



REPUBLIC OF KENYA



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**Njunge v Safaricom PLC (Employment and Labour Relations Cause
E103 of 2022) [2025] KEELRC 287 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 287 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E103 OF 2022**

JW KELI, J

FEBRUARY 5, 2025

BETWEEN

ESTHER WAGIO NJUNGE CLAIMANT

AND

SAFARICOM PLC RESPONDENT

JUDGMENT

1. The claimant following dismissal from employment of the Respondent filed a statement of claim dated 15th February 2022 and amended on the 15th February 2022 seeking the following reliefs against the respondent: -
 - a. An order for the reinstatement of the claimant to her employment and the payment of all the salaries due during the period of time she was out of employment starting 23rd September 2021 at the rate of Kshs. 384,637,25 per month till date of reinstatement
And or in the alternative
 - a. Kshs.5,000,284.25/=(damages particularized under paragraph 7 herein above)
 - b. Interest at court rates on (a) above from the date of filing this suit till payment in full.
 - c. Costs of this suit.
2. The claimant filed a verifying affidavit of even date and her witness statement of even date and bundle of documents(C-exh 1-21). The claimant filed a further list of documents dated 27th February 2024 being Notice of Appeal dated 15th November 2023 filed in the High Court Nairobi Anti- Corruption Economic Crimes Court Civil Application No. E028 OF 2021.



Response

3. The claim was opposed by the respondent who filed response dated to 15th March 2022 to the claim, witness statement 4th July 2022 and the bundle of documents as its evidence. The respondent amended its defence and filed amended response dated 2nd August 2024 to the claim. The respondent filed supplementary list of documents being judgment delivered on the 16th November 2023 in Civil application No. E028 OF 2021 Assets Recovery Agency v Njunge & 5 others ; Ahmed (interested party) and filed a supplementary witness statement of Odhiambo Ooko of 5th August 2024.

Hearing

4. The claimant's case was heard on the 14th of October 2024 where the claimant adopted as her evidence in chief the statement dated 15th February 2022 and produced documents under list of documents of even date as C- exh 1-21 and the further list of documents dated 27th February 2024 being Notice of Appeal dated 15th November 2023 filed in the High Court Nairobi Anti- Corruption Economic Crimes Court Civil Application No. E028 OF 2021 as C-exh 22. The claimant was cross-examined by Ms Wataka for the respondent and re-examination the claimant closed her case.
5. The respondent's case was heard on even date and RW1 was Odhiambo Ooko who testified on oath and stated he was the Senior Manager Employee and Labour Relations at the respondent company. RW1 adopted as his evidence in chief his witness statement dated 4th July 2022 and his supplementary witness statement of 5th August 2024 , amended statement of response dated 2nd August 2024 and produced the respondent's bundle of documents dated 15th March 2022 as R-Exh 1-10. He was cross-examined by the counsel for the claimant Mr. Sumba and after re-examination the defence case was marked as closed.
6. The parties took directions on filing of written submissions and both complied.

The claimant's case

7. The cause of action in this matter stems from the claimant's summary dismissal letter from the respondent dated 23rd September 2021. The claimant in her evidence adopted her witness statement dated 15th February 2022 filed herein. It was the claimant's case that the respondent wrongfully and unlawfully dismissed her from its employment without justification, having taken cognizance of the following allegations. a) That she was implicated in suspected criminal activities. b) That she was in breach of the respondent's standards of business conduct and anti- money laundering policy. c) That she was in breach of mutual trust and confidence as a senior employee. d) That she generated negative press statements and breached the respondent's disciplinary policy and procedures by bringing the respondent into disrepute.
8. The claimant contended that said allegations, which formed the basis of the claimant's summary dismissal by the respondent were unlawful/wrongful on account of, among others, the following reasons: -
 - a. The provisions under which the claimant was summarily dismissed would have only applied if the claimant committed a criminal offence against or to the substantial detriment of the respondent or its property as provided for under the respondent's disciplinary policy and procedure manual. This also conforms with the provisions of section 44 (4) (g) of the *Employment Act*



