from employment where he would have worked for 2 years 2 months until the expiry of the contract.
    - v. Statutory benefits as provided by the state.

- vi. Claimant be issued with a certificate of service.
- c) Interest thereon.
- d) Costs of this suit.
- e) Any other relief the court deems fit to grant.

(pages 10-14 of Appellant's ROA dated 29<sup>th</sup> August 2025).

15. The Respondent filed his undated amended witness statement; list of witnesses dated 4<sup>th</sup> July 2022; and list of documents of even date with the bundle of documents attached (pages 16-43 of ROA). The Respondent later filed a further undated witness statement (pages 44-47 of ROA).
16. The claim was opposed by the Appellant who entered appearance and filed a statement of response dated 15<sup>th</sup> August 2022 (pages 56-59 of ROA). Alongside the response, the Appellant filed a list of witnesses dated 12<sup>th</sup> August 2022; witness statement of ELIZABETH WAMBUI of even date; witness statement of MOSES KURIA of even date; and list of documents of even date with the bundle of documents attached (pages 60-186 of ROA).
17. The Claimant/Respondent's case was heard on the 19<sup>th</sup> of March 2024 with the Claimant testifying. He relied on his filed witness statement as his evidence in chief and produced the documents attached to his list of documents as exhibits. He was cross-examined by counsel for the Appellant, Mr. Omuganda (pages 474-476 of ROA).
18. The Appellant's case was heard on 20<sup>th</sup> March 2024 and 21<sup>st</sup> March 2024, with the Appellant calling two witnesses: ELIZABETH WAMBUI as RW1; and MOSES KURIA as RW2. They both relied on their filed witness statements as their evidence in chief, and RW1 produced the

Appellant's documents attached to their list of documents as aforesaid. The witnesses were cross-examined by counsels for the Respondent Mr. Koech and Mr. Olao (pages 476-483 of ROA).

19. The parties took directions on filing of written submissions after the hearing, and complied.

20. The Trial Magistrate Court delivered its judgment on the 26<sup>th</sup> of September 2024 partially allowing the Claimant/Respondent's claims in respect of salary arrears until completion of the contract; general damages for unlawful dismissal; plus costs and interest (judgment at pages 1-5 of Supplementary ROA dated 27<sup>th</sup> October 2025).

#### DETERMINATION

21. The appeal was canvassed by way of written submissions. Both parties complied.

#### Issues for determination

22. The Appellant, in their submissions dated 15<sup>th</sup> September 2025, identified the following issues for determination:

- i. The Honourable Court awarded remedies that resulted in compensation, the equivalent of 52 months' salary to the Respondent contrary to the provisions of the law – Grounds 1,2,3 and 4 of the Memorandum of Appeal.

- ii. The Honourable Court applied the standard of proof used in criminal cases (i.e. beyond reasonable doubt) in determining an employment matter-Grounds 5 and 7 of the Memorandum of Appeal.
- iii. The Honourable Court erred in determining issues not before the Court, thereby arriving at wrong conclusions-Grounds 6 and 8 of the Memorandum of Appeal.

23. In their supplementary submissions dated 27<sup>th</sup> October 2025, the Appellants identified the following additional issues for determination:

- i. Whether the Respondent was discriminated against.
- ii. Whether there was a valid justification for the termination of the Respondent.

24. On their part, the Respondent identified the following issues for determination in his submissions dated 3<sup>rd</sup> October 2025:

- i. Whether the Respondent was unfairly terminated from employment.
- ii. Whether the Respondent's termination from employment was discriminatory.
- iii. Whether general damages is barred in employment disputes.
- iv. Whether the award of general damages for unfair termination is capped by law at twelve months' salary and whether the trial court erred in awarding general damages of 26 months' salary.
- v. Whether the trial court applied the correct standard and burden of proof in determining the lawfulness of the Respondent's termination.
- vi. Whether the trial court misapprehended the evidence and/or failed to consider relevant facts and submissions.

25. The court adopted the issues for determination as identified by the parties and summarised the same as follows-

- a. Whether the trial court erred in fact and law in finding the Respondent was unfairly terminated from employment.
- b. Whether the trial court erred in finding that the respondent was discriminated against.
- c. Whether the trial court erred in fact and law in the relief granted.

Whether the trial court erred in fact and law in finding the Respondent was unfairly terminated from employment.

