



REPUBLIC OF KENYA



KENYA LAW
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**Musa & another v Makini Schools Limited (Cause E815 of 2022)
[2025] KEELRC 17 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 17 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E815 OF 2022
NJ ABUODHA, J
JANUARY 17, 2025**

BETWEEN

JAPHER NANJIRA MUSA 1ST CLAIMANT

HOSPITAL WORKERS (KUDHEIDHA) 2ND CLAIMANT

AND

MAKINI SCHOOLS LIMITED RESPONDENT

JUDGMENT

1. The Claimants through a Claim dated 7th November, 2021 pleaded inter alia as follows: -
 - a. The 1st Claimant was an employee of the Respondent school in his capacity as a IRE teacher, Upper school Sports Coordinator, Chairperson Makini Independent Electoral Commission, Upper School Transport Coordinator, Chairman, Makini Teachers Welfare Group, IRE Panel Head of the Respondents School and the shop steward of the 2nd Claimant.
 - b. The 1st Claimant averred that he had been an Islamic Religious Education teacher at the Respondent's school for Eighteen (18) years and that on September 2021 or thereabout he was appointed as the shop steward at the Respondent School.
 - c. The 1st Claimant averred that following a series of events at the Respondent School that saw the HR Mr Silas Wafula suspended for gross misconduct, he was summoned for interrogation and disciplinary hearing.
 - d. The 1st Claimant averred that on 30th August 2022 he received invitation to an interrogation session over and about the same issues which was led by one Chantal Chegwiddden and Ms. Jackie Van Der Merwe at the end of the interrogation exercise, he was handed a suspension Letter dated 30th August 2022 with allegations inscribed therein.



- e. The 1st Claimant averred that he was thereafter asked to promptly collect his belonging from his desk and on 1st September 2022 he received the show cause letter which regurgitated what was canvassed in the suspension letter.
 - f. The Claimants averred that on 12th September 2022 they received the notification of implementation of disciplinary action and notification of disciplinary enquiry and the hearing set for 20th September 2022.
 - g. The Claimants averred that an objection was raised during hearing over the composition of the 3-bench hearing panel as far one being a foreigner and the other two having a preempted bias being Academic and Marketing Directors.
 - h. The Claimants averred that the objections were not taken into consideration and the Claimants were denied a chance to table documentations in support of the 1st Claimant's case and the 2nd Claimant deprived copies of the Respondent policies.
 - i. The Claimants averred that during the hearing, the Respondent heavily relied on information that could not be corroborated; information admitted by other parties and information obtained by illegal, unlawful and irregular means and are those that had expressly been admitted to by one Mr Silas Wafula.
 - j. The Claimants averred that the Respondent while being in possession of Mr Silas Wafula Company's laptop infiltrated his WhatsApp Account that was logged in on the work laptop and infiltrated his PRIVATE messages with the 1st Claimant wherein the Respondent deciphered and cherry picked information and interpreted it in a manner suited to it and used the same as evidence to condemn the 1st Claimant for gross misconduct.
 - k. The Claimants averred that the procedure followed during this disciplinary hearing was not in accordance with or how it is set up in "Makini School Disciplinary Policy".
 - l. The Claimants averred that the communication was issued to the 1st Claimant immediately after receiving the Suspension Letter not to discuss the disciplinary process with any one whatsoever but the Respondent issued stern warnings to its employees not to engage with the 1st Claimant including the Kisumu branch.
 - m. The Claimants averred that the 1st Claimant has been a teacher in the Respondent school for 17 years with a good performance record and has never been subjected to any disciplinary process.
2. The Claimants in the upshot prayed for the following against the Respondents;
- a. A declaration that the 1st Claimant be fully reinstated as an employee of the Respondent school in his position without loss of benefit.
 - b. A declaration that the verdict/ outcome of the disciplinary hearing by the Respondent against the 1st Claimant of guilty for gross misconduct as unfair, illegal and irregular.
 - c. A declaration that the decision by the Respondent summarily dismissing the 1st Claimant from employment be set aside, strike out and expunged.
 - d. A declaration that Ms. Jackie Van Merwe is not a qualified Human Resource and therefore all the decisions made by her in that capacity be reversed.
 - e. Costs of the suit.



