



REPUBLIC OF KENYA



Ngugi & 16 others v Safaricom PLC (Employment and Labour Relations Cause 1565 of 2018 & Cause 70 of 2019 (Consolidated)) [2025] KEELRC 1521 (KLR) (26 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1521 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

**EMPLOYMENT AND LABOUR RELATIONS CAUSE
1565 OF 2018 & CAUSE 70 OF 2019 (CONSOLIDATED)**

MN NDUMA, J

MAY 26, 2025

BETWEEN

JOHNSON NGUGI 1ST CLAIMANT
RICHARD ALENGA INYUMILI 2ND CLAIMANT
MARFTIN MUTUMA MIRITI 3RD CLAIMANT
JAMES OMONDI ONYANGO 4TH CLAIMANT
JAMES NGUTHU MUSYOKA 5TH CLAIMANT
HELLEN WAMBUI MBUURU 6TH CLAIMANT
HAWA WANJIKU ALI 7TH CLAIMANT
GEORGE KARIUKI NJERU 8TH CLAIMANT
ERIC MWENDA MUTUMA 9TH CLAIMANT
CRISPUS GACHUHI WACHIRA 10TH CLAIMANT
BISMARCK SHIMULI LITIEMA 11TH CLAIMANT
ANTHONY OPIYO 12TH CLAIMANT
ANGELA SANJA SIRENGO 13TH CLAIMANT
PAUL KEERU GAKINYA 14TH CLAIMANT
BENARD KIBET RONO 15TH CLAIMANT
CHRIS MUASYA MUVAKA 16TH CLAIMANT
HARUN KITHINJI MBAE 17TH CLAIMANT

AND



JUDGMENT

1. The 17 Claimants filed suit on 29th November 2018 and 5/2/2019 against Safaricom PLC, the respondent seeking the following reliefs: -
 - i. Unlawful, unprocedural, unfair and discriminatory termination of service.
 - ii. Violation of the Claimants' rights under section 31, 35, 41, 44 and 45 of the Employment Act, 2007; Articles 10, 27(5), 28, 41 and 50 of the Constitution of Kenya 2010
 - iii. Express and implied breach of the employment contract
 - iv. Violation of the rules of natural justice and asks the following reliefs set out in the statement of claim: -
 - a. A declaration that the Claimants' termination of employment was unfair, wrongful, unprocedural and unjust
 - b. Compensation twelve (12) months'
 - c. One month salary in lieu of notice
 - d. House allowance
 - e. Per diem
 - f. General damages
 - g. Exemplary damages for inhuman treatment and oppressive action
 - h. Loss of future earnings
 - i. Costs and interest
2. Cause No. 1565 of 2018 and 70 of 2019 were consolidated. The particulars of the suit are fully set out and elaborated in the statement of claims and verified by Antony Opiyo the 12th Claimant in his verifying affidavit sworn to on 27th November, 2018.
3. The Claimants further filed authority to swear court process by the said Anthony Opiyo on their behalf in respect of the suit. CW1, the 4th Claimant testified on behalf of all the Claimants under oath and relied on a witness statement filed on 29/11/2018 together with the witness statements of all the Claimants in the suit.
4. CW1 testified that the Claimants were all appointed by the Respondent to the position of Area Sales Manager with the Consumer Business Unit on diverse dates set out in their respective witness statements. That the Area Sales Managers served different designated parts of Kenya earning different salaries as stipulated in the various witness statements. The contract of service provided one month termination notice or one month salary in lieu of notice.

The Project

5. That sometime in October 2016, the Respondent piloted an Electronic Subscriber Registration Project ("the project") to deploy electronic subscriber registration using Huawei Y3 11 devices to



