



**Kirimi (Sued as the legal representative of the Estate of Kirimi M’Muna) v Nairobi Hospital
(Cause E1048 of 2021) [2025] KEELRC 693 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 693 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1048 OF 2021
NJ ABUODHA, J
FEBRUARY 28, 2025**

BETWEEN

**HANNA B KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF KIRIMI M’MUNA) CLAIMANT**

AND

THE NAIROBI HOSPITAL RESPONDENT

JUDGMENT

1. The Claimant through Statement of Claim dated 10th December, 2021 pleaded inter alia as follows: -
 - a. The Claimant averred that the Respondent then known as Kenya Hospital Association, executed a contract of employment with the Claimant on 5th March 1987 effectively employing the Claimant as cashier on permanent and pensionable terms. That she worked diligently and met her obligation at her station of work as required under the employment contract.
 - b. The Claimant averred that in the years 2006, she was promoted to the position of Supervisor-Front Office and as at January 2021 was earning a basic salary of Kshs 135,520/=.
 - c. The Claimant averred that the Respondent contrary to the express terms of the contract and employment laws for no justifiable reason terminated her employment on 15th March 2021 after being subjected in an unfair and illegal disciplinary process that was malicious and un-procedural on allegations of fraudulently conducting transactions conducted on 18th February 2021 allegedly worth kshs 3,859,317/= among other fabricated allegations.
 - d. The Claimant averred that her termination was commenced through issuance of a suspension Letter dated 2/2/2021 asking her to show cause why her employment should not be terminated for alleged involvement in fraudulent Insurance claims. That after responding to the show cause letter through her response dated 4/2/2021 the Claimant was invited vide letter dated



16/2/2021 to attend disciplinary hearing on 18/2/2021 which she attended and defended herself against allegations leveled against her by the Respondent.

- e. The Claimant averred that on 18/3/2021 she received a summary dismissal letter dated 15/3/2021 from the Respondent which summarily dismissed her from employment on allegation that she failed to put adequate measures to deter and flag out fraudulent activities in her section.
 - f. The Claimant averred that she was aggrieved by the dismissal finding and appeal and on 19/3/2021 wrote to Respondent requesting a certified copy of the initial proceedings and the Respondent's Disciplinary Management Policy to enable her prepare for appeal, the Respondent sent to the Claimant 3 different sets of Disciplinary Management Policy which contradicted each other, all of which had been amended by the Respondent to suit its case.
 - g. The Claimant averred that the Disciplinary Proceedings does not quote which set of the Disciplinary Hearing Policy was used during hearing of the Claimant's case.
 - h. The Claimant averred that the Respondent had not fixed the appeal for hearing forcing the Claimant to issue a reminder letter to the Respondent dated 6/5/2021 and was then invited for hearing on 13/5/2021.
 - i. The Claimant averred that as at the hearing of the appeal, she adopted and fully relied on her grounds of appeal as stipulated in her Memorandum of Appeal dated 29/3/2021. That the Appeal Committee upheld the decision to terminate the Claimant's employment vide its letter dated 26/5/2021.
 - j. The Claimant averred that her termination was unfair, irregular and arrived at in breach of the express provisions of Employment Act by the Respondent through its officials. That on 26/5/2021 when she went to have the decision of her Appeal read to her the Claimant was coerced to sign the proceedings of the appeal committee which were not in tandem with what she had submitted during hearing of appeal. That on account of the inconsistencies she refused to sign the proceedings.
 - k. The Claimant averred that at the time of her termination of her employment on 15th March, 2021 she has worked for 33 years and 6 months and was due to retire on 14th April, 2022.
2. The Claimant in the upshot prayed for the following against the Respondent;
- i. Unconditional issuance of Certificate of Service to the Claimant.
 - ii. Service pay calculated at half monthly basic salary multiplied by the number of years worked and completed (5th March 1987 to 15th March 2021) –Kshs. 2,236,080/=.
 - iii. Unpaid provident fund contribution by the Respondent being equivalent of 10% of Claimant's basic salary for the remainder period of employment from 15th March 2021 to April 2022-Kshs. 149,072/=.
 - iv. Reinstatement of her employment.
 - v. In the alternative of (d), compensation for the remainder part of the contract when the Claimant was due to retire, 11 months from April 2022-Kshs. 1,490,720/=.
 - vi. 12 months compensation for unlawful termination of Employment –Kshs. 1,626,240/=.
 - vii. Interest on (ii, iii, v and vi) from the date of Judgment to date of payment.



