



**Ashiono v Family Health International (FHI 360) (Cause
217 of 2020) [2025] KEELRC 713 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 217 OF 2020
NJ ABUODHA, J
MARCH 7, 2025**

BETWEEN

EVERLINE ASHIONO CLAIMANT

AND

FAMILY HEALTH INTERNATIONAL (FHI 360) RESPONDENT

JUDGMENT

1. The Claimant through her Statement of Claim dated May 26, 2020 pleaded inter alia: -
 - a. The Claimant was employed by the Respondent initially as consultant in March 2012 and rose through the ranks to become the Chief of Party, a position she held until her termination on the 3rd April, 2019.
 - b. That vide the letter dated 26th March, 2019 the Respondent invited the Claimant to attend a disciplinary hearing citing three specific issues she was expected to respond to on the 1st April, 2019 which included: -
 - i. The Data submitted to NASCOP/USAID/CDC reviewers in connection with the USAID/MOH Data Quality Assurance (DQA) exercise for the Afya Nyota ya Bonde HIV Service Delivery Support Activity (HSDSA) contained falsified data.
 - ii. The second Daily Activity Register (DAR) for the Nakuru Provincial Hospital had been created by HSDSA team using reconstructed numbers.
 - iii. That you were aware of the matters set out in 1 & 2 above and failed to report these to the Director East Africa or to the Office of Compliance and Internal Audit (OCIA)
 - c. The Claimant averred that she responded to the said issues vide letter dated 1st April, 2019 and presented the same to the Disciplinary Committee prior to the disciplinary hearing. That on 1st April, 2019 she attended the said meeting accompanied by Mr. Patrick Muthee (the



Respondent's Director of Procurement and CMS) acting as her representative for purposes of the disciplinary hearing.

- d. The Claimant averred that when the hearing started her representative and herself were shocked to learn that the Disciplinary Committee insisted on asking her questions beyond the scope of the three issues that she had been requested to respond to and ambushed her with new material she had not read at the time to respond.
 - e. The Claimant averred that she had prepared for the three issues subject to the hearing and therefore she requested to be accorded more time within which to prepare for the questions which the committee insisted she responds to as well as provide documentary evidence in aid of her defense to the said allegations. That her representative and herself requested to be allowed time to respond to the new allegations by postponing the hearing to another date which was dismissed.
 - f. The Claimant averred that disciplinary hearing proceeded to make a finding that she was guilty of the charges levelled against her and vide a letter dated 3rd April,2019 she was summarily dismissed from her employment with the Respondent. That being dissatisfied with the decision to terminate her employment she appealed to the Director, Human Resource, HR Partnering of Respondent vide a letter dated 9th April,2019.
 - g. The Claimant averred that vide the letter dated 16th April,2019 the director responded to her Appeal dismissing the same and siding with the disciplinary committee that the hearing was fair hence confirming her termination of employment with the Respondent. That her summary dismissal was unlawful and unprocedurally contrary to the *Employment Act*.
 - h. The Claimant averred that the process was unfair and deliberate flawed and targeted notification and conduct of the disciplinary hearing to unfairly terminate her including the panel not being properly constituted, biased and she was not supplied with documents requested like investigations report and details.
 - i. The Claimant averred that the Respondent almost immediately announced changes in the position she held hence the disciplinary hearing was just but to ratify a predetermined decision by the Respondent to terminate her services.
2. The Claimant in the upshot prayed for the following against the Respondent: -
- a. A declaration that the Respondent unfairly and unlawfully terminated the Claimant's employment.
 - b. A declaration that the Respondent had already predetermined to dismiss the Claimant and that the disciplinary proceedings were only a formality.
 - c. Compensation in accordance with section 49 of the *Employment Act* in the sum of Kshs 11,7000,000/= being the Claimant's 12 months' salary for the unfair and wrongful termination.
 - d. Payment of Ksh 6,825,000/= being payment towards gratuity for the 7 years the Claimant worked with the Respondent (equivalent of one Month's salary per year for all the years worked according to the Respondent's policy).
 - e. Payment of Kshs 682,500/= being the payment of 21 pending leave days in 2019 in accordance with section 28 of the *Employment Act*.