3. The Respondents filed their Response to Memorandum of Claim dated 19th June 2023 and averred inter alia as follows;
- a. That a blogger, Cyprian Nyakundi published various defamatory statements against the School and the Respondent sought to investigate and ascertain the source of the various defamatory threats.
 - b. The Respondent averred that during the investigations one of the employees, Silas Wafula admitted to have been the author and was put under suspension.
 - c. The Respondent averred that while under suspension, the Respondent found in his work laptop, WhatsApp conversations with various people and that he was actively being used by the 1st and 2nd Claimants to gain confidential information regarding the school.
 - d. The Respondent averred that on 30th August 2022, the 1st Claimant was invited to a meeting wherein he met Ms Jackie Van Der Merwe, a management staff and Chantal Chegwidan an external consultant and was given an opportunity to explain himself generally regarding the various defamatory content and statements that had been posted by the blogger and the 1st Claimant kept giving conflicting statements.
 - e. The Respondent averred that based on unsatisfactory response to the issues raised during the meeting of 20th August 2022, the Respondent decided to suspend the 1st Claimant with immediate effect so as to continue with and finalize the investigations necessitated by the 1st Claimant's influence within the school.
 - f. The Respondent averred that on 1st September the 1st Claimant was served with a show cause letter which he responded to vide letter dated 5th September 2022.
 - g. The Respondent averred that the 1st Claimant attended the disciplinary hearing on 20th and 21st September 2022 accompanied by Mr. Benson Maina Senior Industrial Officer at the 2nd Claimant and Mr. Davis Gitonga.
 - h. The Respondent averred that at the hearing instead of responding to the issues raised in the letter of invitation to the hearing, the 1st Claimant and his representative engaged the committee in never ending sideshows as to compliance with Evidence Act on screenshots and electronic evidence.
 - i. The Respondent averred that pursuant to the Claimant's unsatisfactory response at the Hearing, on 12th October the committee published their finding and commenced immediate termination of the 1st Claimant and on 13th October 2022 issued with a letter of summary Dismissal.
 - j. The Respondent averred that on 19th October the 2nd Claimant on behalf of the 1st Claimant lodged an appeal against the finding and decision of the Disciplinary Committee and sought the Respondent's Appeal Board to reinstate the 1st Claimant.
 - k. The Respondent averred that on 24th October 2022, the Respondent wrote back to the Claimants acknowledging receipt of the appeal and accordingly advised the Claimants that they will be invited to appeal hearing in due time.
 - l. The Respondent averred that considering the broken trust between the parties and amount of time that had lapsed since the 1st Claimant termination, an order of reinstatement would not be a justiciable remedy.



- m. The Respondent averred that the 1st Claimant was summarily dismissed for just cause and solely based on his conduct and that a fair process was adopted before his dismissal.
 - n. The Respondent averred that the orders sought in prayer 4 can only be granted by IHRM.
4. The Claimants filed their Reply to the Response to Memorandum of Claim dated 8th August 2023 and reiterated the contents of its claim and averred that:
- a. The 1st Claimants right to be heard is canvassed under Article 50 of *the constitution* and the Respondent downplaying the same as sideshows is indication that the Respondent was not willing to hear and it was only their way.
 - b. That the interrogation was done and suspension letter issued even without the 1st Claimant leaving the interrogation room and being issued with certificate of service even after the 1st Claimant lodged an appeal proves the Disciplinary Procedure was pre-determined.