- viii. Costs of the suit.
3. The Respondents filed their Statement of Response dated 21st September 2022 and averred inter alia;
- a. The Respondent averred that the Claimant was summarily dismissed from Employment on 16th March 2021 vide a letter dated 15th March 2021 and the summary dismissal was substantially justified and procedurally fair.
 - b. The Respondent averred that on 12th December 2020 the Respondent's Chief Security Officer received number complaints from patients that they were being subjected to unusually long discharge processes yet they had already paid their hospital bills in time. Around the same time the Hospital received a Complaint from the CIC Insurance Group staff and the Respondent's staff and the Respondent's staff.
 - c. The Respondent averred that after conducting the investigations, the Chief Security Officer submitted a report dated 12th January, 2021 to the Chief Executive Officer which contained data relating to 11 patients in the year 2020.
 - d. The Respondent averred that the staff implicated in the Investigation report was mainly the front office assistants, cashiers and their supervisors, all of whose task fell within the admission payment and discharge processes in ADT, which was the Claimant's docket. That the Claimant recorded a statement with the investigators as part of the investigations.
 - e. The Respondent averred that the investigators concluded that the Claimant as well as the supervisor in charge of Credit Control had noted the discrepancies but failed to take action to remedy the same. The Claimant failed to supervise the front office assistants adequately and to maintain efficient admission, discharge and transfer procedures and the investigators recommended that disciplinary action should be taken against the Claimant for her culpability in the matter.
 - f. The Respondent averred that the Claimant was suspended from duty on 1st February 2021 pending further investigations into the fraudulent insurance claims in the department which suspension was extended up to 15th March 2021.
 - g. The Respondent averred that on 2nd February 2021, the Respondent wrote to the Claimant highlighting specific areas where the Claimant was implicated by the investigation report.
 - h. The Respondent averred that the Claimant was given an opportunity to show cause and make representation on why the Respondent should not take disciplinary action against her and why she should not be surcharged the amount of Kshs 3,859,317 being total revenue lost by the Respondent.
 - i. The Respondent averred that the Claimant was invited to a disciplinary hearing vide letter dated 16th February 2021 and held on 18th February 2022.
 - j. The Respondent averred that there is no requirement that the employer must include a member or representative from the employee's department and that the panelists all had relevant training on matters relating to employee disciplinary management by virtue of being heads of department and Human Resource practitioners.
 - k. The Respondent averred that it was under no obligation to furnish the Claimant with a copy of the Disciplinary Management Policy prior to the proceeding, the Claimant did not did not request for a copy before the hearing.



- l. The Respondent averred that it invoked Clause 1.4.2 of the Disciplinary Management Policy as well as Section 44 (4)(c) of the Employment Act 2007 and resolved to summarily dismiss the Claimant from employment. That the Claimant was informed of her right to appeal, the Respondent also availed to her copies of the Policy and proceedings.
 - m. The Respondent averred that all front office assistants and ADT staff implicated in the fraudulent insurance claims were subjected to a similar Disciplinary Process as the Claimant and subsequently terminated from employment.
4. The Respondent in the upshot prayed as against the Claimant that the Claimant's suit be dismissed with costs to the Respondent.