- f. Damages for loss of employment for the remainder of the project period which was to end in December 7th, 2022 calculated as salary that should have been earned to end of the project (45 Months * 975,000) totaling to Kshs 43,875,000/=
 - g. Issuance of certificate of service that complies with section 51 of the *Employment Act*.
 - h. Costs and interests until payment in full.
3. The Respondent filed its Defence dated 27th August 2020 and averred inter alia as follows: -
- a. The Respondent admitted the Job description as outlined by the Claimant herein and averred that the Respondent provided regular returns of patient data to USAID of the HIV Patients being treated under the program. That such returns were compiled by the Respondent's employees in the HSDSA team from the Daily Activity Registers kept by the various health centers participating in the program including the Nakuru Provincial General Hospital.
 - b. The Respondent averred that in July,2018 two employees of the Respondent carried out a Rapid Response Initiative on the patient data reported from Nakuru Provincial General Hospital for the period October, 2017 to June 2018 which showed that the return provided to USAID for June 2018 had 1,675 more patients than was reflected in the Daily Activity Register kept by Nakuru Provincial General Hospital.
 - c. The Respondent averred that on 13th September,2018 USAID gave notice to the Respondent that USAID together with its partners NASCOP and CDC would be conducting a Data Quality Assurance Audit of the returns of the program for June,2018. That the Claimant was aware of the discrepancy at the Hospital found during the Rapid response Initiative Audit and of the Data Quality Assurance audit of the returns of the program for June 2018 to be carried out by NASCOP/USAID/DCD as admitted in the Claimant's e-mail of 25th February,2018 addressed to Keith Hourihan, Sean Temeemi, Annie Zhou and Dr. Doris Macharia.
 - d. The Respondent averred that members of Respondent's HSDSA team prepared a second Daily Activity Register for the hospital which was produced to the Data Quality Assurance audit team from the NASCOP, USAID and CDC. That the Claimant sent an e-mail to HSDSA team on 20th September,2018 thanking them for the long hours they had spent working on the Hospital to achieve the Data Quality Assurance score of 95.4%
 - e. The Respondent averred that when information regarding the preparation and production of the second Daily Activity Register reached the management of the Respondent investigations were carried out by a team from the Respondent's head office in the USA. That as a result of such investigations the Regional Director East and Southern Africa Regional Office of the Respondent Dr. Dorris Macharia and the Director Eastern Africa of the Respondent Josephine Trenchard met with the Claimant on 26th March,2019 when the Claimant was informed that the Respondent was considering disciplinary action against the Claimant on the three issues illustrated by the Claimant.
 - f. The Respondent averred that the Claimant was informed of the hearing on 1st April,2019 where the Respondent would listen to her representations and she was informed to be accompanied by another employee at the hearing. That following the meeting the Respondent wrote to the Claimant on 26th March,2019 confirming what had been discussed at the meeting and the three areas of concern. That the Claimant wrote to the Respondent on 1st April,2019 prior to the hearing, purporting to respond to three areas of concern raised at the meeting and in the letter of 26th March,2019.



- g. The Respondent averred that at the meeting the Respondent was represented by Dr. Dorris Macharia and Josephine Trenchard both of whom had attended the meeting of 26th March, 2018 and the Associate Director, Enterprise services of the Respondent, Lydia K Odongo as committee members while the Claimant was represented by Patrick Muthee the Director of Procurement and CMS of the Respondent.
- h. The Respondent further averred that in light of the evasive answers given by the Claimant in her letter of 1st April, 2018 especially having regard to the Claimant's duties and responsibilities as set out in the job description, the committee members endeavored to get the Claimant to properly address the three concerns as set out before. That the committee members did not raise any new matters but the questions were relevant to the three concerns raised which she declined to answer the questions put to her.
- i. The Respondent averred that after considering the Claimant's letter of 1st April, 2019 and the statements made by the Claimant at the hearing the members of the committee resolved to terminate the employment of the Claimant by the payment of one month's salary in lieu of notice. That the Claimant was not summarily dismissed and Peter Mwarogo was not the direct supervisor of the Claimant but he was under investigation in connection with falsification of the information provided to NASCOP/USAID/CDC and he resigned on 31st March, 2019.
- j. The Respondent further averred that Dr. Macharia, Ms Trenchard and Ms Odongo were qualified and competent to conduct the hearing on 1st April, 2019 and to take decisions regarding the termination of the employment of the Claimant. That the Claimant had a right of appeal which she exercised. That the Claimant had full access to all the information and records relating to the falsification of the data submitted to NASCOP/USAID/CDC and knew from item 2 of the Respondent's letter of 26th March, 2019 that the concerns related to the data from the Nakuru Hospital. That Ms Odongo did not have any conflict of interest and no decision had been taken before the hearing of 1st April, 2019.
- k. The Respondent finally averred that the Claimant did not suffer any loss or damage as alleged and hence not entitled to the prayers sought in the claim and prayed that the same be dismissed with costs.