- be used for digital sub-registration and ensure compliance within the know your customer (KYC) Regulation.
6. That all the Claimants that were part of the distribution team that piloted the project gave feedback to the Respondent's distribution channel department through calls, meetings and trade feedback during market visits during the pilot phase and subsequent roll out of the project.
 7. That after the pilot phase, the Claimants being Area Sales Managers (ASMs) raised issues as feedback to the Respondent as follows: -
 - i. The devices were not locked to the Safaricom network, P-PESA tills and respective location BTS.
 - ii. The devices were not blocked from accessing social media sites such as WhatsApp, Twitter, Instagram or Facebook and hence they were subject to misuse by the end users who were the dealers, M-PESA agents and sub-agents.
 - iii. No risk analysis had been carried out before roll out of this major business project and mitigated;
 - iv. Key learnings on this pilot project should be acted upon before full roll out.
 - v. The registration application ("the App") could have been allowed access from personal devices as opposed to issuing for free devices which would be subject to misuse;
 - vi. The business could cost share the cost of the device with M-PESA agents so as to drive ownership;
 - vii. The massive roll out of the project could be staggered to mitigate losses;
 - viii. A device management system should have been deployed to lock the device for use by only whitelisted M-PESA agent lines;
 - ix. There should be a phased roll out and learnings from the project;
 - x. The Respondent's sub-registration application was unstable hence there were instances where the said Respondent reverted to its old USSD system of 180# for subscriber registration;
 - xi. The old USSD system of 180# was still open for use simultaneously within the new App which led to confusion among the end users.
 - xii. There were no accountability systems such as documentation for use during the distribution of the devices.
 8. CW1 testified that the Respondent's management did not take any action based on the feedback given to them by the Claimants but instead proceeded on a national roll out of the devices totaling about 90,000 some of which was handed over to the Area Sales Managers including the Claimants from December 2016.
 9. That the said distribution was carried out in a haphazard manner in that:
 - i. the devices were sent directly to the Area sales Managers via courier without proof of dispatch or any documentation to indicate receipt of the device by the Claimants, such as a pick list and
 - ii. the device sent to the Claimants were physically pre-loaded with the registration App which involved physically opening the package, pre-loading the App and re-packaging the phone for



dispatch via courier. That this led to mismatch in serial numbers between the numbers in the phones and the packaging.

10. That the Claimants ensured the distribution and activation of all devices assigned to them which were signed for by Agent/Dealers using the indemnity forms. That copies of the indemnity forms were sent to the Respondent's Ms. Rita Mwadime (Dealer Management).
11. That despite the project lacking proper structure, CW1 and the Claimants took the following measures out of their own initiative: -
 - i. Coming up with personal record keeping and control measures when the TDRs were collecting the devices from the retail outlet though the filling of indemnity forms and pick lists.
 - ii. Ensuring that the indemnity forms provided by the Respondent were duly signed by the M-PESA agents or their staff members and witnessed by the TDRs.
 - iii. Ensuring that the signed indemnity forms were shared with the Distribution Channel Department for storage.
 - iv. In addition to the indemnity form, the claimants went out of their way to create a soft database/master list.
 - v. Training the TDRs and the M-PESA agents and their staff on the usage of the devices as required.
 - vi. Created specific feedback channel such as WhatsApp groups for subscriber registration per TDR cluster
 - vii. Providing oversight over the project through daily TDR route rides, random outlet checks and developing daily activation reports as well as analyzing usage reports shared by the Dealer Management Team, Distribution Channel Department for course correction and performance.
 - viii. Use of the available resources and abilities to execute the project and ensure KYC compliance in line registration.
12. That just like CW1 and the Claimants had noted and reported during the pilot phase, the Claimants noted the following systemic failures during the national roll out of the project:
 - i. The devices were not locked to the Respondent's network, M-PESA tills or to the respective locations' BTS.
 - ii. It was therefore impossible to provide system-based monitoring or evaluate their usage by the devices custodian, that is the M-PESA sub-agents.
 - iii. The M-PESA sub-agents did not have a contract with the Respondent and the Respondent did not have exclusivity in the sub-agents stores.
 - iv. The devices were not locked from accessing social media sites such as WhatsApp, Twitter, Instagram or Facebook.
 - v. During the project, they received business intelligence (BI) reports showing only the count of active and inactive devices pers sales area. These reports did not contain the device IMEI/Serial numbers of the devices, making it impossible for the claimants to utilize them to activate the inactive devices. The missing serial and agent numbers were never availed by the Respondent's



management despite several requests to avail them yet this information was available to the Respondent.