EVIDENCE

5. At the hearing, the claimant (CW1) testified on 21st November and adopted her witness statement together with the documents filed in court dated 10th December, 2021 and her supplementary documents dated 4/10/2022 and further supplementary documents dated 9/11/2023 as her evidence in chief.
6. CW1 testified that she was a Supervisor Admissions and Discharges which role she resumed in 2006. That she was accused of fraud with CIC staff. That she was to ensure all admissions follow laid procedure and necessary documents attached as well as discharges.
7. CW1 testified that discharge was done by front office and there were 18 staff under her. That after going through the files she passed them to the billing department for confirmation and later to credit control. That the investigation report listed 10 patients and that she was familiar with Edna Mwenda who was discharged by Martin Tinda on 20/4/2021 and that she disapproved the file and whose medical bill was Kshs. 441,000/=. That she returned the file to Martin to attach the undertaking letter from CIC and NHIF rebate.
8. CW1 testified that she thereafter had a sick off and applied for leave until January 13 and that Edna's file was not brought to her attention on her return immediately and on 19th she was brought the file and asked to write a statement about the patient and that she never wrote a statement concerning the other patients.
9. CW1 testified that later she was suspended with other 5 members of staff for a week and they later received a letter of disciplinary hearing and that the 10 patients were not brought to her attention at the hearing.
10. CW1 testified that the issue about her was financial fraud and that she was not given the investigations before the hearing and no colleague was called to testify against her and no one was called from CIC or Finance to testify.
11. It was her evidence that the 10 patients were not called, and the disciplinary process was unfair and fraud was not proved. That she never got a copy of the disciplinary manual prior to the hearing. That the Respondent annexed the manual after dismissal upon request for Appeal and the Respondent attached 3 sets of the manual.
12. In cross-examination CW1 testified that it was not her role to liaise with insurance for documentation. That she was required to produce admission and discharge reports, ensure completeness of documents, ensure timely payment of claims, supervise the front office staff.



13. CW1 confirmed that she was aware of investigations concerning Edna Mwenda and recorded a statement with security. That supervision could not detect fraud early concerning documents from insurance as far as one has a legitimate letter from insurance; it was not easy to detect.
14. CW1 stated that patients can change from cash to credit which was the work of credit control and when the change takes place, there's a letter of undertaking and in case of Edna, the undertaking was not enough. That the patient Edna was discharged on 19/11/2020 and she (the claimant) went on leave on 28/11/2020.
15. CW1 confirmed that she did not see that the letter from CIC was not signed and that she handed over Edna's case to another staff when she proceeded on sick leave. That there was no requirement of stamp on pre-authorization documents and that Edna did not sign the pre-authorization form. That Edna came to her as a credit patient through CIC.
16. CW1 stated that the insurance used personal email of staff and that she never audited staff emails, they were so many. That she received a show cause letter and responded to it, that she never asked for additional information or documents. That she relied on her response to show cause and statement since she had no access to Respondent's disciplinary policy. That she requested for the investigation report and disciplinary policy to familiarize herself.
17. CW1 confirmed that her contributions to NSSF were remitted and that she never received her terminal dues apart from her provident funds which she received from the bank.
18. In re-examination CW1 clarified that the report was signed by security officer and chief security officer with no approval from Finance department. That she was responsible for credit patients that is all types of insurance and could clear cash patient if the file was complete. That one could not tell in advance the cost of treatment and amount of undertaking until the letter is received. That in the event of dispute with insurance, the patient is changed to cash and forwarded to credit control. That Edna did not have that scenario. That she was asked about Edna since the others never appeared before her.
19. CW1 clarified that the Respondent never presented evidence of the loss of the 3.8 million. That she never received any complaint from CIC.
20. The Respondent on the other hand called two witnesses, Christine Mbukuli, RW1 and Maxwell Maina RW2 who testified in court on the 23/5/2024. RW1 testified and adopted her statement dated 20th June 2023, the Respondent's documents filed in court dated 21/9/2022, 21/9/2022 and 15/6/2022 as her evidence in chief. She further stated that she was the Security Officer for the Respondent.
21. RW1 testified that the Investigation Report came out on 12th January 2021 when they received a client's complaint in admission and discharge process. There were delays and it was escalated to the CEO and they were tasked to conduct investigations.
22. RW1 testified that CIC was one of the insurance company that raised the complaint. Patients could be admitted as cash patients and later converted to insurance. That there was need for countersigning for changes from cash to insurance.
23. RW1 testified that the letter of undertaking commits the insurance to cater for the bills and how much, that there was no stamp on the document implying that the document was not genuine and the Claimant failed to detect the anomalies and report to management.
24. RW1 testified that the clerks used to add patients to CIC cover yet they were not covered. RW1 testified that the Claimant ought to have scrutinized letters of undertaking and preauthorization letters and