Evidence

- 4. The Claimant's case was heard on 29th November, 2023 and 19th March, 2024 where the Claimant testified as the sole witness while the Respondent's case was heard on 19th March, 2024 and 16th October, 2024 where three witnesses testified.
- 5. The Claimant herein (CW1) adopted her witness statement, supplementary witness statement together with the pleadings and documents filed in court as her evidence in chief. CW1 testified that she currently worked for Ampath where she holds the same position she held for the Respondent which is funded by the same donor.
- 6. In cross-examination CW1 confirmed that she was the COP of Afya Nyota ya Bonde funded by USAID a position approved in December, 2018 and before that she was acting COP. That she was to oversee planning, M& E and reporting as well as work with USAID requirements.
- 7. CW1 confirmed that the Respondent provided regular reports to USAID on the program. That the Respondent used to upload HIV Patients data to the USAID program known as DATIM which



- uploads were not from daily activities register but from the Hospitals where the daily activity register was part of them.
8. CW1 confirmed that she was aware of the rapid response initiative by the Respondent in August to assess the quality of the report from the hospital. CW1 confirmed that the report revealed 1,675 more patients than what was reported on daily activities register. That the email from Lydia talked of a problem at Nakuru and Nanyuki hospital and USAID indicated it would conduct data quality assurance Audit in August 2018. That the audit was pushed to 19th and 20th September. That she was already aware of discrepancies in the two hospitals.
 9. CW1 confirmed that she thanked her team for DQA score of 95.4% and the discrepancy was reduced as some of the registers were not together and the team put them together. That most results did not match with source documents.
 10. CW1 confirmed that she called for a meeting on 26/9/2018 where Lydia wanted they discuss the discrepancy in the data as she felt it was manipulated. That she never declined to give Lydia a chance or ever asked her to leave the meeting as she opted to leave the meeting instead of waiting for her chance where everyone contributed. That she was not aware of any investigations over data manipulation at this point.
 11. CW1 confirmed about the email complaining how investigation was being handled and she acknowledged the discrepancy in Nakuru data. That she informed the Country Director her supervisor who she did not know left the Respondent by resigning.
 12. CW1 confirmed that she met with Dr. Dorris and Josephine who informed her disciplinary action was being considered against her. She was accused of falsification of data. She attended disciplinary hearing accompanied by her colleague Patrick Muthee and answered to the charges where she answered that she was not aware of reconstructed numbers.
 13. CW1 confirmed that the three questions referred to DQA process. That she received her termination letter after disciplinary hearing and paid in lieu of notice. She was informed of her right to appeal which exercised and the Appeal was rejected.
 14. In re-examination CW1 clarified that key personnel were proposed by the primary organization and USAID approved. That COP and M& E specialist were key personnel and her role in connection to the data was overseeing key personnel. That the primary responsibility for data collection was M & E director. That she did not deal with primary register but dealt with collected reports.
 15. CW1 clarified that the donor had reports for January-July and DQA took place in September. That Lydia was the M&E Director then. That DQA process was guided by M&E Director. That Lydia requested for the RRI for Nakuru where there were several reporting areas. That RRI was conducted on 27 facilities to check preparedness.
 16. CW1 clarified that the USAID did not give them details of 95% score. That the team worked hard for the score and over reported the numbers but did not falsify due to the register which was not updated yet. DQA used source documents. That she took it upon herself by calling a meeting to correct the discrepancy.
 17. CW1 clarified that the donor and the Director were aware of the corrective measures she took by the time of disciplinary hearing in September and that the data was corrected. That the three questions put to her were about DQA process and she was not part of the same. That there were errors in the data but not falsified. That at the hearing she was given new documents and she asked for more time which was denied. That she was not aware of any investigations by OCIA.