Evidence

- 5. The Claimant called two witnesses, the 1st Claimant (CW1) and the 2nd Claimant's Branch Secretary, Karanja Patrick (CW2). The Claimants witnesses testified in court on the 7th February 2024.
- 6. CW1 adopted his witness statement together with the pleadings filed in court as his evidence in chief. CW1 testified that he was employed in 2004 by the Respondent teaching IRE and was a shop steward for 1 year. That he was accused of among other attacking the person of the HR Director and sabotaging the school.
- 7. CW1 testified that at the hearing he raised issues on the bundles served upon the Claimants which were served a day before the hearing and were not accorded adequate time. That the person who stood for the HR was a foreigner. That Shantal was the one who interrogated him initially and was the prosecutor and later called as a witness. She was also the one taking minutes.
- 8. CW1 testified that Silas Wafula had taken responsibility. That there was a letter from IHRM where Silas Wafula sought to know the credentials of the HR- Director. That in the WhatsApp messages they had been discussing about restructuring because the management wanted to make the same claiming the payroll was fraudulent and he raised concerns as a shop steward.
- 9. CW1 testified that on blogger Nyakundi, he shared the blog to open forums and was shared openly and he received the forward. He later learned that the blogs had been pulled down and commented that was impunity.
- 10. In Cross Examination CW1 confirmed that he worked as an officer of the union before he became a shop steward where he would get access to confidential information, payroll being a confidential document. That if he knew who had leaked information to the blogger he would have informed the school.
- 11. CW1 confirmed that the document on Jackie was sent to him by Silas and that he did not share the document with the management, Silas asked him to add more and share with the union. That in the disciplinary interview he did not state that he had received the documents but later admitted. It was his evidence that the chair of the panel was biased and insisted they stick to the documents before the panel and refused all the proposals.
- 12. In reexamination CW1 confirmed that as a shop steward, he was to protect the interest of the workers and the union but as a teacher, he was to protect his employer.



13. CW1 confirmed that he had no relationship with the blogger and learnt about him in social media like anyone else and that he discussed with the line manager around 6pm when the blog had just been released, he expected him to share the blog with the management.
14. The Claimants' second witness CW2 testified and adopted his witness statement and documents as his evidence in chief. CW2 testified that he was the Branch Secretary of the 2nd Claimant.
15. In cross-examination CW2, he confirmed that he got information from teachers and later CW1 and that there were cases filed against the Respondent concerning redundancies. That he was not aware of a case where Jackie had been found guilty of declaring wrongful redundancy and not aware if Jackie was accused of racism.
16. CW2 confirmed that he wrote the letter on work permit for Jackie Van Der Merwe. That he had not written first to Makini but to IHRM seeking her qualifications. That he never received any confidential information from Makini, he received a document from Jafer given to him by Silas. That according to them, Silas was in management and he never wrote to Makini concerning the grievances raised by Silas.
17. In re-examination, CW2 clarified that there were allegations that Jackie was incompetent and that was why they wrote to IHRM and immigration.
18. The Respondent on the other hand called one witness, Jackie Van Der Merwe, RW1 who testified in court on the 15th October, 2024. RW1 adopted the Respondent's documents filed in court dated 18/6/2023 as her evidence in chief.
19. RW1 testified that she was the Regional HR Director for the Respondent. That the Claimant was terminated because of gross misconduct; he collaborated with others to attack the regional director and shared confidential information. That she did not sit on the disciplinary hearing and the chair of the panel was a Labour Relations Specialist appointed by the Respondent and there was no objection to anyone present at the hearing.
20. RW1 testified that the Claimant was invited to the hearing as well as the union. That the Claimant was notified of his right to be accompanied by a colleague of his choice and issued with a show cause letter and made his response. That the Respondent considered the Claimant's response before proceeding with the disciplinary hearing. The Claimant was suspended before the disciplinary proceedings and union notified of the suspension.
21. RW1 testified that the WhatsApp conversations involved the Claimant. That there were threats to institute legal action against her. The document was authored by Silas Wafula. That the allegations against her were false and were brought to the attention of the management.
22. RW1 testified that the Wafula and the Claimants collaborated to discredit her and the Respondent. That the Claimant sought reinstatement but the position had been filled.
23. In Cross-examination RW1 confirmed that she was the channel for communication between the Claimant and regional MD. That they called the 1st Claimant for a meeting in a fact-finding session and not an interrogation. That Wafula had been terminated by the time the proceedings started.
24. RW1 confirmed that the issuance of suspension and NTSC does not mean an employee was guilty of the charges and there was no inhumane handling when put on suspension. That the disciplinary policy was made available to the Claimant in the bundle of document. That she had a work permit and did not make all the decisions, the decisions were collective.