- ensure they were correct. That the Claimant ought to have closed the issue before proceeding on leave or followed upon resuming. That they recommended Disciplinary action.
25. In cross-examination RW1 confirmed that the staff recorded statements and the statements implicated the Claimant for the loss of approximately 3 million Shillings. That she participated in the investigation and signed the report but was not part of the disciplinary proceedings.
 26. RW1 confirmed that there's nothing in court to show that the Claimant colluded with Edna Mwenda to defraud the Hospital. That there was an audit report which was not attached to her report.
 27. In re-examination, RW1 clarified that the Claimant's Job Description required her to scrutinize documents and follow up on any discrepancies.
 28. RW2 adopted his statement dated 8th May 2023 as his evidence in chief. He further stated that he was senior legal officer of the Respondent. It was his evidence that the reason for termination of the Claimant was for colluding with staff to defraud the Respondent. That there were 11 transactions to CIC and only 3 were paid and the other 9 declined as fraudulent. RW2 testified that the Claimant attended the Disciplinary hearing and was heard, at the conclusion; it was found that she was involved in the fraud and recommendations made for her dismissal.
 29. In cross-examination, RW2 testified that the Respondent lost approximately 4.75 million and that there is no any other document about the loss and the audit report was not before court. That the investigation was conducted by Kilimani Police but no prosecution was conducted against the Claimant.
 30. RW2 confirmed that the 2020 version of the policy was the one that was used in the Claimant's case. That the Claimant was not provided with the statement of the 10 staff that adversely mentioned her. That the CIC report was not before court and the Claimant was not given a copy.
 31. In Re-examination, RW2 clarified that the CIC report was not the Respondent report thus under no obligation to give the Claimant the same. That the Claimant stated that she had all the documents and did not ask for additional documents. That all staff have access to the HR manual and that the Claimant had access to the disciplinary proceedings. That the financial audits are annual but internal audit is continuous.

Claimants' Submissions

32. The Claimants' Advocates Musungu Pekke & Company Advocates filed written submissions dated 1st July 2024. On the issue of whether the disciplinary proceedings conducted by the Respondent in respect of the Claimant's case was procedural, in compliance with the rules of natural justice and fair, counsel submitted that the disciplinary proceedings held on 18th February 2021 and appeal hearing of 13th March 2021 were flawed, unfair and made in abuse of the tenets of natural justice and fair hearing.
33. Counsel relied on article 50(2) (a),(b)(j) of *the Constitution* on the right to fair trial and section 45 of the *Employment Act* on employer not terminating an employee unfairly without valid reasons and fair procedure. Counsel submitted that the Claimant told the court that vide suspension letter dated 18th February, the claimant was suspended on account of gross misconduct. That the letter was silent on whether the Claimant was given documents the Respondent intended to rely on in prosecuting its case at the disciplinary hearing and if so, what was the nature of the documents and when the documents were dated. That the show cause letter did not also have a provision or a separate clause confirming that the Claimant was given particular list of documents and she signed an acknowledgment note confirming receipt of the same.