18. The Respondent on the other hand called the first Witness Lydia (RW1) who said she was the Respondent's Regional Technical Advisor. RW1 adopted her witness statement and the Respondent's documents as her evidence in chief. RW1 testified that RRI was important to verify the quality of data collected. That the target area was HIV care and treatment. That DQA was done to compare periodically, data reported and source documents. That RRI was performed by a team. The clinical team was headed by the Claimant while M& E team was headed by herself.
19. RW1 testified that reporting to USAID was done quarterly. That in August 2018 they received information that NASCOP, USAID and CDC intended to conduct DQA. That they had earlier conducted RRI for several facilities including Nakuru where the team observed there was discrepancy between value reported and daily activity register.
20. RW1 testified that COP was informed of the discrepancy and as the heads of the two teams they sent parties to cross check ahead of USAID report. That she compiled a report after the teams visit. She testified that when the Nakuru hospital reported having attained 95% score everyone celebrated apart from her and she became curious. That she was informed by Osoti, M& E officer that while she was away on leave that a meeting was held to correct the discrepancy in the daily activity register. RW1 testified that the Daily Activity register allowed for 18 entries and Osoti said that copies of the registers were made and additional insertions made.
21. In cross-examination RW1 confirmed that she was M & E Director then and she got into current role in 2019. That the Claimant had left when she got in the current role which was a promotion. That she had worked for the Respondent for 17 years and she was a key personnel.
22. RW1 confirmed that it was not her role to make entries in the Daily Activity register and neither the Claimant. That she could not talk for Osoti and did not know if he could falsify the data as no staff was permitted to falsify data and if so it was disciplinary offence. That the errors were not at Nakuru alone as there were other hospitals as well where there was discrepancy between MOH731 and the Daily Activity Register. (DAR).
23. RW1 confirmed that she visited the Nakuru Hospital after the RRI revealed the discrepancy. That they did a physical recount of the register and established there was a discrepancy of 1,675 and the records officer could not explain the same. That 95% was erroneous as was based on wrong indicators
24. RW1 confirmed that she did not attend the Claimant's disciplinary hearing as it was not within her scope. That she was not involved in the audit process and her work relationship with the Claimant was good even outside work. That the relationship got acrimonious sometimes in 2017 and the Claimant was not her supervisor but supervised her in that project. That she was never supervised by Country Director and did not work for USAID project.
25. RW1 confirmed that she reported to FHI Officer in DC and that she did not handle any projects at the moment.
26. RW2 was Dr. Dorris Macharia who adopted her witness statement and the Respondent's documents as her evidence in chief. In cross-examination RW2 confirmed that she was the regional Director for EA and Southern Africa FHI 360. That she was overseeing Respondent's operations in the region including Kenya. That she was aware of the Respondent's disciplinary procedure.
27. RW2 testified that the Claimant was reporting to Josephine Trenchard Director EA where she was the acting COP but promoted to COP in December, 2018. That the Claimant was the acting COP when the accusations arose.



28. RW2 confirmed that the Claimant was issued with show cause letter which she responded to and was invited to disciplinary hearing which she as well attended. That the Claimant had in her possession all the documents needed. That Director M& E was reporting to the COP and her role was to oversee M& E under COP.
29. RW2 confirmed that daily registers were under COP. That she was in-charge of Claimant's disciplinary process. M& E director was to ensure the right tools and indicators were in place and to oversee the project meets targets. That the Claimant knew the DQA had issues. The Director M & E was on leave that time and they did not call the said director as the Claimant was the one responsible. That she congratulated the team for passing with 95% which was not true.
30. RW2 confirmed that she chaired the session attended by Josephine and that Peter Mwarogo could not attend as he was also implicated in the falsification of data and he resigned before disciplinary process was undertaken. That the issues at the hearing were about handling the project and the Claimant was responsible.
31. RW2 confirmed that Josephine replaced Mwarogo as the Claimant's supervisor. That the Claimant asked for more time to respond and she was not provided with new additional documents as she had all the documents as the custodian of the documents. That the documents were not new to the Claimant. That she was not bombarded with documents and that DAR was known to her earlier prior to filing of suit.
32. RW2 confirmed that the Claimant had 6 days to the hearing and could get all the information needed. That there was no need to extend time as the Claimant knew about the documents and the reports. That she was aware of the charges. That OCIA requested to meet with the Claimant. That she was not part of the investigation team.
33. RW2 confirmed that the Claimant conceded that she was aware of the discrepancy in the collected data. That she was not supposed to key in data as her role was to oversee the activities of the Project.
34. In re-examination RW2 clarified that the Claimant was terminated after the hearing and Peter Mwarogo resigned in March, 2019. That at the February meeting the Claimant was aware of the RRI and discrepancy in the register. That it turned out there were two DARs.
35. RW3 was Carolyn Limo the Health Records and information Officer at Nakuru Hospital. She produced the Daily Activity Register (DAR) for June 2018 as her evidence in chief which tallied with the original register produced in court.
36. In cross-examination RW3 confirmed that she was the one in charge at the registry. That the person keying in should do so as patients come in. That there were data clerks employed by USAID to only capture the HIV data.
37. RW3 confirmed that there were chances of errors which was collected through DQA and that reports were generated by data clerks. That from the registers the Claimant had no role on data entry and numbers vary from time to time which was normal. That errors were caused by wrong entries. That they were collected within a period of time.
38. RW3 stated that she did not know about the score and heard that the reports generated were not correct. That there was no official communication. That access to data must be authorized through medical superintendent. That the documents need to be certified.
39. In re-examination RW3 clarified that she never saw the data being reported to USAID. That if there was discrepancy between data reported to USAID and DAR then the DAR prevailed.