- b. The respondent relied on rumours and unfounded allegations in the court case filed by the Asset Recovery Authority (Nairobi High Court Anti-Corruption and Economic Crimes Court Misc. Application Number E019 of 2021, Asset Recovery Authority versus Esther Wagio Njunge & 6 others) which case the claimant was by the time of her summary dismissal, yet to respond to. The proceedings relied on in dismissing her from employment by the respondent were however ex parte.
 - c. The respondent's disciplinary process that led to the claimant's summary dismissal was flawed as the respondent failed to appreciate that the pending court case initiated by the asset recovery authority was civil in nature and was for forfeiture and was not a criminal matter to warrant the drastic disciplinary action taken by the respondent.
 - d. The respondent's disciplinary process was flawed because the respondent relied on unverified social media bloggers, TV and newspaper reports in arriving at its verdict. e) The respondent's adverse verdict against the claimant was prejudicial to the claimant as the matter was still pending in court for hearing and determination. It is not understandable how the respondent could usurp the court's role by arriving at an adverse verdict against the claimant. f) The respondent summarily dismissed the claimant from employment without considering that the claimant had diligently worked for itself for more than ten (10) years without even a single warning, having kept a clean slate all along.
9. Based on the above reasons the claimant sought reinstatement to her employment and/or in the alternative damages for wrongful termination as particularized hereunder:
- a. Damages for wrongful termination as provided for under the provisions of section 45 and 49 (c) of the Employment Act, calculated at a maximum 12 months' salary. Kshs.338,480.45/ = monthly salary together with quarterly sales commission of kshs.138,470.62/= which translates to kshs.46,156.80/=per month totals kshs.384,637.25/= multiply by 12 = kshs.4,615,647/=.
 - b. One month's salary in lieu of notice as provided for under the provisions of section 35(c) and section 36 of the employment act- kshs.384,637.25/= . Total Claim = kshs.5,000,284.25/=

Respondent's case

10. The basis of the termination was as per the dismissal letter as summarised by the claimant above. The respondent denied the accusations and relied on the Notice to show and dismissal letter on the reasons for the termination and further produced documents on the disciplinary process. The Respondent filed the following documents in the suit:
- a. Respondent's Amended Response dated 2nd August
 - b. Respondent's Witness Statement of Odhiambo Ooko dated 4th July 2022
 - c. Respondent's Supplementary Witness Statement of Odhiambo Ooko dated 5th August 2024
 - d. Respondent's Bundle of Documents dated 15th March 2022
 - e. Respondent's Supplementary Bundle of Documents dated 21st February 2024.

It was the respondent's case that the claimant was dismissed for valid reasons and there was compliance with the procedural process as demonstrated in the documents produced on the process. The Respondent denied the entire claim and sought dismissal with costs.



Determination

Issues for determination

11. The claimant on the issues for determination submitted:-
Whether the claimant was wrongfully and unlawfully terminated by the respondent from its employment.
12. The Respondent identified the following issues for determination in the suit:-
 - a. Whether the Respondent had valid reasons for termination of the Claimant's employment.
 - b. Whether the Respondent applied a fair and proper procedure in terminating the Claimant's employment.
 - c. Whether the Claimant is entitled to an order of compensation for alleged unfair termination.
 - d. Whether the Claimant is entitled to an order of reinstatement.
 - e. Who should pay the costs of these proceedings.
13. The court having heard the case and perused the submissions by the parties was of the considered opinion that the issues for determination in the suit were as follows:-
 - a. Whether the claimant was unlawfully and unfairly terminated by the respondent from its employment
 - b. Whether the claimant was entitled to reliefs sought.Whether the claimant was unlawfully and unfairly terminated by the respondent from its employment
14. It is settled law that for termination of employment to pass the fairness test there has to be substantial fairness and procedural fairness. This position is decreed in Section 45 (2) of the [Employment Act](#) to wit:-

“45(1) No employer shall terminate the employment of an employee unfairly.

 2. A termination of employment by an employer is unfair if the employer fails to prove—
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.”

Substantive fairness

15. This relates to the reason for termination of employment and the burden lies with the employer under section 43 of the [Employment Act](#) to wit :- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

The claimant’s submissions on substantive fairness

16. The claimant submitted on whether the offences and/or charges were proved as follows:-

On the offence of breach of security and compliance rules, procedures and policies, this broad head of charge was not proved, neither did the respondent particularize the offences under this heading as all it relied on was the asset recovery case that was pending in court against the claimant and which has since been determined in the High Court and is pending for hearing and determination in the Court of Appeal. The respondent’s witness MR. Odhiambo Ooko did not adduce evidence to prove this charge but concentrated on the charge of criminal culpability. That even if the said charge would have been proved then the claimant, out of her exemplary, diligent, dedicated service to the respondent for more than ten years, having risen through the ranks to a managerial position without a single warning to her name, deserved, at the very worst a last warning as provided for under the Respondent’s policy document.