34. Counsel submitted that the only case brought to the Claimant's attention in the show cause and during disciplinary proceedings was that of Edna Mwenda but not the 9 other patients adversely mentioned against her during hearing of this case. That the show cause letter stated that following investigation it was found that the Claimant was involved in colluding with an official of CIC Insurance group with a view of defrauding the hospital and the insurance company. That by its own wording it was alleged that the Claimant connived with one-person Mr. Dennis Munene Ndwiga which allegations she denied.
35. Counsel relied on section 107(1) of the Evidence Act on duty to prove those allegations by the Respondent and section 47(5) of the Employment Act on the burden of proof of the parties. Counsel also relied on section 44(4) of the Employment Act on what amounts to gross misconduct while submitting that the hearing conducted on 18th February, 2021 was unfair for the reasons that the Claimant was not given all the evidence to be relied on, charges were not sufficiently disclosed, none of witnesses testified against her, none of the 10 patients testified and no document from CIC Insurance or in the investigation report of Finance department was presented to confirm loss of funds. That the Respondent did not prove the charges leveled against the Claimant.
36. Counsel submitted that in respect of the appeal, the appeals committee failed to evaluate the evidence presented by both parties and come up with a decision that was fair but instead adopted the decision of the disciplinary committee in violation of the law and that it was equally not clear from the various disciplinary manuals given to the Claimant which version was used. That the appeal court upheld the position that the Claimant had connived with staff from CICI Insurance to cause loss of money to her employer when the same had not been proved at the disciplinary committee. That the disciplinary proceedings were unfair, unprocedural, flawed and made in abuse of the rules of natural Justice.
37. On the issue of whether the Respondent proved that the Claimant directly or indirectly fraudulently contributed to the loss of Kshs.3,859,317/- or any amount thereof to the Respondent, Counsel submitted that while the Respondent's witnesses told court that the Respondent lost Kshs.4,600,000/= the show cause letter stated that the Respondent lost Kshs.3,859,317/= which was a huge contradiction and that an annual audit was conducted for the Respondent and revealed that indeed the Respondent lost Kshs. 3,859,317/= but the said audit report was not presented to court.
38. Counsel further submitted that while the show cause letter alleged that the Claimant connived with front office Assistants and staff from CIC Insurance no witness was presented by the Respondent before the disciplinary proceedings or at the trial of this case to testify against the Claimant. That no witness from CIC Insurance testified before disciplinary hearing or this court to prove allegations of fraud levelled against the Claimant. That the charge of fraud as leveled against the Claimant by the Respondent was not proved.
39. On the issue of whether the termination of the Claimant's employment was fair, counsel submitted relied on section 43 and 45 of the Employment Act on need for prove of the reasons for termination. That the Respondent's letter of summary dismissal dated 14th March 2021 states that the Claimant was summarily dismissed from employment for taking part in fraudulent claims while conniving with the staff of CIC Insurance while the suspension letter states that as a supervisor, the Claimant failed to put adequate measures to deter and flag out fraudulent activities in her department and that her explanation about the actions taken were un satisfactory.
40. Counsel submitted that her job description did not involve reversing any payments as that was the mandate of Cashiers which assertion by the Claimant was not rebutted by the Respondent by any form of evidence.



41. Counsel submitted that that the reason for terminating the Claimant's employment was not valid, was unfair and was made in abuse of disciplinary procedures and therefore in violation of the provisions of Section 45 of the *Employment Act*.
42. On the issue of whether the Claimant is entitled to reliefs sought, counsel submitted on the prayers as sought in the memorandum of claim and submitted that the Claimant was entitled to all the reliefs sought.

Respondent's Submissions

43. The Respondent's Advocates Munyao Muthama & Kashindi Advocates filed its submissions dated 16th October 2024 and on the issue of whether the Respondent had valid reason and grounds for terminating the Claimants employment, Counsel relied on section 43 of the *Employment Act* on the need to prove the reasons for termination. That the reason for which the Respondent terminated Claimant's employment was gross misconduct in that she failed to put adequate measures to deter and flag out fraudulent activities in the ADT section. That this amounted to gross misconduct as per section 44(4) of the *Employment Act*.
44. Counsel relied on among others the case of Galgalo Jarso Jillo v Agriculture Finance Corporation (2021) eKLR and submitted that section 44 of the Act does not require the employer to have watertight evidence of the alleged criminal transgression for the ground to arise.
45. Counsel submitted that the Claimant's job description included, having an efficient admissions and discharge process by ensuring availability of admissions and discharge documents and the criteria of ADT are adhered to completeness of documents in order to ensure that the insurance/ third party claim is payable, reduce risk exposure and delays in discharge by monitoring the credit bills to ensure they are within the undertaking limit.
46. Counsel submitted that the Claimant indicated that she was not directly involved in the admissions and discharge process that this was done by her supervisees. That contrary to this the Claimant's job description included admitting, transferring and allocating beds. That as a supervisor her job entailed more than just receiving and scrutinizing documents received from her supervisees and she was expected to develop, facilitate and maintain effective admission, discharge and transfer processes. That although she was not directly involved with admission and discharge being conducted by her 18 supervisees at all times as the Supervisor she could audit the work of her supervisees and address any risks. That the Claimant's statement that her role was limited to scrutiny of documents was therefore untenable.
47. Counsel submitted that as a supervisor, the Claimant did not mention any single instance whereby she questioned her supervisees on the irregularities in the file. That the fact that the investigators noted the irregularities meant that they were detectable gaps which the Claimant missed and some of the files did not contain the relevant documents. That the fraudulent transactions went on unchecked for a prolonged period. That the Claimant alleged that it was not easy to detect fraud especially where patients presented letters of undertaking from insurance which looked genuine.
48. Counsel submitted that a document cannot be said to be complete or genuine if it lacks a signature especially where the document has a clear provision for signing. That this did not require forensic examination hence the anomalies could not be hard to detect as alleged by the Claimant.
49. Counsel submitted that clause 6.11 of the Work Instructions for the Admission and Discharge of Patients provided that ADT staff shall follow up with the doctor and ward nurses once a patient is