The appellants' submissions

26. Whether the Honorable Court erred by applying the standard of proof used in criminal cases (i.e beyond reasonable doubt) in an employment matter - Grounds 5 and 7 of Memorandum of Appeal - The Honorable Court erred by applying the standard applicable in criminal cases in determining an employment claim. The Honorable Court stated as follows in its analysis of the issues between the parties at page 4 of the judgment: "After carefully considering the pleadings, evidence and submissions tendered, I find that there was no evidence linking the claimant to the crime simply because the claimant was working from home, he was never caught by the CCTV cameras, the guard who allegedly claimed to have been sent to steal by claimant never testified nor his statement with the police produced, the other staff who were mentioned by the said guard never recorded statements with police nor were their disciplinary records produced in court. Further, the claimant was never charged before court yet the incident was criminal in nature. The reason offered for this is that the security company opted to pay the respondent for the laptops lost rather than have the guard charged. Although this appears favourable to the respondent it is

prejudicial to the claimant and the principle of reasonableness and fairness. This can be considered an act of discrimination of the claimant which must be discouraged by this court." The Honourable Court proceeded on the wrong basis by seeking to have the employer prove without a shadow of doubt that the Respondent was linked to the crime, and to have him charged in a Criminal Court as evidence of wrongdoing. Disciplinary proceedings are administrative proceedings and the standard of proof is not similar to criminal proceedings. The standard in disciplinary proceedings is that of a balance of probabilities. The Court of Appeal in Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] 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 he can take appropriate action subject to the requirements of procedural fairness that are statutorily required." "It bears repeating that the standard of proof an employer needs to be satisfied about an alleged act of criminality on the part of an employee is the lesser one of balance of probabilities." (At page 54 of the Appellant's Bundle of Authorities) In New Kenya Co-operative Creameries v Sigei (Appeal E002 of 2022) [2024] KEELRC 27 (KLR) (25 January 2024) (Judgment), the court described the nature of a disciplinary hearing as follows: "The appellant was under legal obligation to prove that indeed it had genuine and reasonable cause and believe for taking the disciplinary action culminating in the dismissal. Certainly, and this court has stated as much in many a decision, disciplinary proceedings are not court trials and an employer is not expected to prove the 11 allegations/charges against an employee beyond reasonable doubts. However, disciplinary proceedings are an administrative action that must adhere to the standards set by Article 47 of the Constitution, Section 4 of the Fair Administrative Action Act, and the various provisions of the Employment Act. (At page 66 of the Appellant's Bundle of Authorities) Additionally, the outcome of criminal proceedings has no bearing on disciplinary proceedings by

an employer, as was stated by the Court of Appeal in *Gichobi v Oracle Technology Systems (Kenya) Limited* (Employment and Labour Relations Cause 1661 of 2017) [2023] KEELRC 43 (KLR) (19 January 2023) (Judgment) as follows: "The Court of Appeal settled this issue in its decision in *Attorney General v Andrew Maina Githinji & another* [2016] eKLR, holding that criminal proceedings and internal disciplinary proceedings at the work place are separate and distinct, with different procedures and standards of proof. An employer is therefore not obliged to withhold action against an employee on the basis of pending criminal proceedings nor is the employer bound by the outcome of such proceedings." (At page 78 of the Appellant's Bundle of Authorities).

27. Section 43 (2) of the Employment Act also states that the reasons for termination should be those that the Employer genuinely believed to exist at the time of the termination. The Appellant, was satisfied from the internal investigations conducted that there was reasonable suspicion that the Respondent had been involved in the theft, due to the following: a. The guard, Benard Rono, when questioned by the police stated that the Respondent had showed him where to get the laptop and where to sell it. The Respondent admitted in examination that there was no bad blood between him and Benard Rono. There was no reasonable explanation why the guard would specifically implicate the Respondent and not any other employee other than for the fact that it was the truth. b. The Respondent was the person in charge of distributing laptops to new hires. The Respondent was a systems administrator, and one of the only two people who had access and control to the biometrics details that had been tampered with. The internal investigations conducted by the Appellant revealed that the Respondent was not being truthful at the disciplinary hearing and therefore could not be trusted. DW 2, Moses Kuria, testified that the System Administrator role held by the Respondent within the Appellant who deals with patient's

data is a key and sensitive position, central to the business of the Appellant. It was critical that the Appellant should fully trust the Respondent. 47. Additionally, Section 43(2) of the Employment Act, provides that the reason for termination should be what the Employer genuinely believed to exist at the time of termination. The Appellant believed that the Respondent was involved in the theft, and had in that case discharged the required burden to the required standard in an Employment Case. Had the Honorable Magistrate used the correct standard of proof, she would have come to the conclusion that the Respondent's termination was proved to the required standard and for that reason, there was a valid justification for the dismissal of the Respondent. We pray that this Honourable Court finds that the Honourable Magistrate Court erred in applying the standard of beyond reasonable doubt in an employment claim.