25. In reexamination, RW1 clarified that she had no role in the disciplinary hearing and the Claimant was suspended with pay. That the Claimant did not object to the presence of Ms Chantal at the meeting. He did not complain about the time he was served with the documents.
26. RW1 clarified that the WhatsApp conversations were obtained from the official laptop issued to Wafula. That the Claimant did not bring to the attention of the Respondent Wafula's letter of intention to institute legal action against Jackie.

Claimants' Submissions

27. The Claimants' Advocates Adhiambo Omondi & Co. Advocates filed written submissions dated 4th November 2024 and on the issue of whether the alleged offenses were committed by the 1st Claimant, Counsel submitted that the circumstances surrounding this suit emanates from publications that were made on a website by one Cyprian Nyakundi, a blogger.
28. Counsel submitted that the Respondent in their response to the statement of claim, at paragraph 10 stated that one of the employees admitted to being the author of the threats and the defamatory statements that had been published by the blogger but the Respondent found the admission curious in its opinion.
29. Counsel submitted that the Respondent proceeded to send the said employee for suspension and accessed the suspended employee's private WhatsApp conversations and particularly that of him and his colleague, the 1st Claimant, which formed the basis of framing him for the offenses as an easier way to get rid of him from the institution.
30. Counsel submitted that the WhatsApp evidence relied upon by the Respondent did not directly pin the 1st Claimant to the publication and sharing of the information to Cyprian Nyakundi as he was equally on the receiving end of the documents that were being shared to him by Mr. Wafula, in his capacity as a colleague.
31. Counsel relied on the case of *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR while submitting that the termination of the Claimant's employment by way of summary dismissal was unfair for want of due procedure.
32. On the issue of whether the evidence relied on by the complainant during the hearing was legally obtained, counsel submitted that during the disciplinary hearing, the Claimants raised various objections, one of them being that the evidence tabled before disciplinary committee was not legally obtained in accordance with the *Evidence Act* and that it further violated the rights to privacy of the 1st Claimant and that of Mr.Wafula.
33. Counsel relied on the case of *Terry Muringo Muchiri v K-Rep Group Limited*[2021] eKLR and submitted that the personal whatsapp contact did not form part of the Respondent property as compared to a work email and therefore was not subject to access by the Respondent despite being in the Respondent's property.
34. Counsel submitted that the said access to the encrypted whatsapp messages between the Claimant and Mr. Wafula was in itself illegal and the contents of the information shared between the two could not be used against the parties.
35. On the issue of whether the termination was procedural and substantively fair, Counsel submitted that 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.