- admitted to have the necessary insurance forms completed within 24 hours of admission and sent to relevant third parties once completed and signed.
50. Counsel submitted that the investigators noted that there was no supervision in the ADT Section and staff carried out their duties in a laissez faire manner and confirmed through the non-chalant manner the Claimant responded in the cross examination when shown the pre-authorization form for EM which did not have the patient's signature and doctor's stamp, her response was that such details are not necessary or mandatory. That she did not point out to any document or instruction given to her that such details were no longer required from patients.
 51. Counsel submitted that the investigators noted that out of the 12 transactions worth Kshs. 4,675,233 identified during investigation only 9 transactions worth kshs 969,289 have been paid by CIC. That the Respondent lost a total of Kshs 3,859,317 in unpaid bills. That the reason for her dismissal was not that she was directly involved in the fraud but on the contrary her failure to put adequate measures in her section and her failure to properly scrutinize files to ensure completeness of documents that created a conducive environment for the fraud to be committed. That since she was not dismissed for fraud she was not surcharged for the Kshs 3,859,317 that was lost through her negligence.
 52. Counsel relied on the case of *Bamburi Cement Limited vs William Kilonzo* [2016] eKLR, and submitted that the question that the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services. That the Respondent had valid and fair reasons which it genuinely believed to exist which caused it to summarily dismiss the Claimant. That RWI confirmed that the staff in the ADT section who were implicated in the investigation report were also subjected to disciplinary action and their employments were terminate. The Respondent had lost faith and trust in the Claimant and her ability to supervise the ADT staff.
 53. Counsel submitted that it was not necessary contrary to the Claimant's assertions to call Mr. Ndwiga to testify as he was not an employee of the hospital and the Respondent equally had no power to summon any of the patients to testify in internal disciplinary hearings.
 54. On the issue of whether the disciplinary process against the Clamant was procedural and fair, counsel submitted that the Respondent complied with the requirements of section 41,43 and 45 of the [Employment Act](#) and the Respondent's Human Resource Manual and Practice.
 55. Counsel relied on the case of *Nicholas Muasya Kyula v Farmchem Ltd* [2012] eKLR and submitted that the employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.
 56. Counsel submitted that the disciplinary process against the Claimant was procedural and in accordance with the provisions of the law as elaborated in *Nicholas Muasya Kyula v Farmchem Ltd* and *Galgalo Jarso Jillo v Agriculture Finance Corporation*. That the Claimant's allegation that she was not issued with the disciplinary Management Policy prior to the first hearing was not true since the Respondent's policy was accessible on its intranet to which she had access to and in any event she did not request for it when the show cause letter was issued to her.
 57. Counsel further submitted that on the Claimant's allegations that the CIC Insurance and investigation report was not issued to her that the report from CIC originated outside the hospital confirming the fraudulent insurance claims. That it was not relied on during disciplinary hearing but instead the hospital conducted internal investigations which confirmed the existence of insurance fraud. That the evidence and findings were compiled in the investigation report dated 25th January, 2021.



That all findings of the investigations and report were elaborated in the show cause letter dated 2nd February,2021.