28. Issue 3: Whether the Honourable Court erred in determining issues not before the Court, thereby arriving at wrong conclusions – Grounds 6 and 8 of the Memorandum of Appeal. The Honourable Court determined issues that were not before the Court, and which are not within the jurisdiction of an Employment Court. The Honourable Court framed the issues for determination in its judgment as follows: a. Whether there is evidence oral or written linking the Claimant to the crime of theft. b. Whether there was bias in the police investigations and internal disciplinary action. c. Whether the Claimant has proved his case to the required standard. The parties had already filed the agreed list of issues dated 8th September 2022 and outlined the following issues for determination: a. Whether the Respondent terminated the Claimant's contract for valid reasons. b. Whether the Respondent wrongfully and unfairly terminated the Claimant's employment contract? c. Whether there was a basis for initiating disciplinary proceedings? d. Whether the Respondent followed the requisite procedure while terminating the contract of the

Claimant? e. Whether the Claimant was afforded a fair hearing? f. Whether the Claimant was paid terminal dues? g. h. i. j. Whether the Claimant is entitled to general damages owing to his dismissal? Whether or not the Claimant is entitled to statutory benefits for his dismissal? Whether the Claimant is entitled to the reliefs sought? Who is entitled to the costs of the suit? The Court went off the tangent and determined issues that were not material in the case before it. In particular, the Court sought to usurp the role of the Appellant to conduct the disciplinary proceedings against the Respondent, and finding on an issue of discrimination that was never pleaded. The Court in *Veronica Gathoni Mwangi another v Samuel Kagwi Ngunjiri another* 2020KEHC5118(KLR) expressed itself as follows concerning the issue: "I agree with the appellant on the objective of pleadings in an adversarial system that the court can only lawfully determine issues that are specifically pleaded and proved before it and that the court cannot base its decision on an unpleaded issue." (At page 81 of the Appellant's Bundle of Authorities) The Claimant's Claim was a claim for unfair termination/wrongful termination as can be discerned from the Amended Statement of Claim. Section 43 of the Employment Act guides the Employment Court on what should be determined in a claim for unfair termination. Section 43 provides as follows; (1) In any claim arising out of the termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section (2)The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. The Court have further reinforced these provisions and stated that in a claim for unfair termination, the Court ought to consider substantive and procedural fairness. In *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* [2015] KECA 919 (KLR) the Court of Appeal stated as follows: "The respondent's claim was founded

on unfair/wrongful termination of his services by the appellant. In considering whether termination was fair or unfair, the court ought to examine whether the reason (s) for termination was valid and whether the procedure for dismissal was fair. Therefore, in such a case as the one before us the court considers both the procedural and substantive justice." (At pages 86-87 of the Appellant's Bundle of Authorities) On the first ground of whether the Respondent was dismissed for a valid reason, the Appellant ably demonstrated before the Magistrate's Court through the evidence of DW-1 and DW-2 and the cross examination of the Respondent, that the Respondent was involved as an accomplice in the theft of an office laptop. He was one of the only two people who had access to the biometrics and would be able to access the logs and also allow other people access to the office, even without needing to be physically at the office. He was also very untruthful during the disciplinary hearing and was the person in charge of distributing laptops to new hires. The Disciplinary Committee of the Appellant was satisfied that there was enough reason to believe that he had actually been involved in the theft, and there was a breach of trust noting the kind of role that he held in the Appellant. DW 2, Moses Kuria, testified that the System Administrator role held by the Respondent was central to the business of the Respondent and it was critical that the Appellant should fully trust the Respondent, being that the Appellant is a company that deals with sensitive client data. The reason for termination of the Respondent's contract was thus related to his conduct. There was reasonable suspicion that the Respondent had committed a crime to the detriment of his employer, and as per the provisions of section 44 of the Employment Act, that would have warranted summary dismissal. The Court in determining the validity of the reason for dismissal, must not substitute its views for those of the employer. The standard is one of reasonableness. Whether the employer was reasonable in dismissing on those facts. The Court in CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] KECA 919 (KLR) while quoting from Halsbury's Laws of England, 4th

Edition, Vol. 16(1B) para 642 stated as follows:- "...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair. (At pages 89-90 of the Appellant's Bundle of Authorities) There was a valid justification for the dismissal of the Respondent, especially in light of his role as a systems administrator in a data driven company. We pray that this Honourable Court finds that the Magistrate Court erred in failing to consider the justification. On the second ground, the Appellant did demonstrate that the Respondent was treated fairly and the process was procedurally fair. What constitutes fair procedure was discussed by the Court in Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR as follows: "The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. is Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible." (At page 96 of the Appellant's Bundle of

