



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Trustees of Premier Academy Charitable Trust t/a Premier Academy
(Cause 1420 of 2016) [2025] KEELRC 144 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1420 OF 2016
L NDOLO, J
JANUARY 30, 2025**

BETWEEN

JOYCE GATHONI KARIUKI CLAIMANT

AND

**THE TRUSTEES OF PREMIER ACADEMY CHARITABLE TRUST T/A
PREMIER ACADEMY RESPONDENT**

JUDGMENT

Introduction

1. The Claimant, Joyce Gathoni Kariuki, was an employee of Premier Academy, having been employed in the position of Human Resources Manager, by a letter of offer dated 14th May 2013.
2. The Claimant brought this claim alleging unlawful termination of employment. The matter was initially heard by O.N Makau J, who took the Claimant's testimony. I took over the matter at the defence stage.

The Claimant's Case

3. By a letter of offer dated 14th May 2013, the Claimant was employed by the Respondent in the position of Human Resources Manager. She was confirmed in her appointment on 27th August 2017.
4. On 1st December 2015, the Claimant was issued with a show cause letter on allegations of breach of trust and lack of integrity, particulars being loss of Safaricom bonga points. The Claimant was required to respond to the show cause letter within 24 hours and she responded on the same day.
5. The Claimant was subsequently invited to a disciplinary hearing on 3rd December 2015 and on 4th December 2015, she was dismissed. At the time of separation, the Claimant earned a gross monthly salary of Kshs. 170,000.



6. The Claimant contends that the termination of her employment was unjustifiable and unfair. She claims that she was a victim of discriminatory treatment on account of gender and race. She therefore claims the following:
 - a. 3 months' salary in lieu of notice.....Kshs. 510,000
 - b. 12 months' salary in compensation.....2,040,000
 - c. Severance pay.....46,920,000
 - d. Special damages.....700,000
 - e. Damages for loss of expectation.....10,000,000
 - f. Punitive and exemplary damages

The Respondent's Case

7. In its Statement of Response dated 4th August 2016, the Respondent admits having employed the Claimant vide a letter of offer dated 14th May 2013.
8. The Respondent denies the Claimant's claim of unlawful termination of employment and adjudges the Claimant's performance as unsatisfactory. The Respondent states that the Claimant was placed on a Performance Improvement Plan but her performance did not improve.
9. The Respondent admits issuing the Claimant with a show cause letter on 1st December 2015. The Respondent accuses the Claimant of acting dishonestly by transferring the School's bonga points to her mother, without authority.
10. The Respondent defends the termination of the Claimant's employment and maintains that she was given ample opportunity to respond to the accusations levelled against her.

Findings and Determination

11. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

12. The Claimant's employment was terminated by letter dated 4th December 2015, stating thus:

“Dear Ms. Joyce Kariuki

TERMINATION OF YOUR EMPLOYMENT

We refer to the above matter, Notice to Show Cause Letter Dated 1st December, 2015, your response thereto dated 1st December, 2015, our reply dated 2nd December, 2015 and the disciplinary hearing held on 3rd December, 2015 at 230pm in your presence as well as that of your witness Mr. George Kiyimba, the school's principal.

The disciplinary Committee has considered the charges levied against you, your written as well as oral responses, the contract of employment and the various policies governing the conduct of the members of staff. The Disciplinary Committee found that you unlawfully



and without justifiable cause appropriated for your own benefits bonga points which properly, lawfully and ethically belonged to the school, something which you knew or ought reasonably to have known, given your senior position within the School's establishment. The committee found that your conduct: -

- i. was wilful and deliberate and inconsistent with the continuation of your contract of employment;
- ii. caused a serious and imminent risk to the reputation and viability of the Employer's business in that it denied the School revenue that was properly due to it;
- iii. amounted to fraudulent (sic) and in the circumstances your continued employment would be unreasonable; and
- iv. you refused to carry out a lawful and reasonable instruction that was consistent with your contract of employment, and in the circumstances your continued employment would be unreasonable.

We consider that your actions constitute serious misconduct warranting summary dismissal. This is hereby to notify you that you have been summarily dismissed from employment with immediate effect pursuant to the provisions of section 44(4) (c), (e) and (g) of the [Employment Act](#), 2007.

You will be paid any accrued entitlements and outstanding remuneration, up to and including the date of this letter. You will also be issued with a certificate of service.

Yours sincerely,

(signed)

Pravin T Parmar (Mr)

Administrator.”

13. The reason for termination of the Claimant's employment is not contested. She was accused of transferring loyalty points, popularly known as 'bonga points' offered by Safaricom to its subscribers, from the Respondent's mobile phone to her mobile phone.
14. While admitting having initiated the transfer of the 'bonga points', the Claimant defended her action, stating that she was under the impression that since the line that had earned the points had been allocated to her, she could use the points however she wished. She adds that after the issue was flagged, she restored the points.
15. The question then is whether the Claimant's action constituted a valid reason for termination of employment as contemplated under Section 43 of the [Employment Act](#). In answering this question, the Court is required to apply the 'reasonable responses test' as codified in Section 43 of the [Employment Act](#) which provides that:

43.

- (1) In any claim arising out of termination of 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 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.
16. The ‘reasonable responses test’ was defined by Lord Denning in *British Leyland v Swift* (1981) IRLR 91 in the following terms:
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him.”
17. The hallmark of this test is that in assessing an employer’s action, the Court must guard against supplanting the employer’s decision with its own. In other words, the Court does not ask what action it would have taken had it been in the employer’s shoes. All the Court asks is whether the decision taken by the employer is one that an ordinary reasonable employer would have taken, and if the answer is in the affirmative, the employer’s decision should not be disturbed.
18. By her own admission, the Claimant wrote a letter, on the Respondent’s letterhead, to Safaricom PLC asking that bonga points be transferred from a mobile phone line belonging to the Respondent to her own personal mobile phone line. The Claimant further admitted that she did not seek authority from her superiors, to take the action she took. In my view, this was a clear case of conflict of interest because the Claimant sought to draw a benefit from her employer and confer it to herself.
19. At the very least, the Claimant, who held a fairly senior position at the Respondent, ought to have disclosed to her superiors the action she intended to take, on the bonga points. Having failed to do so, she placed herself within the crosshairs of breach of trust and the Respondent had a valid reason for terminating her employment.
20. The next question is whether in effecting the termination, the Respondent observed due procedure. In this regard, Section 41 of the *Employment Act* requires as follows:
- 41.
- (1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.



21. There is evidence on record that the Claimant was issued with a show cause letter to which she responded. She was also invited to a disciplinary hearing which she duly attended. Her complaint during trial that she was not allowed adequate opportunity to defend herself was not supported by any evidence. On the whole, I find that the Claimant was subjected to a fair disciplinary procedure, as set out in Section 41 of the [Employment Act](#).

Final Orders

22. Pursuant to the foregoing findings, the Claimant's entire claim fails and is dismissed, with an order that each party will bear their own costs.
23. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngaira for the Claimant

Mr. Olao for the Respondent