58. On the issue of whether the Claimant is entitled to the reliefs sought, Counsel submitted that the Claimant was not entitled to reinstatement as she had not demonstrated exceptional circumstance under Section 49(4) and that it was not practicable in this case given the circumstance the Claimant left employment and that 3 years period has since lapsed as per section 12(3)(vii) of the *Employment and Labour Relations Court Act*.
59. On the prayer for 12 months compensation counsel submitted that the Claimant did not prove that there was unfair termination or it fell outside section 45 of the Act. Counsel relied on the case of Josephine M Ndungu & Others v Plan International Inc (2019) eKLR on the burden of proving unfair termination occurred on the Claimant. That the Respondent demonstrated that the termination was fair both substantively and procedurally.
60. On the prayer for service pay counsel submitted that the Claimant section 35(6) of the *Employment Act* excludes an employee who is a member of NSSF hence she is not entitled to this prayer. On the prayer for compensation for the remainder part of contract up to retirement counsel relied on among another the case of D.K Njagi Marete v Teachers Service Commission (2013) eKLR where the court disallowed such a prayer which was upheld in appeal that there was no permanent employment as there was provision for termination. That the prayer for provident fund was anchored on employee-employer relationship which also ended.

Determination

61. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The Court has also considered authorities relied on by Counsel and has come up with two main issues;
 - i. Aa. aa. Whether the claimant was unfairly terminated.
 - ii. Whether the Claimant is entitled to the reliefs sought.

(a) Whether the Claimant was unfairly terminated

62. It is the Claimant's case that the Respondent summarily dismissed her from employment on allegation that she had failed to put adequate measures to deter and flag out fraudulent activities in her section.
63. On the contrary, it was the Respondent's case that after receiving complaints from customers and a report from CIC indicating staff from ADT had colluded with CIC staff to conduct fraud, the Hospital conducted internal investigations which confirmed the existence of fraud which evidence was compiled in the investigation report dated 25th January 2021.
64. The events leading to the termination of employment of the Claimant points out to gross misconduct as the main reason for terminating the Claimant's employment in failing to put adequate measures to deter and flag out fraudulent activities in the ADT section.
65. The Claimant was suspended from 1st February 2021 to 15th March 2021 and issued with a show cause letter indicating that together with the front office assistants and CIC care Manager, fraudulently conducted a transaction worth Kshs.3,859,317/=.
66. The requirements for employers to terminate employees employment contracts on fair and valid reasons is governed by section 43 of the *Employment Act* read together with section 45 and 47. The



Court is further guided by the case of Pius Machafu Isindu v 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.”

67. The employer must give a fair and valid reason as per section 43 of the *Employment Act*. Section 45 of the Employment is clear that where there is no valid and fair reason such termination is unfair. In this case the charges were financial fraud, failing to supervise staff, negligence and failure to properly scrutinize the documents and detect anomalies in email communications, failing to follow up and close insurance claims for patients, failing to reverse cash payments within 24hours and offering poor customer service. The Respondent also stated losing approximately Kshs 3,858,317/=.
68. The Court finds that with the main reason prompting the investigations by the Respondent and the subsequent termination of the Claimant, was fraud which happened in her docket. She failed to supervise her supervisees properly. The blame therefore fell squarely on her. Whereas the Claimant stated that the insurance claims were dealt with at front office, as the supervisor of that docket she had to ensure everything was done properly and escalate any anomalies for remedial action. She failed in exercising this mandate. Failure to perform duties or performing them negligently is gross misconduct under section 44(4) of the *Employment Act*.
69. In addition, section 43 of the *Employment Act* states that the employer must have genuinely believed the reasons existed which caused termination of the employee. The Court of Appeal in Civil Appeal No 66A of 2017, Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR held as follows on the standard of proof: -

“ The trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services.”
70. From the above proposition it is clear that so long as the Respondent believed that the Claimant failed in her role causing it to incur losses then the Respondent had valid reasons to terminate her. In this case the Claimant acknowledged that the pre-authorization forms were not signed by the patient and the doctor and there was no document produced by herself exempting her from following the laid down procedure. On the issue of Edna after returning the forms to her colleague for documentation she ought to have followed up after she resumed from her leave.
71. The court notes that it was in her job description to supervise her staff in the ADT section as well as admitting, transferring and allocating beds. That claims had to be filed within 24 hours yet some files did not have proper documentation. However long the Claimant had served the Respondent she was bound to act in good faith to protect the Respondent from incurring loss.