Authorities). The Respondent was informed of the charges and the reasons why the Appellant was initiating disciplinary proceedings against him in a language that he would understand. 68. He was also asked to prepare a defence in writing and invited to make presentations during a physical hearing that was held on 7th April 2020. He was informed of the right to be accompanied by an employee of his choice to the hearing. He was accompanied by Jimmy Adema, his line manager. During the hearing, the Respondent was allowed to make his representations, ask questions and raise any concerns which were all addressed by the Appellant. The Respondent also had his written defence to the allegations made against him. From the 1st of April, 2020 the Respondent was aware of what he was being accused of, and specifically that Benard Rono had implicated him in the stealing of a laptop and other items from the office. The Respondent had sufficient time to prepare a defence, he was accompanied by an employee of his choice and had a chance to explain himself. The process was procedurally fair. These were the issues in dispute between the parties, and had the Court considered them, it would have arrived at a different conclusion. There is no evidence from the analysis of the Magistrate that these issues as presented by the Appellant were taken into consideration. In the circumstances, we pray that the Honourable Court finds that the Trial Court erred in failing to consider the evidence that the Respondent was terminated for a valid reason, and that the process was procedurally fair.

29. Whether there was a valid justification for the termination of the Respondent? The Appellant reiterates paragraphs 58 - 64 of its Written Submissions and submits that there was a valid justification for the termination of the Respondent. The Respondent in paragraphs 10, 11, 13(b), 20, and 21 of its Written Submissions avers that there was no internal investigation conducted to justify the termination. DW-1 Elizabeth Wambui testified that she was at the police station when Bernard Rono stated that the Respondent had advised him where to steal and to sell the laptop

(Paragraph 14 of the Witness Statement of Elizabeth Wambui and page 63 of the Record of Appeal). The Respondent corroborates this testimony in his responses to the Disciplinary Committee as recorded at page 2 of the Disciplinary Committee's minutes attached to the Respondent's Bundle of Documents and exhibited at page 36 of the Record of Appeal. He states that he was with Dorothy, Elizabeth, OCS, Rono, and Sammy in the same room when Rono accused him of stealing the laptop. 26. The Appellant obtained the Written Statement that was recorded by Rono at Muthangari Police Station (at pages 73-74 of the Record of Appeal) implicating the Respondent for stealing the laptop. The Respondent corroborates the evidence that Rono recorded a statement at the Police Station. It is therefore not true that the allegations against the Respondent were not based on any investigation and were not substantiated. The threshold under the law for an employer to prove reasons for terminating an employee is that of "a reason that the employer genuinely believed to exist at the time of termination". DW - 2 Moses Kuria testified that the Appellant terminated the Respondent because the disciplinary panel was satisfied that there was circumstantial evidence implicating the Respondent in the theft, but also because there were very many inconsistencies in the testimony of the Respondent that created doubt whether he could be trusted. This was especially in light of the very sensitive role that he played in the Appellant. The Appellant demonstrated in paragraph 45 of its Written Submissions the reasons why there was reasonable suspicion that the Respondent was involved in the theft, including the fact that he was the person responsible for the distribution of laptops to new hires, and would get the laptops from the store. There was reasonable suspicion that the Respondent was involved in the theft, and could thus not be trusted in the role that he held, and this was a sufficient and valid reason for termination. The Court of Appeal in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] KECA 300 (KLR) stated as follows: "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. That is a partly subjective test. In the case of *Bamburi Cement Limited vs. William Kilonzi* [2016] eKLR this Court expressed itself on the nature of proof required as follows: "The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing....." (At page 61 of the Appellant's Supplemental Bundle of Authorities). The Court of Appeal in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] KECA 300 (KLR) further proceeded to state as follows with regard to the test to be considered in such circumstances: "The test to be applied is now settled. In the case of the *Judicial Service Commission vs. Gladys Boss Shollei*, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in *McKinley vs. B.C.Tel.* (2001) 2 S.C.R. 161 "Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer." (At page 61 of the Appellant's Supplemental Bundle of Authorities) The actions of the employee led to a breakdown in the employment relationship, and any reasonable employer would have dismissed the Respondent in the circumstances. We pray that the court

finds that there was a valid reason for the termination of the employment, which the Appellant genuinely believed to exist at the time of the termination

Respondent's submissions

30. Whether the respondent was unfairly terminated from employment? The Respondent submits that for termination to be fair, the same must be for a valid reason; the reason must be related to the employee's conduct and the termination must be done in accordance with fair procedure. Sections 43 and 45 of the Employment Act, 2007, place a legal obligation on an employer to demonstrate that the reason for terminating an employee's contract was not only valid and fair but also one that the employer genuinely believed to exist at the time of termination. The Respondent submits that the reason for his dismissal was invalid as the same was based on unsubstantiated allegations of insincerity regarding a theft incident at the workplace. This is evidenced by the lack of any credible evidence presented by the Appellant linking the Respondent to the theft and that despite the gravity of the accusation, no internal investigation was ever conducted prior to any disciplinary hearing. The Appellant. In its submissions, is hinging its appeal on the trial court's finding that no charge was ever brought against the Respondent. While this was doubtlessly taken into account as apparent from the trial court's Judgment, it is not the only consideration taken into account in arriving at the Judgment. Indeed, the trial court listed a raft of inconsistencies in the Appellant's case: (i) the Claimant was working from home; (ii) the Claimant was never caught on any CCTV camera at the premises, (ii) the guard who was allegedly sent by the Claimant never testified nor his statement with the police produced, (iv) the other staff members mentioned by the said guard never recorded statements with the police nor were their disciplinary records produced. The trial court's apprehensions are justified by the Appellant's own evidence: page 160 to page 173 of the Record