- vi. In addition, these BI reports were inaccurate and inconsistent.
 - vii. The devices received from time to time had different serial numbers such that the serial numbers on back of device versus serial listed on the packaging box were different.
 - viii. There were inconsistencies noted on serial numbers provided by the risk department versus the serial numbers provided by the dealer management team.
 - ix. The old and the new registration systems were running concurrently hence undermining the success of the project.
 - x. The indemnity forms did not have a clause on restriction of use.
 - xi. Some IMEIS were duplicated
 - xii. Some devices were labeled as inactive yet they were active as shown by screen shots of the devices.
 - xiii. It was therefore impossible for the claimants to provide system-based monitoring of the usage of the devices given the above-noted gaps. In fact, the Claimants had no resources or technological equipment to do so.
13. CW1 stated that all the Claimants' executed their job well as per their job description. However, while working in January 2018, the Claimants' received an email/memo from the Respondent's Internal Audit and Risk Division to account for some devices. Then CW1 and other Claimants responded to the queries by preparing and sending to the Respondent a reconciliation statement accounting for the devices that were issued to each one of them. That there was no feedback from the Respondent on their response.
14. That on or about May 2018, the Claimants received calls from the Risk Division summoning them to the Headquarters of the Respondent to account for the devices. That the Claimants were coerced to record statements which were largely dictated to them. That there were no clear instructions from Risk Division on the format of reconciliation required. That the Risk officers demanded that the Claimants physically bring the unaccounted-for devices in two (2) days despite challenges the project had experienced and the fact that: -
- i. The roll out had taken more than a year to implement while they were only being given 2 days to recover the physical devices from M-PESA agents from the vast sales area that they covered in their area of operation.
 - ii. Some of the TDRs had been transferred while others had resigned. Some had resigned without proper accountability.
 - iii. Some agents were hostile while others had relocated, some had lost or damaged their phones.
 - iv. There was a high turnover of M-PESA agent staff some of who were reported to have left employment with the devices.
15. That CW1 and all Claimants did their best to account for the devices and presented their reports and recovered devices to the Risk Division but they were not given any feedback. That for the devices that were lost, police abstract forms were presented to the said Risk Division by the Claimants.



16. That CW1 and other Claimants were not provided with controls to check whether the devices were used for personal use or on competitor network as alleged by the Respondent.
17. CW1 said that having not received any feedback from the Respondent they had assumed that the Respondent was satisfied with the explanation given. However, to the shock of the Claimants, sometime on 23/5/2018 they received invitation to attend a disciplinary hearing on 30th May 2018.
18. CW1 said that himself and other Claimants were not given any show cause letters detailing the accusations levelled against each one of them. That they did not receive any findings of investigations conducted from the Ethics and Compliance Team yet that formed the basis of the disciplinary action against CW1 and other Claimants that was underway.
19. CW1 said that himself and other Claimants accounted for all devices assigned to them but no response was received from the Respondent.
20. That to their shock and dismay the Claimants received letters of summary dismissal dated 28th June 2018. That indeed all the 39 Area Sales Managers who were involved in the project were summarily dismissed on 28th June 2018 on the grounds of 'Failure to adhere to requirements of ensuring proper distribution, activation and monitoring of the devices as expected.'
21. CW1 and other Claimants appealed the decision to dismiss them summarily. That the Claimants realized later that the appeals had been pre-determined by the Respondent because all their positions had already been advertised, the advertisements cancelled and a promise to the candidates made on the expected date of re-advertisement even before the appeals were concluded.
22. That the Respondent paid CW1 and other Claimants their terminal dues in July 2018 while the appeals were pending. That the Respondent acted in a discriminatory manner by reinstating 5 of the 39 ASMs who had been dismissed in unclear circumstances. That the reinstated staff were: -
 - i. Stephen Maundu
 - ii. Joel Mboga
 - iii. Daniel Gichuru
 - iv. Edward Owiti and
 - v. Abdullfatah Sheikh
23. Furthermore, only ASMs were singled out for dismissal yet there were several other cadres of staff who had contributed to the challenges experienced in the project.
24. CW1 and Claimants denied that they were negligent in their performance but the failures witnessed in the project were as a result of deficiencies in the operational procedures, policy and systems of the project that had been diagnosed and reported to the Respondent during the pilot phase and well set out in the witness statements of Claimants.
25. That indeed, as an indirect admission of these systemic failures, the Respondent upon dismissing the Claimants reverted to 180# system of subscriber registration immediately. The Respondent also immediately introduced a system where the M-PESA agents now buy their own devices for the same project. That currently 3rd party staff (Brand Ambassadors) are able to do registration on their own devices.
26. That the Respondent did not pay the Claimants' house allowance as claimed provided in the letters of employment and as seen in previous pays lips. That the reputation of the Claimants had been ruined



by false accusations and unfair dismissal from employment. That attempts by the Claimants to get alternative jobs has been difficult and unsuccessful. The Claimants pray that the reliefs sought in the claim be granted by the court.