CLAIMANTS' SUBMISSIONS

40. The Claimant's Advocates S.K Oloo & Co. Advocates filed written submissions dated 5th November 2024 and on the issue of whether termination was unfair and unlawful, counsel submitted that the disciplinary proceedings, the events leading to the proceedings and the events post the proceedings compounded the unfair and unlawful nature of the Claimant's termination of employment.
41. Counsel submitted that on the events leading to the disciplinary proceedings, it was the Claimant's testimony that the Respondent had already decided to terminate her services and the disciplinary hearing conducted on 1st April 2019 was just but a coronation. Counsel submitted that the refusal by the Respondent to supply the documents together with the recording of the skype call meeting that was being taped amounted to treating her unfairly and as such the only conclusion that can be inferred is that it had already made up its mind to terminate her employment and supplying them would have mounted an explanation/ defence. Counsel relied on the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR and submitted that the Respondent failed to meet the 3 ingredients of procedural fairness.
42. On the charges vide letter dated 26th March 2010, counsel submitted that the charges leveled against the Claimant were ambiguous and general in nature they did not stipulate the period subject of the data to enable her respond with specificity if at all she was aware of the issues in the first place. That the Claimant's response was sufficient based on how the issues subject of the disciplinary proceedings were framed.
43. Counsel submitted that the show cause letter did not indicate, mention or allege that the extracts from the register report was attached, closed or supplied or delivered to the Claimant. That in her letter of appeal the Claimant lamented about failure by the Respondent to supply her with the certified extracts from the register and there's no evidence on record that the Respondent obliged.
44. On the purported reconstructed Daily Activity Registers, counsel submitted that the time given to the Claimant to prepare and attend the hearing was too short of 5 days as the Respondent itself took close to two years after filing suit to obtain the Daily Activity Registers.
45. Counsel submitted that the filing of the DARs would only be made possible subsequent to the Respondent's Application dated 10th June 2021 seeking to file additional documents after filing of pleadings had closed and, in any case, the documents it sought to be allowed were screenshots and not originals followed by a ruling by Hon. Lady Justice Monica Mbaru directing the originals to be produced upon witness summons issued to the CCC Data Clerk at Nakuru Provincial General Hospital to produce at the hearing.
46. Counsel submitted that although Mr. Ouma was eventually not called by the Respondent as a witness, it is his report and the documents he obtained from the Nakuru PGH that the Respondent eventually relied on to form the foundation of the case against the Claimant herein and to justify her termination.
47. On the custody of the Daily Activity Registers, counsel submitted that all the witnesses who were called agreed that the DAR's are the property of the Ministry of Health as collated from various hospitals around the country. All the witnesses confirmed that the Claimant never interacted with the registers either as acting COP or COP. That data management was under M & E docket held by Lydia. That instead of correcting the errors in her docket she behaved like whistleblower by reporting the Claimant. That Ms. Limo testified that the data used to be keyed in by data clerks. That errors could occur.
48. On the composition of the Disciplinary Committee, counsel submitted that the committee as constituted lacked competence to interrogate the technical monitoring and evaluation aspects of the



process it purported to undertake, it failed to include an internal and independent subject matter expert in knowledge management, monitoring and evaluation, in addition to a person with a good understanding of the program data issues. That none of the members of committee had the technical knowhow to understand the issues they were purporting to grill the Claimant on.