of Appeal contains records of meetings carried out with other staff members by the Appellant, apparently after the disciplinary hearing. It must be borne in mind that the Appellant's ultimate reason for terminating the Respondent's employment was that "During the hearings you made a statement that you have never been in the procurement store which is not true. This gave us doubt in our trust levels on you and whether we can continue to trust you" (Page 177 of the Record of Appeal). Interrogating the Appellant's conduct against this justification, the following glaring inconsistencies clearly come out: a) The theft was carried out by a night guard who was an employee of a company contracted by the Appellant; at what point did the Respondent, a day-working Systems Administrator, meet with the night guard and conspire to steal laptops during the COVID 19 pandemic when they were working from home? b) At the disciplinary hearing, it was stated on record that shortly after the Respondent was summoned to his workplace following the incident, "Elizabeth escorted the police to office and soon after they came out. Teddy and Dorothy were taken to the station and were not told why" (Page 161 of the Record of Appeal). This fact was never challenged and it points to police action being taken pursuant to whatever discussion they must have had with the said Elizabeth, who was also the Appellant's key witness. Indeed, no investigation was ever done by the Appellant. It admittedly relied on minutes of meetings held after the disciplinary hearing in arriving at its decision (See page 166 of the Record of Appeal). c) All through the investigations, the said Elizabeth (DW-1) was at the heart of each and every action. First, she states that she was in the company of police when the actual thief, one Rono, was being interrogated. That "Elizabeth asked Rono where he got the keys from to gain access and Rono initially said that he found them at the office compound." However, when Dorothy's relative sought her assistance, "Elizabeth informed them that the matter is a police case and she is not in control" (Page 166 of the Record of Appeal). The same Elizabeth alleges in her meeting minutes that "Rono's relative who was present, told Rono in their mother

tongue to tell the truth.” Asked how she knew what they were saying, she states that the police translated it to her. Elizabeth was also present when the police picked up the alleged purchaser of the stolen item (Page 166 of the Record of Appeal). Who was doing police investigations, was it the police or Elizabeth? This question becomes even more interesting when one considers Elizabeth's position in the Appellant company and her control of the store room where the theft took place. The same Elizabeth, who apparently discovered keys to the store room missing from her desk drawer on 04/04/2020 and then again on 08/04/2020 (Page 167 of the Record of Appeal), was the same person asking the questions and accompanying the police in all their inquiries! Elizabeth then states that she discovered things were missing from the store "on 12th March and the following day 13th March I reported [to] Emily." Yet, in her statement before the trial court she states that she discovered the theft on 19/03/2020. Asked if she checked whether she had all her keys on 13/03/2020, she says "I did not check since I did not suspect that someone would take my keys." f) Elizabeth states that on 13/03/2020, after discovering the missing items, she started using two locks at the procurement store (Page 167 of the Record of Appeal) but still managed to somehow lose them, hence the theft of 20/03/2020! g) The same Elizabeth states that she got a new padlock and keys for the store room in 2019 (Page 168 of the Record of Appeal). She is not able to recall when she purchased the said padlock and keys. She needs to confirm who has the records for the purchase. She only discovered the other missing items at the police station yet she is the Procurement and Administration Manager. She is the custodian of the store room keys. h) Benard Mwangi, who was also interviewed by the Appellant, states in his interview minutes that he gave back his store room keys to the said Elizabeth, apparently in 2019 as well (Page 171 of the Record of Appeal). He confirms that Dorothy never entered the store room whereas Elizabeth categorically states that Dorothy would follow her into the store room (Dorothy was also accused after Elizabeth's short tet-a-tet with