27. By consent of parties, an order of the court was made upon close of CW1's testimony admitting all the witness statements by the Claimants as their evidence in chief. The consent order was signed by counsel for the parties.

DEFENCE

28. The Respondent filed memoranda of response to the consolidated suit in which it admitted the employment of the Claimants and the capacity in which they served. The Respondent denies the rest of the particulars of claim and puts the Claimants to strict proof thereof.
29. The Respondent called RW1, Emmanuel Dibo to testify in defence of the claim. RW1 adopted the witness statements dated 20/11/2019 and 11/4/2020 respectively as his evidence in chief. RW1 also produced exhibits '1' to '17' as exhibits in support of the case.
30. RW1 stated that he was Senior Manager, Fraud Detection of the Respondent company and was aware of the matters set out in the suit.
31. That sometimes in December 2016, the Respondent rolled out a distribution plan of 90,000 Huawei Y311 devices to its dealers, agents and shops. That the Respondent incurred about Kshs. 544.5 million in purchasing the devices which would be distributed for free.
32. That the purpose of the project was to enhance the process of registration of subscribers to the Respondent's network in a bid to comply with regulation "know your customer" requirements. That an application was installed in the devices to enable the registration. That the application had ability to take copies of customers identification document as well as photographs of customers. That the Claimants as Area Sales Managers (ASMs) for various regions had the responsibility to: -
- i. Collect the devices and subsequently oversight over the delivery and activation of the devices.
 - ii. Monitor and report on ground usage statistics by the Respondent's agents and shops
 - iii. follow up on lost and faulty devices.
33. That the Respondent put in place elaborate mechanisms, to assist the Claimants to carry out these responsibilities which included: -
- a. Inventory management
 - b. Documentation in the form of pick list and
 - c. Indemnity forms as evidence of collection and delivery of the devices and
 - d. A returns procedure for faulty devices.
34. In short, the devices were distributed to the Respondent's retail shops by the ASMs. The retail shops served as collection centres for the quantities requested by ASMs. That based on the requests by ASMs a Retail Centre Stock Controller ("RCSC") would circulate sales orders for the devices required with specific ship to location (preferred collection point). ASM was the sales person and the sales order would be attached ID and email allocation list. That RCSC would process and ship the orders once they were booked and ready to transport. That once fully shipped a serialized picklist and delivery note would be printed, ready for collection. A copy would be signed by the ASM and shared on email. That



verification for accurate quantity shipped matched the order and each item was complete before leaving the shop and any item with discrepancy should be rejected.

35. The ASM would deliver the device to the dealers, agents or shops and ensure it was activated and ready to work. In addition, the ASM was to ensure that the dealer/agent were trained on the use of the subscriber registration application.
36. Finally, upon activation the ASM would issue the dealer or agent with indemnity forms for the device containing the terms and conditions of use. The ASM would then return the indemnity form duly signed by the dealer or agent.
37. RW1 said that the ASMs were trained on all the above aspects of the project.
38. The Respondent after some time noted that the requests were either ignored by the Claimants or unsatisfactorily responded to. Additionally, the Claimants. recorded statements to assist in the investigations. RW1 denied that statements were dictated to the Claimants.
39. RW1 said that he is aware, that subsequently, the Respondent commenced formal, disciplinary process against several ASMs including the Claimants. That during the course of that process, the Claimants accounted for additional devices but none of them was able to fully account for all the devices that were issued to them.
40. That as a result of the negligent conduct by the Claimants, the Respondent had a slow uptake of the subscriber registration and this led to an investigation by the Respondent's Ethics and Compliance Department which exercise unraveled several indicators that the objective was not being met which included device not being used on the Respondent's network for subscriber registration activities; devices being used on a competitor network and devices being mapped to individual customers being the Respondent's agents or dealers.
41. RW1 stated that in view of the above the Respondent required the Claimants to account for the devices that were issued to them that exposed it to a financial loss of about Kshs. 6,776,671.40 in addition to potential regulatory exposure for failing to comply with subscriber registration regulation.
42. That the Claimants were dismissed from employment for negligence and their appeals for dismissal were not successful.
43. RW2, Odhiambo Ooko adopted her witness statement dated 11th November 2019. RW2 testified that she was a Senior Manager – Employee and Labour Relations with the Respondent. That she was familiar with the facts of the case. RW2 stated that following conclusion of investigation by the Respondent's Ethics Compliance Department into the irregular distribution of subscriber registration devices by the Claimants,' the Respondent issued invitation letters to the Claimants requiring them to attend a disciplinary hearing. RW2 produced the letter of invitation.
44. That the Claimants' attended the disciplinary hearing where they were afforded opportunity to be heard on the allegation that faced them and to advance their defences. RW1 produced the minutes of the disciplinary hearings marked appendix 5.
45. That during the disciplinary hearing, each Claimant sought for more time to fully account for the devices that were issued to them. However, in spite of being granted more time, the Claimants were still not able to fully account for the devices.
46. That the Respondent found the Claimants guilty of negligence and improper performance of their duties. Consequently, the Respondent summarily dismissed the Claimants. Letters of dismissal were produced as Appendix 8.