49. Counsel relied on among others the case of the case of Judicial Service Commission v Gladys Boss Shollei and another [2014] eKLR, and submitted that the test is objective and the facts constituting bias must be specifically alleged and established. That all factors considered, the Respondent showed extreme bias against the Claimant in terminating her employment.
50. On the Disciplinary Proceedings, counsel submitted that the Claimant was not given an opportunity to be heard. Counsel relied on among others the case of Anthony Mkala Chitavi v Malindi Water and Sewerage Company limited [2013] eKLR and submitted that the ingredients of procedural fairness as within the Kenyan situation is that the employer should inform the employee as to what the charges the employer is contemplating to use. That without affording the Claimant a chance to air her defence during the disciplinary hearing meant that the dismissal was not done in accordance with a fair procedure as required under Section 45(2)(c) of the *Employment Act*.
51. Counsel submitted that the Respondent did not have any valid reasons in its Letter dated 3rd April 2019 warranting her dismissal under Section 43(1) of the *Employment Act* and has not proved the same as required under Section 45 of the Act. Counsel relied on the case of Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR and submitted that the right to fair hearing under the common law is a general right and universal.
52. On the Process of obtaining the DARs, counsel submitted that the Ministry of Health (MoH) and the Hospital does not allow any organisation to access Patient Level Data without seeking permission in writing and certified copies of the same issued by the Hospital and a letter signed by MoH approving their issuance accompanying the same.
53. Counsel submitted that in order for the said documents to be relied upon by the court as evidence therefore, the Respondent must attach a letter from the Respondent to the Hospital and MoH Requesting for certified copies of the Daily Activity Registers; a Clearance letter from the Medical Superintendent - Nakuru PGH approving their access and use in Court, the County Director of Health as well as a clearance letter from MoH approving their use.
54. Counsel submitted that the Claimant's averments were confirmed by Ms. Caroline Limo, the Nakuru PGH's Health Records and Information Officer in her testimony on oath where she stated that for documents to get out the facility; they have to be an approved request and that the documents are certified as true copies of the originals which was not the case as documents presented by the Respondent were neither certified nor was there a letter requesting for the same implying they are in illegal possession of official hospital documents. That the Respondent illegally terminated the Claimant's employment and then went on a frolic to look for evidence to justify its action.
55. On the issue of whether the Claimant is entitled to the prayers sought, counsel submitted on all the prayers and equally submitted on abandoning prayer (g) as subsequent to the filing of this suit, the Respondent issued the Claimant with the Certificate of Service.

Respondent's Submissions

56. The Respondent's Advocates Hamilton Harrison & Mathews filed its submissions dated 28th November 2024 and on the issue of whether there were fair and valid reasons for the termination of the Claimant's employment, counsel relied on among others the case of CFC Stanbic Bank Limited



- v Danson Mwashako Mwakuwona [2015] eKLR and submitted that when considering whether the Respondent had valid grounds for termination, a court must simply consider whether a reasonable employer could have decided to dismiss based on the facts of the case.
57. Counsel submitted that in line with section 43 (2) of the *Employment Act*, 2007 which provides that the reason(s) 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.
 58. Counsel submitted that RW2 testified that when the information regarding the preparation and production of a second set of DARs reached the management of the Respondent, investigations were carried out by a team from the Respondent's head office in the United States of America. As a result of the investigations, RW2 and Josephine Trenchard, the Claimant's supervisor, met with the Claimant on 26th March 2019 and informed the Claimant that the Respondent was considering disciplinary action against the Claimant.
 59. Counsel submitted that RW2 further testified that the Claimant was informed that there would be a hearing on 1st April 2019 and that the Claimant responded by a letter dated 1st April 2019 in which she responded to the 3 issues raised by the Respondent. That the Claimant's response to the letter dated 26th March 2019 was not satisfactory and having regard to the evidence was not truthful.
 60. Counsel submitted that RW2 testified that in light of the Claimant's emails of 20th and 21st September 2018 it was clear that the Claimant was aware of the problems in the data reported for Nakuru PGH and that the Claimant had spent long hours working at Nakuru PGH to ensure the data presented to USAID did not have the gaps which were noted during the RRI thereby obtaining the high score of 95.4%.
 61. Counsel submitted that RW2 further testified that the disciplinary committee members tried to get the Claimant to clarify the answers in her letter dated 1st April 2019, but the Claimant was hostile and repeatedly declined to answer the questions put to her during the disciplinary hearing.
 62. Counsel submitted that having regard to all the information made available to the disciplinary committee it was resolved that the Claimant had failed to honour her obligations as set out in her job description. Counsel relied on the case of Robert Kenea & another v Ocean Sports Resort [2015] eKLR the standard of proving the reason for termination is all about what the employer personally and genuinely makes out of the conduct of the employee.
 63. Counsel relied on the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR and submitted on the burden of proof of misconduct that is sufficient for an employer to take disciplinary action.
 64. On the issue of whether the Claimant was terminated in accordance with fair procedure, counsel submitted that the Claimant was given notice of the issues she was required to address at the disciplinary hearing and was given 5 days to prepare for the hearing and had full knowledge of all the matters raised in the letter of 26th March 2019.
 65. Counsel relied on the case of Henry Isaiiah Onielo v Maridadi Flowers Limited [2015] eKLR and submitted that sufficiency of time to prepare for a disciplinary hearing depends on the circumstances of each case.
 66. Counsel submitted that the disciplinary committee that was appointed to hear the Claimant comprised RW2 who was the Regional Director, East and Southern Africa Regional Office, Josephine Trenchard, the Director, East Africa Region and the Claimant's direct supervisor and that the Claimant's assertion



that Peter Mwarogo was her supervisor was not correct. That at the hearing of 1st April 2019, the Claimant was given ample opportunity to respond to the 3 issues raised by the Respondent but repeatedly failed to do so.