The claimant submitted that the respondent’s witness, Mr. Odhiambo Ooko attested in his evidence, the diligence, exemplary service of the claimant to the respondent.

17. The respondent relied on the policy clause on gross-misconduct namely:- an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property. The claimant submitted that this is an offence specified at page 72 of the claimant’s list of documents 2nd last paragraph, appendix 2 of the respondent’s disciplinary policy and procedure manual which indeed attracts summary dismissal. She contended that this particular charge was not supported by any fact as it envisages a situation where an employee is suspected to have committed a criminal offence against the employer or to its substantial detriment or its property. The claimant’s alleged offence which was in any case not criminal as provided for under section 81 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) was against a 3rd party and not the respondent. Section 81 of POCAMLA states as follows:- Section 81: “..nature of proceedings 1) All proceedings under this part shall be civil proceedings. 2) The rules of evidence applicable in civil proceedings shall apply to proceedings under this part.” That as such the court proceedings against the claimant in the asset recovery case were therefore not criminal to support this head of charge, a fact the respondent’s witness MR. Odhiambo Ooko conceded to when being cross examined in court.

Respondent’s submissions

18. The Respondent submitted that it was incontrovertible that the Respondent had valid reasons for termination of the Claimant’s employment as detailed below:
19. In cross-examination the Claimant testified that she had been employed by the Respondent for over 10 years and therefore that she had institutional knowledge of the policies, rules and regulations of the Respondent. The Claimant also testified that the Letter of Appointment (page 9 of the Claimant’s Bundle) provides that the Respondent’s policies and staff manual will form part of the terms of the Claimant’s employment.



20. The Court of Appeal in *Heritage Insurance Company Limited v Christopher Onyango & 23 others* [2018] eKLR in finding that where a contract of employment refers to policies and manual of the employer, these form part of the terms of the employee's employment held that: "It is axiomatic that companies as employers do from time to time come up with new Staff Handbooks or Staff Manuals to reflect new regulations in the area of employment of their own staff. In practice, employment contracts do make reference to staff manuals or staff Handbooks as forming part of the terms of employment. In the instant appeal, there is evidence that each respondent's contract made provision for obedience of lawful orders of the appellant as an employer that may be given from time to time. The fact that the contract of each respondent contained a clause to the effect that orders or directions issued from time to time through the Staff Manuals or Handbook would be obeyed meant that the terms of such staff manual or Handbook were incorporated in the contract of employment..."
21. That from the foregoing, the Claimant was bound by the terms of the Respondent's policies and regulations. The Claimant further testified she was aware of the provisions of the Respondent's Disciplinary Procedure Policy produced at pages 52 to 73 of the Claimant's Bundle. In cross examination, the Claimant was directed to specific provisions of the Disciplinary Policy and testified that:
- a. Clause 5.2.2 at page 59 of the Claimant's Bundle provides that the Respondent expected employees to maintain high standards of personal and professional behaviour.
 - b. Clause 7.1 at page 61 of the Claimant's Bundle provides that an employee could be suspended from employment with full pay if their conduct is found to be unacceptable.
 - c. Clause 7.6 at pages 63 to 64 of the Claimant's Bundle provides that any internal disciplinary processes would not be dependent on processes instigated by law enforcement agencies and the Respondent would at its sole discretion take disciplinary action where such processes bring the Respondent into disrepute.
 - d. Clause 7.9 at page 64 of the Claimant's Bundle provides that the Respondent may summarily dismiss an employee for gross misconduct.
22. The Respondent contended that the Claimant also testified that the Respondent's Standards of Business Conduct Policy provided at page 95 of the Claimant's Bundle that the Respondent's employees would not be involved in known or suspected activities that involve the proceeds of criminal activity. The Claimant testified that indeed she was the first respondent in a suit filed by the Assets Recovery Agency against her and other respondents in Miscellaneous Application E019 of 2021 (supra) for recovery of assets that were the proceeds of crime under the provisions of the Proceeds of Crime and Anti Money Laundering Act (POCAMLA). (Copies of the court documents filed in that matter are produced at pages 1 to 560 of the Respondent's Bundle.)
23. The Respondent stated that upon becoming aware of the said court proceedings, it issued the suspension letter dated 5th July 2021 to the Claimant (page 50 of the Claimant's Bundle) for a period of 10 days with full pay to allow for investigations into the matter. The Respondent carried out an investigation and issued the investigation report in July 2021 (pages 31 to 40 of the Claimant's Bundle). The investigation report confirmed that the Claimant was indeed sued as the first respondent in the proceedings filed by the ARA both in her personal capacity and in her capacity as a director of the third respondent in that suit for, inter alia, being in possession of cash totalling over Kshs.78,000,000 which at the time was suspected to be proceeds of crime. The investigation report also made reference to media reports on the case filed by the ARA against the Claimant including social media reports by a well-known blogger that specifically linked the Claimant to the Respondent as its employee. The



Claimant also testified that at the material time it was generally well known, including by the ARA, that the Claimant was employed by the Respondent.