72. Employment relationship is governed by trust, this was lost in this case and the Respondent's witnesses confirmed that the Claimant's supervisees were also terminated on account of the involvement of the fraud. It is not upon the court to ask for proof if money was lost or not so long as an investigation was done and recommendations made that the Claimant failed in her role to supervise her staff and fraud occurred. Any reasonable employer would dismiss for such reasons since trust had been broken by failure to put in place measures to deter fraud.
73. The court therefore finds and holds that the Respondent had a valid and reasonable grounds for summarily dismissing the Claimant.
74. Regarding procedural fairness it is now an established principle that for termination to pass fairness test there should be both substantial and procedural fairness. There are a number of cases on this point including in the case of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
75. Further Section 41 is the guiding law on the procedural fairness which must be adhered to an employer. It is the Respondent's case that the disciplinary process against the Claimant was procedural and fair. That on 2nd February 2021, the Respondent issued the Claimant with a show cause letter to which she responded to on 4th February 2021 denying all charges. She was thereafter invited for a disciplinary hearing and informed of her right to be accompanied by a colleague of choice. That the hearing happened on 18/2/2021 before a properly constituted disciplinary panel and summary dismissal was recommended. That the Claimant was informed of her right to appeal which she did and the hearing happened on 13th May 2021 where the Appeal Committee upheld the decision to summarily dismiss the Claimant.
76. However, the Claimant raised certain issues regarding the hearing including that the 10 patients were not called, that she never got a copy of the disciplinary manual prior to the hearing. It was impractical and unnecessary to call patients who had already been discharged to testify over internal processes of the respondent. The Claimant was aware of the charges against her which were detailed in the show cause letter. Irrespective of which manual was used the court wonders that even if the Claimant had the right manual or not, would change the fact that she never performed her duties as required. In any event it was in evidence that the relevant manual was available to staff on the intranet and the claimant never alleged she was denied access.
77. The Claimant during hearing confirmed that she never requested for additional documents. The burden of proof in civil cases is on balance of probabilities. So long as the Respondent tried its best to give the Claimant a hearing then it passes this test. The disciplinary process which is an administrative process need not be as strict as a court of law. The Claimant appealed the disciplinary verdict which was upheld on appeal despite her being furnished with all necessary documents.
78. In conclusion this court returns a verdict that the Claimant was dismissed fairly after a fair procedure and on valid reasons.

Whether the Claimant is entitled to reliefs sought.

79. Having established that the Claimant was fairly terminated the court proceeds to find that she was not entitled to the damages for compensation under 49 of the *Employment Act*.
80. On the prayer for service pay, the court finds that service pay is only due when the employer fails to abide by the provisions of Section 35(5) and (6) of the Act. It was the Claimant's testimony that her contributions to NSSF were remitted thus the court finds that she is not entitled to Service pay.



81. On the prayer for reinstatement of the Claimant to her employment, the court finds that in as much as Section 49(3)(a) as read with Section 49(4) (c) provides for reinstatement of an employee. In making such an order, the court has to consider the practicability of recommending reinstatement or re-engagement. The court finds that that the Claimant's relationship with the respondent had irretrievably broken down and the 3-year time limit had lapsed thus an order for reinstatement would be impracticable. In any event the Court has found that the respondent was justified in dismissing the claimant hence the issue of reinstatement does not arise.
82. On compensation for the remainder part of the contract, the court finds that payment for salaries for the unexpired period of contract are not due as the law does not provide for anticipatory income. In *Peter Wesonga Opaka v Hilltop Preparatory School & another* [2019] eKLR the court held as follows;
- “I agree with the respondent's submissions that the claimant is not entitled to payment of the unexpired term of the contract as the contract does not provide for the same.
83. In conclusion the Claimant's claim is found without merit and is hereby dismissed with costs.
84. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE - APPEALS DIVISION