47. RW2 further said that the Claimants were afforded a right of appeal. That all the Claimants exercised their right of appeal setting out grounds of appeal produced in appendix 9. That appeal panels were constituted to hear the Claimants appeals. That the Claimants attended the appeal hearing to present their position. The minutes of appeal hearing were produced as appendix 6.
48. That the appeals were however not successful and the summary dismissal of the Claimants were confirmed.
49. RW1 and RW2 were closely cross-examined by Mr. Change, Advocate for the Claimant. RW1 said that though there was no report before court on the feedback given by the Claimants and other Area Sales Managers, there was indeed feedback given to the Respondent on issues noted from the pilot of the project. RW1 said he was not part of the pilot project and did not prepare any pilot report.
50. RW1 said he did not know that Claimants had pointed out crucial information that would have prevented the failures that followed upon roll over of the project because he did not participate in the pilot. RW1 said that the Area Sales Managers remained accountable for all devices distributed despite involvement of other staff including TDRs in the distribution process. RW1 said conciliation of distributed devices and activated registration would be done on weekly basis before the next dispatch by the head office. That this was done by sampling forms to confirm completion and accuracy. That reconciliation was continuous and not an event. That compliance team was not involved in the reconciliation process but only came in when there was an issue. RW1 said he was part of the compliance team and their role was to assure the quality of the project. RW1 said he was not privy to the distribution process and only familiarized himself with the project process during investigation. RW1 said he had not received the pilot feedback even at the time of testifying before court. That the feedback was done to the headquarters. RW1 said he did not have any of the periodic reports made by the Claimant before court. RW1 was unable to explain how the Claimants would ensure the devices are not used in competitor networks. RW1 admitted that the Claimants had no gadget to monitor the use of the devices distributed to dealers and agents. RW1 however insisted that accountability remained with the Area Sales Managers (ASMs).
51. That monitoring was by indemnity forms and there was no technological device to do that. RW1 admitted that there was no device to tell usage in a rival network. RW1 admitted that the compliance team had capacity to know if device was used in other networks. RW1 said they had capacity to lock devices from use in other networks but was not aware if that was lawful. RW1 said that the registration devices were left open and could be used for other purposes including M-PESA. RW1 said the duty given to the Claimants was not impossible because they could also move around in the areas to inspect compliance by the dealer and agent shops and ensure proper use.
52. RW1 admitted that the dealers and agents signed the indemnity forms to indemnify the Respondent from any issues arising from misuse of the device. RW1 said that the Respondent could not discipline the dealers and agents.
53. RW1 said the investigation report is before the court and same was given to Human Resource Department.
54. RW2 said that she also relied on a further written statement dated 11/11/2019 and adopted it as her evidence in chief. RW2 said she had 30 years' experience in HR matters and was aware that the Respondent should have a valid reason to dismiss employees. RW2 said that she chaired one of the disciplinary panels and that she was not part of the investigations.
55. RW2 denied that two days were insufficient to account for the devices because reconciliation was a continuous process. RW2 said all Area Sales Managers were dismissed from employment. That they



had been recruited on merit in an open process. RW2 said that the positions advertised on 4/7/2018 before completion of the appeal process were different positions from Area Sales Manager position. She denied that the appeals had been pre-determined.

56. RW2 admitted that about 5 Area Sales managers were reinstated after the appeal process. That the appeals were successful and reinstatement was not based on discrimination. That grounds of appeal were different. RW2 admitted that the Respondent reverted to manual registration after dismissal of the Claimants. The project was therefore abandoned but RW2 said she could not confirm if abandonment was due to the challenges faced by the project.