police officers). He further states that as at 16/03/2020, he would use one key to access the store room whereas Lizabeth claims there were two keys in use. i) A very pertinent question is left unanswered at Page 173 of the Record of Appeal: "For Elizabeth, she had asked Benard for the keys sighting (sic) she left hers at home. Why did she get Benard Mwangi's key, yet she had 2 keys at her locker?" Why would DW-1 be involved in police investigations to such intimate extents when in fact she ought to have been a person of interest? Why were the police acting on her information and not interrogating other staff members? In the full glare of all these inconsistencies, the Appellant still proceeded to conclude by stating that "Teddy's statements are not factual, this is a concern from an integrity perspective." With regards to Elizabeth, they conclude that "She is not under investigations but evidence of negligence on how keys have been handled." No disciplinary process was taken against the said Elizabeth or any other employee. Your Lordship, from page 160 to page 173 of the Record of Appeal alone, it is apparent that the Appellant's internal inquiries were marred with gaps and inconsistencies, and its ultimate decision was not supported by the information it collected. It is unquestionable that there was no substantive reason for summarily terminating the Respondent's employment. The Appellant bears the burden of justifying the grounds of termination and proving their validity and fairness as mandated by Section 47(5) of the Employment Act and emphasized in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR) where it was stated that: "Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows: "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or

wrongful dismissal shall rest on the employer." [Emphasis added] The Respondent submits that the Appellant's justification for the termination of the Respondent was fundamentally flawed and the trial only confirmed this fact; 17. During the hearing, Elizabeth Wambui Wangui testified that she was responsible for overseeing the procurement store and was therefore the custodian of its keys. Elizabeth also conceded that the Respondent did not possess a key to the procurement store and was not responsible for its management. As such, the Respondent had no means of accessing the store. The only individuals with access to the store were herself, Dorothy the cleaner and one Mary Njoroge. We shall leave the apparent inconsistency between her oral testimony and documentary evidence for the court's consideration. Notably, Elizabeth assumed the roles of complainant, investigator, and key witness in the matter. While it was the Appellant's case that Bernard implicated the Respondent at the police station, no police officer was called to verify this statement. The only evidence presented was an unauthenticated handwritten statement allegedly made by Bernard, without any indication of its maker, its official status, or supporting police documentation. The Appellant neither produced the Investigating Officer nor called Bernard as a witness to corroborate this central claim. Even more telling is the fact that no money trail or communication was shown between the Respondent and Rono to prove any conspiracy or instruction to steal and there was no evidence to prove that Rono and the Respondent have ever even met or interacted. In its minutes, the Appellant expressly notes that Rono changed his story three times (See page 166 of the Record of Appeal). Still, it was Rono's indication that he had been instructed by the Respondent which the Appellant put weight on in the end. Dorothy, whom he alleged gave him the keys in 2019 (Dorothy who did not have access to the store room) did not have her employment terminated. 19. The Appellant's other witness, Moses Kuria, testified that they noted inconsistencies when they questioned the employees although notably, no specific inconsistencies in the Respondent's statement was highlighted.

Following the alleged inconsistencies, they contacted the vendor of the biometric system who confirmed that the biometrics had been tampered with and therefore, they terminated the Respondent's contract because they could not trust him with the sensitive role anymore. Upon cross examination, Mr. Kuria however conceded that the Respondent was not responsible for the missing biometric data and that the vendor never informed them who tampered with the data. He also confirmed that there is no evidence linking the Respondent to the theft, putting him in contact with Rono or linking him to Imenti House where he allegedly advised Rono to sell the laptop. No evidence was also produced linking the biometric system to the theft by Rono. Both witnesses also confirmed that no internal investigations on the incident were conducted prior to the Respondent's arrest OR prior to the disciplinary hearing, and that the Appellant dropped the charges against the Respondent. From the foregoing, the Respondent submits that ultimately, the allegations against him amounted to nothing more than rumor, speculation and scapegoating. The Appellant Page 7 of 17 sacrificed the Respondent's employment without any factual basis as they lacked the minimum evidentiary threshold required under civil law, proof on a balance of probabilities. It is therefore not true that the trial court raised the standard of proof to beyond reasonable doubt. It is trite law that he who alleges must prove as grounded in Sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya and emphasized in the case of Kipkebe Limited v Peterson Ondieki Tai (2016) eKLR where the court stated that; "It is trite law in evidence that he who asserts must prove this case. No evidence was adduced by the plaintiff. In such cases the burden of proof lies with whoever would want the court to find in his favour in support of what he claims" The Respondent therefore submits that the Appellant's reason for dismissing the Respondent was unjustified and fails the substantive requirement that for termination to be fair, the same must be for a valid reason related to the employees' conduct. The Respondent further submits that having failed in the reason for terminating the Respondent, the

trial court needed not to have gone into the disciplinary process of the termination as both procedural and substantive fairness need to be present for termination to be fair. We place reliance on the case of Walter Ogal Anuro vs. Teachers Service Commission [2013] KEELRC 386 (KLR) where the court stated that: "However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness." (Emphasis ours) It is therefore the Respondent's submission that the trial court was right in holding that the Respondent's termination was illegal, wrongful and unfair.