36. Counsel submitted that the 1st Claimant was summoned by a management staff, one Ms Jackie Van Der Merwe and Chantal Chegwiddden who determined in the meeting that the 1st Claimant was lying based on the information he gave and further proceeded to suspend him to continue with the investigation, pure proof that the investigation team had pre- informed judgment about the 1st Claimant prior to concluding the investigation.
37. Counsel submitted that upon completion of the investigation, the 1st Claimant was served with a notice to show cause and subsequently summoned for a disciplinary hearing which he attended together with a representative from the 2nd Claimant. According to Counsel, a disciplinary hearing is a right of an employee and should not be done just as a favour to an employee or a mere formality.
38. Counsel relied on the case of Joshua Rodney Marimba v Kenya Revenue Authority [2019] eKLR and submitted that the procedure of disciplinary hearing at work place is governed by the employment contract and the law. Counsel further submitted that the Claimant was shocked at the composition of the disciplinary committee. While the disciplinary policy provided for a panel consisting of at least one member from the Human Resource Office, one person in authority i.e. the head teacher/ operations director/ finance controller, the employee in subject and other stakeholders if need be.
39. Counsel submitted that when the disciplinary process had ended, the Claimants appealed against the tribunal findings but was terminated all the same before the outcome of the appeal against the recommendations of the disciplinary hearing prompting the claimants to move the Court.
40. On the issue of whether the finding of the disciplinary committee to summarily dismiss the Claimant was fair, counsel relied on the case of *Wanyonyi v Principal Kamusinde Secondary School & Another (Employment and Labour Relations Appeal E010 of 2023)* [2024] KEELRC648 (KLR) (14 March 2024) (Judgment) and submitted that the employment claims are civil in nature and thus the standard of proof was on a balance of probabilities. Counsel submitted that the Respondent was familiar with the fact that the 1st Claimant and other employees were members of the 2nd Claimant and freedom of association was a constitutionally protected freedom which could not be limited by the Respondent.
41. Counsel submitted that in the disciplinary report apart from publishing and sharing of defamatory contents to the blogger, one Cyprian Nyakundi, the rest of the accusations arose from the duty of the 1st Claimant as a shop steward whose role was to ensure good employment working condition for the members of the 2nd Claimant at the Respondent institution.
42. Counsel submitted that as a shop steward, the 1st Claimant was privy to information about the welfare of the Respondent and bound to act, through the 2nd Claimant in the event that the welfare of the Respondent employees who are its members were violated. This was done, admittedly by the Respondent through legal means and could not form part of gross misconduct claims.
43. Counsel submitted that the only offence the 1st Claimant had been guilty of was that of being a good shop steward and overseeing the employment rights of the Respondent employees and that the same did not amount to gross misconduct warranting summary dismissal and as such the finding of the committee was unfair.
44. On the issue of whether the Claimant was entitled to the reliefs sought, counsel relied on among others the case of *Re Estate of M'Mugambi M'Mbiro- Deceased* [2022] eKLR, and submitted that in ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he had pleaded in his case were more likely than not to be what took place.



45. Counsel submitted that the Claimants had proven on a balance of probability that the termination of the 1st Claimant was wrongful and the grounds presented to him unfair and did not fall within the literal meaning of gross misconduct and court to grant the prayers as sought.