67. Counsel submitted that the Claimant's allegation that the disciplinary committee introduced new issues during the disciplinary hearing is not supported by the evidence. That RW2 testified that the committee members did not raise any new matters and that she did not accept that the Claimant could have been surprised by the questions the committee posed as the questions sought to have the Claimant give information on her role in relation to each of the concerns raised by the Respondent.
68. Counsel relied on the case of Joseph Onyango Asere versus Brookside Dairy Limited [2016] eKLR, and submitted that internal disciplinary proceedings are not similar to court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.
69. Counsel submitted once it was resolved that the Claimant's employment should be terminated by giving one month's notice; the Claimant was issued with a termination letter. The Claimant exercised her right of appeal by a letter dated 16th April 2019 the Claimant was informed that the decision of the disciplinary panel was upheld.
70. On the issue of whether the Claimant is entitled to the reliefs sought, counsel submitted that the Claimant had not proved any of her claims. That the Claimant was not entitled to 12 Months compensation for unfair termination as she was fairly terminated. That the Claimant was not entitled to any gratuity as it was not provided for under her contract or CBA. On the claim for leave days counsel submitted that the claimant was paid for the same in her terminal dues.
71. On the claim for remainder of contract counsel submitted that there was no basis for the same and the maximum the court can award is 12 month's compensation while relying on the case of Kenfreight(E.A0 Limited v Benson K Nguti(2019) eKLR.
72. Counsel submitted that the Respondent had discharged the burden of proving that the termination was fair and for valid reasons and that all provisions of the law were observed. That the claim ought to be dismissed with costs to the Respondent.

Determination

73. 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.
74. The Court has come up with two main issues;
 - a. Aa. aa. Whether the Claimant was unfairly terminated.
 - b. Whthe Whether the Claimant is entitled to the reliefs sought.

(a) Whether the Claimant was unfairly terminated

75. In this case, it is the Claimant's case that the Respondent terminated her service on 3rd April, 2019 for invalid reasons as well as unprocedurally. According to the claimant, the Respondent had already made up its mind to terminate her service on the allegations of falsified data in the Daily Activities Registers (DAR) produced to DQA.
76. The Respondent on the other hand alleged that the Claimant as the Chief of Party (COP) and the one overseeing the USAID project contributed to the falsified data where there was discrepancy of 1,675



- HIV patients more than what was in the DAR. That the Claimant was aware of the discrepancy but she did not communicate the same to her immediate supervisor.
77. It is now an established principle that for a termination to be fair the employer must show that it had valid reason for doing so and that the termination was carried out through a fair procedure. The Court of Appeal in the case of Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR emphasised this requirement.
78. Section 45 of the Employment Act is clear that where there is no valid and fair reason, such termination will be deemed unfair. The Act further envisages under section 43 that the reasons that caused the employer to terminate the services of an employee must be those that the employer genuinely believed to exist. In this case the allegations in question were those of DAR entries for June 2018. The claimant faced three charges namely:
- i. The data submitted to NASCOP/USAID/CDC reviewers in connection with USAID/MOH data quality assurance DOA exercise for the Afya Nyota Bonde HIV Service Delivery support activity (HSDSA) contained falsified data.
 - ii. That a second daily activity register (DAR) for Nakuru Provincial Hospital had been created by HSDSA team using reconstructed numbers.
 - iii. That you were aware of the matters set out in 1 and 2 above and failed to report these to the Director East Africa or the Office of Compliance and Internal Audit (OCIA).
79. The allegations arose when the Claimant was the acting COP before she was promoted to COP in December, 2018. The claimant's key responsibility as per her job description included:
- i. Being the primary liaison with USAID and management of project staff and implementing partners to ensure proper reporting, financial management and compliance.
 - ii. The essential job function was described as overseeing all aspects of the program implementation and management, providing strategic leadership to design and implement HIV Service Delivery activities and oversee program planning, monitoring, reporting and evaluation.
80. The issue in contention that gave rise to the disciplinary hearing that culminated in the termination of claimant's service was the increased numbers of HIV patients recorded in the DAR which the Respondent termed as falsification of data. The claimant in her evidence before the court acknowledged that the report revealed 1,675 more patients than what was reported on daily activities register (DAR) and that the email from Lydia talked of a problem at Nakuru and Nanyuki hospitals and USAID indicated it would conduct data quality assurance Audit in August 2018. That the audit was pushed to 19th and 20th September, 2018.
81. The claimant in her email dated 21st September, 2018 (p4 RBD) commenting on the DQA for Nakuru and Turkana stated that
- “ the scores are good, and a lot of work went into this achievement, I really appreciate the good work done by the MDTs. Most of the reports in almost all the sites were not matching with source documents. We thus need to put our house in order soonest, starting with PGH as discussed last week...”
82. The claimant was the Acting COP and was the overall supervisor of the project activities. She acknowledged the problem and before verification she proceeded to congratulate her team for a score