### Decision

31. The relevant grounds for determination were as follows-
- i. The Honourable Magistrate misapprehended the facts and the issues in dispute between the parties thereby arriving at a wrong decision based on the following:
    - b) The Honourable Court determined the criminal culpability of the Respondent.
    - c) The Honourable Court failed to consider the Appellant's evidence that the Respondent was taken through a fair disciplinary process.
    - d) The Honourable Court failed to consider evidence that the Appellant dismissed the Respondent for a valid reason recognized under section 44 of the Employment Act as a ground for summary dismissal.
  - i. The Honourable Magistrate erred in fact and in law in applying a standard of proof that is beyond reasonable doubt in an employment matter.

- ii. The Honourable Magistrate erred in fact and in law in failing to consider the issues and the submissions of the parties leading to an erroneous conclusion.

32. From the outset, the court states that the standard of proof in employment claims is on a balance of probabilities and the claims are to be proved according to section 47 (5) of the Employment Act. Section 47(5) states- *‘For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.’*

36. The existence of a terminated employment of respondent by the appellant was not in dispute. the dispute was on the validity of the reason of the termination and whether the termination was procedural. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- *‘45(2) A termination of employment by an employer is unfair if the employer fails to prove—*

*(a) that the reason for the termination is valid*

*(b) that the reason for the termination is a fair reason—*

*(i) related to the employees conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure.’* To pass the fairness

test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

Validity of the reason

37. The appellant, in response to the claim, stated the respondent was implicated in the theft of a laptop from the respondent's store that occurred on 31st March 2020 at 5.28pm, and the matter was reported to the police station. The termination letter was dated 21<sup>st</sup> April 2020 did not directly state reason of termination but referred to disciplinary hearing of 7<sup>th</sup> April 2020 and subsequent decision made (page 28 of ROA). The disciplinary proceedings record are produced at pages 160 – 177 of ROA. During the hearing the claimant told the court that his employment was terminated based on allegations that he conspired with a guard to steal a laptop. That the matter was reported to the police. that he was arrested and detained for a long time and was never charged. That he was issued with a notice to show cause, appeared before the disciplinary committee accompanied by his hire manager. It was the Respondent's position that he was not given access to the serial number of the laptop alleged to have been stolen, not shown the CCTV footage, and not shown the statement of Rono, who had implicated him. He was working at home and was called to the office by one Mwangi and arrested.

38. During cross-examination, the respondent told the trial court that he did not know Rono prior to the arrest. He admitted that Rono's statement made damaging allegations, claiming that the claimant sent him to steal the laptop from the procurement store to sell it at his home for Kshs. 15,000. The claimant told the court that one Mwangi said he had seen him go to the store with Elizabeth. he admitted that the role he was playing was critical and was based on trust. He provided biometric logs. In re-examination, the claimant told the court that no one corroborated what Mwangi said, that he saw him at the police cells for the first time. that he did not know Imenti house and no evidence of payment. That Sergeant Nyagah told him he was accused of stealing a laptop and that there was no CCTV installed in the premises.

39. Conversely, the appellant called Elizabeth, who told the court she was the procurement and administration manager who installed a nanny camera in the store, which caught the guard, Rono, stealing a laptop, and was arrested. That Rono informed the police in her presence that it was the claimant who advised him to steal the laptop and that the key had been given by one Dorothy.

40. During cross-examination, Elizabeth told the court she caught Rono on camera stealing the laptop and that it was COVID time. That Rono was a night guard. The claimant did not work on the night shift. She further told the court that Teddy was not charged with theft, as she had withdrawn the case so they could be paid by the security company. He said biometrics could have been used to show who accessed the store. That Teddy was not subjected to the HR policy. On re-examination, Elizabeth stated that it was Rono who implicated the claimant, and it was possible that Rono and the claimant may interacted at shift changes. RW2 was Moses Kuria, who told the court that they spoke with the vendor of the biometric system, who confirmed that the biometrics had been tampered with, so they terminated the claimant's services as they could not trust him with the sensitive role. Elizabeth and Rono confirmed that the claimant had been going to the store with Elizabeth. Biometrics operations at the appellant's premises were under the claimant.

41. During cross-examination, Moses(rw2) told the court that they noted inconsistencies raised against Teddy. That he had a privileged role, that there was no evidence linking Teddy to the laptop, the alleged sale of the laptop at Imenti house, or evidence of Teddy being in touch with Rono. The gist of the finding of the trial court was as follows- *'After carefully considering the*

*pleadings, evidence and submissions tendered, I find that there was no evidence linking the claimant to the crime simply because the claimant was working from home, he was never caught by the CCTV cameras, the guard who allegedly claimed to have been sent to steal by claimant never testified nor his statement with the police produced, the other staff who were mentioned by the said guard never recorded statements with police nor were their disciplinary records produced in court. Further, the claimant was never charged before court yet the incident was criminal in nature. The reason offered for this is that the security company opted to pay the respondent for the laptops lost rather than have the guard charged. Although this appears favourable to the respondent it is prejudicial to the claimant and the principle of reasonableness and fairness. This can be considered an act of discrimination of the claimant which must be discouraged by this court. For this reason, the court allows prayers (a) (b) (i) (iv), (c) and (d).”*