Respondent's Submissions

46. The Respondent filed its submissions late (15th January, 2025). The Court will nonetheless consider the same. Mr. Wachira for the respondent while relying on section 43 and 45 of the [Employment Act](#) submitted that the matters that the respondent genuinely believed to exist and which led to the termination of the claimants' service could be deduced from three main documents namely: the show cause letter, dated 1st September, 2022, notification of a disciplinary hearing and the letter of summary dismissal. According to Counsel, the show cause letter set out the details of the charges against the claimants and the letter of summary dismissal communicated the verdict of the panel after hearing the claimant. The claimant was at all material times aware that the respondent was considering taking disciplinary action against him on account of allegations against him contained in the show cause letter.
47. According to Counsel, the claimant at the disciplinary hearing admitted to the offence of failing to follow known company processes and collusion. The claimant further admitted that the defamatory statements published by Cyprian Nyakundi were false. At the disciplinary hearing, the claimant failed to substantiate contents of the documents shared with Nyakundi. He further failed to explain why the issues were not raised with the management if at all they were genuine. The published document according to counsel, was therefore simply false, malicious yet it accused Jackie van der Merwe of lacking requisite qualifications to practice as a human resource professional in Kenya; obtaining work permit irregularly, discrimination and abuse of office and called for sanctions against her. Concerning the dismissal, counsel submitted that the same was consistent with section 44(4) of the [Employment Act](#) and respondent's disciplinary policy.
48. Regarding procedure for termination, counsel relied on section 41 of the Act and further stated that the claimant was placed on suspension to allow for investigations of sabotage and collusion. He signed the suspension letter to acknowledge receipt and the contents thereof. A notice to show cause was subsequently issued which listed the charges against the claimant in great detail and he was called upon to respond to the same which he did. He was thereafter invited for a disciplinary hearing through a letter dated 12th September, 2022. The disciplinary hearing took place 20th and 21st September, 2022 and the claimant attended and attended with a union representative and an observer. He was given a chance to make representation and further given a chance to present written submissions after the hearing. The outcome of the disciplinary hearing was communicated 13th October, 2022 to both the claimants herein and the 1st claimant informed of his right of appeal which he exercised but the appeal could not be decided as the claimant in the interim filed the present suit.
49. To support the fairness of the procedure followed, counsel relied on the cases of Postal Corporation of Kenya vs. Andrew K. Tanui [2019]eKLR and Galgalo Jarso Jilo vs. AFC [2019] eKLR. On the issue whether the documents relied on by the respondent were supplied late, Counsel submitted that, until these proceedings before court, the claimants never raised any objection, reservation or complaint during the disciplinary hearing. Concerning the admissibility of the WhatsApp messages, Counsel submitted that the conversations in issue took place between Silas Wafula and the Claimant and that access to the laptop was proportionate to the seriousness of the allegations contained in the evidence directly related to the defamatory claims and the retrieval of the information was necessary for a fair investigation. Mr. Wachira while acknowledging that the right to privacy is protected under article 21 of [the Constitution](#), such right was not absolute. The right had to be balanced against the employer's right to manage their business effectively. In that regard counsel cited that case of GJK v.



KPMG Advisory Services[2017] eKLR where Judge Mbaru stated that the right could be limited in the context of work investigations, particularly where there are allegations of serious misconduct and limitation of investigation was over employee's personal gadgets and not to gadgets provided by the employer. Counsel further relied on the case of Peter Appollo Ochieng' vs. Instarect Ltd [2017] eKLR. Therefore the respondent's action accessing the private communication between the 1st Claimant and Silas Wafula, which communication was found in a laptop assigned to Wafula by the respondent for purposes of work, was proportionate to the seriousness of the allegations.

50. Regarding the remedies sought, Mr. Macharia submitted that it was well over two years since the dismissal of the claimant from employment and the position had since been filled besides the respondent considered the relationship between itself and the 1st Claimant to have irretrievably broken down due the nature of the misconduct by the 1st claimant. Counsel further submitted that the claimant never made any claim for compensation for unfair termination as an alternative hence the same could not be granted.

Determination

51. The Court has reviewed and considered the pleadings, testimonies and submissions by counsel for the Claimants in support of the case and has also considered authorities relied on by Counsel and has come up with two main issues;Aa. aa.
- a. Whether the 1st Claimant was unfairly terminated.
 - b. Whether the Claimants are entitled to the reliefs sought.

Whether the 1st Claimant was unfairly terminated.