24. The Respondent submitted that the suit by the ARA against the Claimant was clear evidence that the Claimant was suspected of being involved in criminal activity. The argument that the proceedings by ARA were civil in nature did not aid the Claimant noting that such proceedings are aimed at recovery of proceeds of crime as described in Section 3 of the POCAMLA. Additionally, the Claimant's testimony confirmed that there were indeed press reports and social media on the case by ARA against the Claimant and that some of these reports linked the Claimant to the Respondent thus adversely affecting the reputation of the Respondent which is a public company with a very well-known brand in the country and beyond.
25. The Respondent asserted that it had fair and valid reasons to terminate the Claimant's employment for breach of the express provisions of the Respondent's policies which formed part of the terms of the Claimant's employment in accordance with Section 44(4)(g) of the *Employment Act*. The Respondent in this regard relied on the case in Michael Homas Opondo Were v Maths Trading Company Limited [2016] eKLR where the Court held that:- "Further where an employee commits or is suspected to have committed criminal offences against or to the substantial loss of the employer's property, such is breach of contract of employment and is in gross misconduct. The expectation here is that once an employee is employed he is to offer his labour for the overall good of the employer business and where any conduct, directly or indirectly results in the commission of a criminal offence or such conduct leads to the loss and detriment of the employer, such is gross misconduct that result in summary dismissal."

Decision on substantive fairness

26. The standard of proof in employment matters is on a preponderance of evidence also known as balance of probabilities. This standard requires that a party has to establish that their assertions are more likely true than not, which equates to demonstrating a greater than 50% likelihood in their favour. In practical terms, this means that if the evidence presented by one party outweighs the evidence of the opposing party, the former prevails. Section 47(5) of the *Employment Act* provides for prove of employment claims as follows:- "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."
27. The claimant to support her case of wrongful dismissal submitted as stated above. The respondent also submitted to justify the termination as also outlined above. The validity of reasons for termination of employment ought to be according to the provisions of section 43 of the *Employment Act* to wit:-
 1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."(emphasis given) Further the said reasons to be held as valid, they must be must be related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer;(see section 45 (2) b of the *Employment Act*)



28. Broadly the charges and/or offences against the claimant and of which she found liable for as per the respondent's notice to show cause dated 15th July 2021 and the respondent's summary dismissal letter dated 23rd September 2021 were as follows:-
- i. Being implicated in suspected criminal activities.
 - ii. Breach of the company's standards of business conduct and anti-money laundering policy.
 - iii. Breach of mutual trust and confidence as a senior employee.
 - iv. Generating negative press interest.
 - v. Breach of company's disciplinary policy and procedures by bringing the company into disrepute.
28. The Respondent led evidence that investigations were done on the claims of alleged money laundering against the claimant and the media coverage of the matter. During cross-examination the claimant admitted that the respondent issued her a suspension letter dated 5th July 2021. The letter indicated that on the 17th June 2021 a case had been filed against the claimant and that had come to the attention of the company, namely, HC Misc Application No. E019 OF 2021. That she was the 1st respondent in the case and a director of the 3rd Respondent. The Claimant confirmed that it was her boss who initiated the conversation on the existence of the case. Apparently she had not disclosed to the employer that ARA had a case against her. The claimant confirmed that the investigation was done and that it was her who produced the report in court (at pages 31-40 of the claimant's document). The Claimant confirmed that the report confirmed that a case by ARA was reported in the press to effect that the High Court had issued orders freezing an account at Co-operative Bank held by the claimant and that the money in the account exceeded Kshs. 74 million. The claimant confirmed that her gross salary was Kshs. 338000. She confirmed to be the director of the company in the ARA case called Light House Ltd(3rd Respondent) where she was the director holding more than 50% shareholding. She confirmed to be the sole signatory of the bank account holding over Kshs. 74 million. She confirmed that the matter was also covered under Citizen TV news and posted by a popular blogger Cyprian Nyakundi on twitter(X now) who specifically mentioned her as a safaricom employee. The claimant confirmed that the Respondent's standards of business conduct at page 95 subtitle Money Laundering standard warned against engagement on proceeds of criminal activity. She also confirmed that the standards requires that she is not involved in any criminal activity. The claimant confirmed receipt of the show cause by the respondent raising same issues reflected in the dismissal letter.
29. During cross-examination RW1 confirmed that the respondent arrived at the dismissal while the ARA case was pending in court stating that internal procedures were parallel to the court case. The claimant stated that her relationship with the respondent was contractual. That no property of the respondent was affected by the case in court which she stated was civil in nature. The employer relied on its human resources policy produced by claimant where at page 72 it provided as follows:- 'an employee commits or on reasonable and sufficient ground is suspected or having committed a criminal offence against or to the substantial detriment of his employer or his employers' property.' The claimant emphasized not have committed any crime against the employer or its property. The court noted that besides the policy was also the business standards which required the claimant not to commit acts of money laundering or benefit from proceeds of crime.
30. The court concluded from the evidence before the is the reasons for the termination were valid and reasonable and related to misconduct of the claimant in engaging in proceeds of crime . The court noted that judgment was also entered in HC Civil Application NO. E028 OF 2021 where the court