DETERMINATION

57. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1, RW1 and RW2 and the court has delineated the following issues for determination:
- a. Whether the Respondent had a valid reason to summarily dismiss the Claimants from employment?
 - b. Whether the Claimants had proved violation of their constitutional and statutory rights by the Respondent?
 - c. Whether the Respondent had followed a fair procedure in dismissing the Claimants from their employment?
 - d. Whether the Claimant are entitled to the reliefs sought?

Issue (a)

58. The suit consists of consolidated Cause no. 1565 of 2018 and Cause No. 70 of 2019 comprising seventeen (17) Claimants employed on diverse dates by the Respondent as Areas Sales Managers (ASMs). The Claimants were sometimes in October 2016 introduced into a pilot project of electronic subscriber registration application. The pilot project targeted 600 outlets country wide. The project involved the deployment of Huawei Y311 devices to the M-PESA dealers and agents.
59. It was made clear by CW1 that during the pilot phase a key objective was to give feedback on the roll out and registration to the Respondent regarding deficiencies in the project. The Claimants testified that they faced a raft of problems witnessed in the pilot phase which had the potential of undermining the project. It was the Claimants' case that the Respondent did not address these problems but instead went on to roll out the distribution of about 90,000 devices in December 2016, thereby setting up the Claimants for failure. RW1 was confronted with the issue of the problems that had been identified by the Claimants which needed to be sorted out before the roll out during cross-examination by counsel for the Claimant, RW1 told the court that he did not participate in the pilot phase and so was not aware of the deficiencies reported by the Claimants that needed to be rectified to enable a similar roll out of the project. RW1 added that he had not seen the report made regarding pilot phase and so could not produce it in court. RW1 was therefore unable to rebut the evidence by the Claimants that they had been set up for failure.
60. It is factual that the claimants had worked well in their various capacities before the project was introduced. That they had no previous record of poor work performance or misconduct but were summarily dismissed due to systemic loopholes identified and reported to the Respondent by the Claimants but the Respondent had chosen not to seal the loopholes before rolling out the project.



Indeed, there were no work appraisal reports or any remedial measures taken prior to the disciplinary process that led to their summary dismissal.

61. The court is aware that in terms of section 43(1) and (2) of the *Employment Act* 2007, the Respondent had the burden of proving that it had a valid reason to summarily dismiss the Claimants. RW1 and RW2 were unable to rebut the graphic evidence by the Claimants of the systemic deficiencies that led to low up take of registration, loss of devices, use of devices in other networks, and use of the devices for other purposes other than registration. In particular, the absence of any efficient monitoring mechanism provided to the Area Sales Managers compromised their ability to identify misuse or loss of devices in real time and evidence by RW1 that the Claimants were meant to physically travel to the various dealer and agent shops to establish whether or not the devices supplied were fit for purpose; was used for correct purpose; were not linked to rival networks; were being used by the people they were indeed supplied to was a bridge too far in the absence of a real time electronic device to monitor these matters.
62. The Claimants were all charged with the offence of “failure to adhere to requirements of ensuring proper distribution, activation and monitoring of the devices as expected.” There is no evidence that the Claimant did not adhere to all the requirements of distribution of device including collecting personal information of the recipients, filing the indemnity forms; training the dealer and agent on how to use the registration devices and activating the application for purpose of the dealer and agents registering customers. RW1 was unable to produce the weekly reconciliation reports provided by the Claimants since supplies of new devices were made upon provision of the reconciliation reports to the headquarters. Indeed all 39 Area Sales Managers, were dismissed for what is indeed poor work performance despite that all of the officers had been recruited in an open and competitive manner and so were qualified persons.
63. The fact that none could deliver the project well is evidence adverse to the Respondent and the only conclusion the court reaches is that the project was incapable of implementation without fundamental rectification being made in it.
64. RW1 indeed confirmed that as soon as the Claimants were dismissed the Respondent discontinued the project of electronic registration and resorted to manual registration by dealers and agents using their devices.
65. This evidence corroborated the evidence by the Claimants that they were set up to fail.
66. That they were given very short notice to account for many devices which they had distributed to the dealers and agents which had to be done manually since the project provided no electronic means of monitoring the location and use of the devices they had been made to distribute to dealers and agents in large areas.
67. Furthermore, RW1 conceded that no notices to show cause were first issued to the Claimants to give them adequate opportunity to respond to the charges of failure to adhere to requests to ensure proper distribution, activation and monitoring of the devices as expected.
68. The Respondent instead only invited the Claimants to attend hearings to account for devices which had been issued to them. The Claimants at the hearing requested for more time to trace the devices which could not be accounted for according to the Respondent but they were not given adequate time to trace and account for hundreds of devices each one of them had distributed in their wide area of operation without any effective means of monitoring the devices used by the Respondents.