of 95.4% which turned out to be inaccurate. The claimant's contention that there were data clerks employed for that role did not absolve her as the Acting COP as per her job description set out above. The witnesses acknowledged that there could be errors and the Claimant stated that when the discrepancy was noted via the Rapid Response Initiative (RRI) done in July, 2018 she called for a meeting in September, 2018 and her team embarked on correcting the discrepancy where it was discovered that there were DAR's left out which had to be reconciled and the team came up with a second DAR with corrections. The respondent doubted that authenticity of the second report which it thought was falsified and had reconstructed numbers.

83. The Claimant acknowledged that the DQA did not give details of how the score was achieved but she attributed the same to the corrections to the Records. The Claimant's role involved submitting the reports while dealing with collected data. The M&E Director, Lydia was reporting to the Claimant as the Acting COP. Lydia in her evidence stated that she wondered if she could go on leave in view of the pending RRI but the claimant allowed her to proceed on leave. The claimant therefore took full responsibility for the integrity of the data reported which data the claimant congratulated her team for only to turn out as inaccurate.
84. The respondent as an employer placed premium on data integrity for its activities and programming. The Claimant according to her job description was made ultimately responsible for ensuring that the data met the standards required by the respondents hence could not pass the back to anyone else. An attempt to blame the M&E Director for the inaccuracies in the data which she had celebrated did not add up. No evidence was tendered in court of any queries raised with the M&E Director or staff under her supervision over the inaccuracy or otherwise of the data she celebrated.
85. The reasons for which an employer can terminate an employee's service are provided under section 43 of the Act as those which the employer genuinely believed to exist and caused the termination. There was clear and reasonable evidence that the data which the claimant celebrated were exaggerated and therefore compromised the integrity of the HIV data that the respondent could have relied on for its activities and programming. Lord Denning in the case of *British Leyland UK Ltd v. Swift* [1981] IRLR 91 observed thus:
- 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, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other 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"
86. In this particular case the Court takes the view that the respondent acted reasonably in dismissing the claimant and finds no reason to disturb the decision to dismiss.
87. Concerning the termination process, this is provided for under section 41 of the *Employment Act*. The Court of Appeal in the case of *Janet Nyandiko vs. Kenya Commercial Bank Limited* [2017] eKLR held as follows;

"Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in



the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

88. The Claimant was issued with a show cause letter dated 26th March,2018 with three allegations set out earlier in this judgment. She which was to respond to by 1st April,2018. She did respond to the show cause letter which response the respondent found unsatisfactory. She was subsequently invited for the disciplinary hearing and she attended with a colleague of choice.
89. Although the claimant averred that she was not furnished with the documents in support of the charges against her, the claimant was fully aware of the issue in question which was data integrity in the DAR and which she had earlier acknowledged in her email dated dated 21st September, 2018. It could therefore be safely assumed that the claimant was fully aware of the charges against her and what they entailed to adequately participate in the disciplinary hearing. The request for more documents was therefore just an attempt to buy time.
90. The Court is therefore satisfied that the procedure for the termination was proper and in accordance with the respondents HR Policy and Manual. No prejudice was occasioned to her.

Whether the Claimant is entitled to reliefs sought.

91. On the prayer for remainder of the project which was to end on 7th December,2022 of Kshs 43,875,000/- this court notes that the contract provided for termination clause which could be utilized by either party. The same is found unwarranted as the employment relationship could have ended in any other ground other than the termination. The same prayer fails.
92. The Court having found that the respondent had valid reasons for the termination of the claimant’s service and that the termination was carried out through a fair procedure and further that the claimant was paid her terminal dues as per the termination letter, the claimant is not entitled to any of the reliefs sought.
93. The claimant’s claim is therefore found without merit and is hereby dismissed with costs
94. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF MARCH, 2025

DELIVERED VIRTUALLY THIS 7TH DAY OF MARCH, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