held money held by the claimant in the said account was proceeds of crime. The judgment was entered post dismissal from employment of the claimant hence not basis of the court's findings on the validity of the reasons. The civil case was filed under *Proceeds of Crime and Anti-Money Laundering Act* whose preamble reads:- "An Act of Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes" The court consequently held that the argument by the claimant of the case by ARA having been a civil case does not make her conduct non-criminal. Money laundering is a crime even under the civil proceedings as per the enabling Act. ARA was seeking to recover the money held in a bank account where the claimant was a sole signatory on basis of the money being suspected to be proceeds of crime.

31. In the mind of this court as far as suspicion of commission of crime is concerned, the employer just needs to give reasons for the suspicion of the employee having been involved in a criminal-related conduct on a preponderance of evidence(supra) . That is not to same standard as required in criminal cases of beyond reasonable doubt. The employer just needs to justify the suspicion. In this case, the court found that the respondent justified the suspicion based on the media reports, the case by ARA on money laundering with the claimant as the 1st respondent and being accused of holding approx Kshs. 74 million suspected to be proceeds of crime in a bank account where during the investigation it was confirmed she was the sole signatory. Her salary of gross salary Kshs. 338,000.
32. The court agreed with the respondent that the conduct of the claimant also risked injury to its reputation. The claimant was a senior officer interacting with clients of the Respondent. The court holds the reasons for the dismissal were valid and based on the misconduct of the claimant and the operational requirements of the employer (see section 45(2) of the *Employment Act*).

Procedural Fairness

Claimant's submissions

33. The claimant submitted that in as much as the respondent chose to paint her as a criminal who it had to get rid of under all circumstances, one thing that has to be primarily considered is the fact that the relationship between the claimant and the respondent was contractual and all the engagements between her and the respondent had to be founded on the contractual relationship. The respondent's letters of appointment issued to the claimant by the respondent and which are available at page 9-27 of the list of documents form part of the claimant's contract with the respondent. The letters of appointment together with the respondent's disciplinary policy and procedure manual that can be found at page 52-73 of the claimant's list of documents produced in court as C-exh 17 also form part of the contractual documents between the claimant and the respondent. The disciplinary procedure to be followed by the respondent must therefore fall within the framework of the charges and/or offences provided for as the punishment to be meted in the respondent's disciplinary and procedure manual.
34. The claimant contended that according to the respondent, through its witness evidence, MR. Odhiambo Ooko, the five charges preferred against the claimant for which she was found liable fall under two heads of offenses that are provided for in the disciplinary policy and procedure manual. i) Breach of security and compliance rules, procedures and policies - (page 69 of claimant's list of documents, last paragraph). ii) An employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property (page 72 of the claimant's list of documents, 2nd last paragraph). That the said disciplinary policy and procedure manual further specifies that summary dismissal as meted out to the claimant is only applied when an employee is guilty of gross misconduct as detailed under clause 5.2.4 of the disciplinary policy and procedure manual - (page 60 of the claimant's list of