52. In determining the question, the court must look at it from both substantive and procedural perspective. This is a well-established principle in the court of Appeal in the case of Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR among other cases.
53. As to the substantive justification this court is guided by section 43 of the *Employment Act* where the employer must prove the reasons for termination and if not proved, it would amount to unfair termination under section 45 of the said Act. The evidentiary burden is well apportioned under section 47(5) where the employer has the burden to prove the reasons for termination while the employee has the burden to prove that the termination was unfair.
54. In determining the substantive fairness the court will determine the question as to whether the alleged offences were committed by the 1st Claimant. The court notes that the grounds for termination of the 1st Claimant's service was based mainly on private WhatsApp conversations among other preceding events. The WhatsApp conversations were as a result of a blog post by one Cyprian Nyakundi which prompted the Respondent to undertake investigations to find out the source of the information. This ended up with an admission by Mr. Wafula who was an employee of the Respondent.
55. It was the Claimants' case that the WhatsApp evidence did not directly pin the 1st Claimant to the publication and sharing the information with the blogger. It was also the 1st Claimant's case that the evidence was obtained in a manner that violated his right to privacy.
56. Section 6(1)(d) of the *Access to Information Act* puts limitation to the right to access information where it involves unwarranted invasion of privacy. It is the court's opinion that the said WhatsApp messages were not held by the 1st Claimant but in the Company's laptop thus his privacy was not invaded. This position has been judicially stated in the cases relied on by the respondent to wit, GJK v. KPMG



Advisory Services[2017] eKLR and Peter Appollo Ochieng’ vs. Instarect Ltd [2017] eKLR and the Court concurs with the observations by the learned judges on the scope and extent of the right to privacy under article 30 of the Constitution.

57. The court notes that there was an admission by one Mr. Silas Wafula on some of the grounds of termination and the WhatsApp screenshots do not show direct involvement of the 1st Claimant. In this case, the 1st Claimant in his testimony stated that his services were terminated by the Respondent on grounds of alleged gross misconduct including collaborating with others to sabotage the Makini School and the HR Director, sharing confidential information among others.
58. This court is of the view that in as much as the information was shared with the 1st Claimant by the said Mr. Wafula who was his colleague, there was no nexus between the 1st Claimant and sharing the same with the blogger. The only mistake which the Respondent could fault the 1st Claimant was not communicating the same with the management. It must be noted that the 1st Claimant apart from being the Respondent’s employee, was also a shop steward with the interests to protect the members of the 2nd Claimant. The court also notes that the 1st Claimant served the Respondent for 18 years without any history of disciplinary cases not even a warning.
59. The Respondent’s case was that the 1st Claimant’s actions amounted to gross misconduct as per section 44(a) of the Employment Act 2007 hence warranted summary dismissal.
60. The court will be guided by the case of Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR, where the Court of Appeal stated:
- “ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
62. The court finds that the grounds of terminating the 1st Claimant’s employment were not substantially justified save for the ground that the 1st Claimant agreed in his testimony on making an adjustment to document that he forwarded to the union as a shop steward.
63. Section 44(4) of Employment Act lists down what may constitute acts of gross misconduct and the court finds that the 1st Claimant never committed any of the acts above.
64. On the requirement of fair procedure, this is generally provided for under section 41 of the Employment Act. The Act requires the employer to give notice of the termination, allows the employee to make his representations on the charges against them, appear in a disciplinary hearing with a representative of their choice and be accorded a hearing and a chance to put up their defence. This position was amplified by the Court of Appeal in the case of Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR.
65. The 1st Claimant was issued with a Notice for suspension dated 30/8/2022 and a show cause letter dated 1/9/2022 the show cause letter on the same date as the fact finding meeting after which he tendered his response on the allegations levelled against him on 5/9/2022.
66. On 12th September 2022 he was issued a Notification of a Disciplinary inquiry which took place on 20th and 21st September 2022, which he attended accompanied by representatives from KUDHEIDHA.



The procedure for disciplinary termination was concluded. The 1st Claimant was as a result summarily dismissed and lodged an appeal dated 19/10/2022.