42. This being first appellate court it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”* It is recorded in the minutes produced by the appellant that Rono, in the presence of the respondent’s staff, Dorothy, Elizabeth, OCS, and Sammy, the alleged buyer of the

laptop, at the police station room, implicated the respondent as having aided him steal the laptop, including sharing tip of the fact of the lack of CCTV and where the laptops were kept. (page 161 of ROA ). Teddy never recorded a statement at the police station. Teddy(Respondent) took the position that he never had access to the procurement store, had not stopped there, and hence could not know where the laptop was kept. Teddy denied knowing or meeting the said Rono and said they only interacted at the police station. He did not know Sammy, the alleged buyer. On perusal of the minutes, Teddy remained steadfast in his position that he had not been to the store, did not know Rono, and had not called Rono. The employer asked whether they checked call logs, which would confirm he did not call Rono, and he answered that they would find no call log. During the cross-examination of Elizabeth at the disciplinary hearing, she said that Teddy assisted her in carrying some laptops to the store (page 169 of ROA). She told the panel she had no witness to the allegation that Teddy assisted with carrying his laptops to the store. Moses (RW2) concluded that Teddy was lying about not entering the store and thus could not be trusted, whether or not there was proof of stealing the laptop (page 173). On the 24<sup>th</sup> April 2020, the respondent was called to a meeting where he was informed of the disciplinary outcome and the reason for the termination. The key issue was that Teddy was not factual about entering the store, raising trust issues and Rono's allegations were considered substantial and raised concerns about trust.

43. The test for validity of reasons are as stated in section 43 of the Employment Act to wit- *‘In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.(2)The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the*

*contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’* The appellant, having heard the respondent and evidence of Rono, Elizabeth, and Mwangi, did not believe that the respondent had ever entered the store. Further, the employer found that Rono raised serious issues against him.

44. The respondent was responsible for a sensitive issue of biometrics. The employer informed the actual reason for the termination was loss of trust. It had irretrievably broken down. The court finds that the trial court based its decision on the alleged theft, yet the actual reason was trust having broken down, and the basis of the same was established. The fact that the matter was reported to the police and that the respondent was arrested was sufficient to demonstrate a genuine belief that the respondent was involved in the theft. It may well not be true, but the employer met the test of a genuine belief that the respondent was not truthful and that trust had broken down.

45. The court for the foregoing reasons finds that the standard of proof applied by the trial court was of strict proof that the respondent was involved in the theft yet section 44 provides for suspicion as follows- *‘44(4)(g)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.’* The reason given to the employee was the loss of trust, as the respondent was in charge of biometrics. That was a genuine reason for the termination. The Court of Appeal in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] KECA 300 (KLR) further proceeded to state as follows with regard to the test to be considered in such circumstances: *"The test to be applied is now settled. In the case of the Judicial Service Commission vs. Gladys Boss Shollei, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in Mc*

*Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161 "Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."*

46. The court further found compliance with section 41 of the Employment Act as the respondent was issued with NTSC, heard accompanied by his hiring manager, the employer considered the representation, and on a later date called the claimant and gave a verdict with the reasons. The issue of there being no internal investigations cannot be an issue to fault the process, as it was a criminal suspicion and the same was reported to the police. An employer cannot be blamed for a police investigation. It was the duty of the police to record statements from all suspects, including the respondent, and failure to do so is not within the ambit of the appellant. I find that on a balance of probabilities the termination was based on valid reason and was procedural. The decision of the trial court is set aside.

Whether the trial court erred in finding that the respondent was discriminated against

47. The trial court stated as follows- "This can be considered an act of discrimination of the claimant which must be discouraged by the court." On perusal of the pleadings no discrimination pleaded or damages claimed for discrimination (Pages 13 were the reliefs sought by the claimant).

48. On whether the trial court erred in fact and law in the relief granted. The court granted relief a, b(i) and (iv) and d. The awards were unmerited, the court having found the termination was fair. The court applied decision in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:-

*“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”*

49. The appeal is allowed. The Judgment and Decree of the Hon. T. B. Nyangena (SPM) delivered on 26<sup>th</sup> September 2024 in Nairobi MCELRC No. E1354 of 2020 is set aside and substituted with a judgment that the suit is dismissed with costs to the respondent. To temper justice with mercy I make no costs in the appeal.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY, 2026.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – Ms. Kendi

Respondent – Mr. Olao

ORIGINAL