documents). The said clause states thus:- "5.2.4 Gross misconduct Gross misconduct is a severe breach of Safaricom's rules, work practices, policies, procedures, regulations and other misconduct of a serious nature. If gross misconduct has occurred, the company is entitled to summarily dismiss an employee after following fair procedure; theft, dishonesty, fraud or falsification of records, deliberate damage of Safaricom property or that of a client, endangering the health and safety of others, threatening behavior and/or assault. insubordination. abusing his/her position as an employee to access and/or process customer data without appropriate authority, permission or any other work-related cause, breach of data protection regulations, using of company issued computer and any other means of electronic communications for the access, transmission, processing and/or passing any material which is regarded as inappropriate, authorized and/or which could potentially result in loss of operations, business and/or reputation. Appendix 1 shows the nature and order of sanctions applicable under this disciplinary policy. Appendix 2 provides a non-exhaustive list of examples of breaches in discipline, integrity, conduct, performance or attendance issues that may trigger this process. For the avoidance of doubt, in the event of any conflict in the interpretation of any applicable sanction under this disciplinary policy, the sanction stipulated under Appendix 2 shall take precedence".

35. The claimant asserted that the charges and/or offences visited on the claimant as set out herein did not form part of the specified offences that would be rendered very serious to warrant categorization under gross misconduct so that it would attract summary dismissal. The respondent's witness conceded during cross-examination that the said offences are not categorized under clause 5.2.4 of the disciplinary and procedure manual reproduced hereinabove which is to do with gross misconduct. The respondent's disciplinary policy and procedure manual under the said clause 5.2.4. hereinabove headed appendix 2 specifies that in the event of any conflict in the interpretation of any applicable sanction therein, the sanction under appendix 2 shall take precedence. The sanctions under appendix 2 as already set out hereinabove at page 69 of the claimant's list of documents, last paragraph and page 72 of the claimant's list of documents, 2nd paragraph offers the punishment of final warning and summary dismissal respectively.
36. The court evaluated the evidence. The court concluded that it was not in dispute that the process leading to the dismissal complied with the provision of section 41 of the Employment Act to wit:-“(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 this 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” The claimant only challenged the sanction meted to her as too harsh stating there was option of final warning for such conduct as hers.

Decision

37. The Respondent's position was as per the summary of their case.
38. It was true that on page 69 (claimant's bundle) there was a provision for sanction breach of security and compliance rules procedures and policies for dismissal/ final written warning. At page 72 the suspicion of criminal offence attracted dismissal only. The court agreed with RW1 that the choice of sanction



where there is two options is at discretion of the employer to be applied on cases to case basis. The conduct of the claimant may have not directly caused loss or injury to claimant but it was to substantial detriment of the respondent's reputation the case having been covered in the press and further posing a risk to the relationship with the business partners as the conduct was in violation of the business standards which the claimant admitted knowledge of. Her conduct was gross misconduct which also attracts summary dismissal under section 44(4) (g) of the Employment Act to wit:- "(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property." The choice of dismissal as a sanction was thus justified and procedural. It was the prerogative of the employer to choose which sanction to apply taking into account the severity of the misconduct and the sanction was lawful. The court is further guided by the reasonable employer test in *British Leyland (U. K.) Ltd v B. J. Swift*[1980] EWCA Civ J1017-8 where it was observed at paragraph 17 as regards what sanction ought to apply :- "The first question that arises is whether the industrial tribunal applied the wrong test. We have had considerable argument about it. They said: "... a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate". I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him." The court was convinced that, taking into account the nature of the charges facing the claimant, any reasonable employer would have dismissed the claimant instead of imposing a final warning.

39. The court held the process leading to the dismissal and the sanction imposed on the claimant met the procedural fairness test.

Whether the claimant was entitled to reliefs sought

40. The claimant filed a statement of claim dated 15th February 2022 amended on the 15th February 2022 seeking for the following reliefs against the respondent:-
- b. An order for the reinstatement of the claimant to her employment and the payment of all the salaries due during the period of time she was out of employment starting 23rd September 2021 at the rate of Kshs. 384,637,25 per month till date of reinstatement
- And or in the alternative
- a. Kshs.5,000,284.25/=(damages particularized under paragraph 7 herein above)
 - b. Interest at court rates on (a) above from the date of filing this suit till payment in full.
 - c. Costs of this suit.
41. The court having held the dismissal of the claimant from employment was lawful and fair found that the claimant was not entitled to reinstatement nor to the alternative order of compensation The court could only have considered the reliefs after finding unfair termination guided by section 49 of the Employment Act which provides for compensation or reinstatement in event of unlawful and unfair termination.
42. In the upshot the Court held the dismissal from employment of the claimant by the respondent was lawful and fair. The claim lacked merit and was dismissed with costs to the respondent.



43. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

claimant: - Sumba

Respondent: Wataka