67. However, the 1st Claimant raised some issues in the Disciplinary Hearing including among others the composition of the disciplinary panel, failure to be issued with the Makini Policy document as well as access of private information in the WhatsApp messages.
68. The 1st Claimant contention on the composition of the disciplinary panel, being served with the bundle a day before hearing as well as not being able to cross examine Mr Silas Wafula have not been rebutted apart from the Respondent's witness stating during hearing that he did not raise an issue with the composition of the disciplinary committee or the time given to prepare for the same.
69. The Disciplinary hearing was a quasi-judicial process in which the 1st Claimant's conduct was being adjudicated upon. He was therefore entitled to adequate time and to test their evidence they relied through cross examination. The said rights were denied and the court therefore returns that the process followed was not consistent with fair hearing. The foregoing view is fortified by case of David Wanjau Muhoro Vs Ol Pejeta Ranching Limited (2014) eKLR where the Court held:-

“The principle of fair hearing requires the employee has sufficient opportunity to prepare. This entails:’

- i. The right to sufficient time to prepare. Time however, was not the totality of sufficiency of opportunity.
- ii. The right to fully understand the charges. General charges such as dishonesty, fraud and fraudulent activities were vague and offered the employee no opportunity to respond intelligibly, or at all.
- iii. The right to documentation. The employee needed to be given the documents the employee requests for.”

70. In conclusion, the court finds that a fair procedure was not followed at the Disciplinary Hearing and that rendered the separation herein unfair within the meaning of section 45 of the Employment Act. There cannot be a fair hearing where the Committee sitting to hear the case is improperly constituted and it acts with bias. The dismissal was therefore unfair both on substantive fairness and procedural fairness.

Whether the Claimants are entitled to the reliefs sought.

71. The court having found that the 1st Claimant was dismissed unfairly both substantively and procedurally the court makes a declaration that the verdict/ outcome of the disciplinary hearing by the Respondent against the 1st Claimant of guilty of gross misconduct as unfair, illegal and irregular as prayed.
72. The Court however declines to grant the order for immediate and unconditional reinstatement to employment since the same is not tenable by virtue of section 12(3) (vii) of the ELRC Act since it is past three years since the 1st Claimant was terminated.
73. On the prayer to declare that Ms. Jackie Van Merwe not a qualified Human Resource and the decisions made in her capacity be reversed, the Court declines to award the same since it is not within the jurisdiction of the Employment and Labour Relations Court but that of the International Human Resource Management (IHRM) to decide besides, the dispute herein was between the claimants and



the respondent and Ms. Merwe was not a party to enable her prepare here defence to the allegations. She merely appeared as a witness.

74. The Claimants did not pray for alternative prayer for compensation for unfair termination however under section 49 read together with section 50 of the *Employment Act*, the Court upon finding that an employee has been unfairly terminated may make any of the orders under section 49 which include an order directing an employer to pay such employee an amount not exceeding 12 months' salary as compensation for unfair termination. This is a statutory provision and the fact that an employee did not plead it does not prevent the Court from making the award where merited.
75. This court takes in to account the fact that the 1st Claimant had worked for the Respondent for 18 years without any previous disciplinary issue. The Court further having found that the reasons for which the claimant was dismissed were not tenable as some of the reasons contemplated under section 44(4) and fair reasons within the meaning of section 45 as read together with section 47 of the *Employment Act*, but noting that the 1st Claimant being an employee of the respondent admitted to omitting to inform the respondent of the pernicious activities of his colleague Silas Wafula, would consider ten (10) months' salary as adequate compensation for unfair termination in the circumstances.
76. Parties herein, including the claimant never disclosed how much the 1st Claimant was earning per month, this might be attributed to drafting error and or obsession with the prayer for reinstatement. The claimant however was undisputed employed as a teacher by the respondent for approximately 18 years. He must have had a salary. The respondent is therefore directed to compensate the claimant as follows:
- i. One month's salary in lieu of notice (based on salary at the point of separation)
 - ii. Ten months' salary as compensation for unfair termination (based on salary at the point of separation)
 - iii. Items (i) and (ii) shall be subject to taxes and statutory deductions but shall attract interest at Court rates from the date of this judgment until payment in full.
 - iv. The matter to be mentioned on 24th of February, 2025 for recording of final orders.
 - v. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 17TH DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