69. RW1 was candid enough to admit that it was only the Respondent (HQ Compliance team who had the technical capacity to monitor the services and that electronic ability was not given to the Claimants in their areas of operation.
70. In some cases, it was evident that some Claimants had been transferred including CW1 in new areas in the middle of the roll out exercise. Despite their transfer they were still required to account for devices that they had distributed while in their previous station, which was an impossible task in the short period they were given by Respondent to do so before and during the disciplinary hearing conducted by the Respondent.
71. The disciplinary hearing focused on the Claimants being placed on their defence to account for untraceable devices. The records before court do not show evidence of how each of the Claimant failed to ensure proper distribution; failed to ensure proper activation; failed to ensure proper monitoring of the devices as expected.
72. The court finds also that the record of the hearing does not demonstrate any evidence adduced by the Respondent at hearing on the requirements, properly given to the Claimants' before the roll out of the project; any shortcomings discovered in the weekly roll outs; any steps taken by the Respondent or jointly with the Claimants midway in the project to rectify any identified loophole at the pilot stage and upon weekly reconciliation exercise conducted by head office especially given that the compliance unit had exclusive possession of electronic monitoring device not availed to Area Sales Managers.
73. The conclusion by the court is that the Respondent has failed to discharge the onus placed on it in terms of sections 43(1) and (2) as read with 47(5) to prove that it had valid reason to summarily dismiss the Claimants and therefore to justify the summary dismissal of each of the Claimant.
74. RW2 on the other hand told the court that she was not involved in the project but relied on information supplied to the HR department by the investigations. RW2 said that she was only involved in one disciplinary panel. RW2 did not identify which particular Claimants appeared before her and did not adduce any specific evidence regarding failure by any of the Claimant to adhere to the standards alleged in the charges laid against them.
75. Indeed, no person testified before all the panels which the Claimants appeared before as to the guilt of the Claimants. They were placed on their own defence for prolonged period of time on matters which the Respondent had not given them ability or time to fully account for. RW1 and RW2 were unable to rebut these allegations made by the Claimants in their witness statements admitted in court by consent of all parties. The Court finds that the respondent did not follow a fair procedure in finding the Claimants guilty of the misconduct they were accused of.
76. Accordingly, the court finds that the Respondent did not also give the Claimant fair opportunity to defend themselves. This in itself offends the rules of natural justice and is a violation of section 41 of the *Employment Act*, 2007.
77. In the case of Charles Mwema Munuve and Mary Roco versus Safaricom PLC [2021] KEELRC 1013 (KCRI) Rika J. held:

“The court does not think having considered the facts and the decision supplied by the Respondent, Kenya Revenue Authority versus Reiwel Waithaka Gitahi and 2 others [2019] e-KLR, that the decision to summarily dismiss the Claimant was reasonable. The Respondent did not act within a band or range of reasonable responses; Reasonableness entails that an employer is fair; transparent; takes into account all factors; being able to justify the decisions, having clear standard of communication and being proportionate. The court



does not think that the Respondent demonstrated these qualities of a reasonable employer, in dealing with Claimants.”

78. The above judgment by Rika J resonate with the conduct of the Respondent depicted in this matter. The Respondent set up a project riddled with loopholes identified during the pilot phase; immediately roped up the Claimants as fall guys by rolling out a deficient project to be implemented by the Claimants without utilizing the electronic ability it had to minimize the bottlenecks and ultimately blamed the Claimants 100% for the collapse of the project which it proceeded to fold upon sacking the Claimants for poor work performance.
79. This is not conduct attributable to a transparent, honest, employer treating employees fairly and justly as is demanded of it by common sense, internal policies and the law. Accordingly, the summary dismissal of the Claimant was unlawful and unfair and violated sections 36, 41, 43, 44 and 45 of the *Employment Act* 2007.
80. Different courts per Rika J. in Charles Muema Munuve (Supra); Hellen Wasilwa J. in Michael Thuo versus Safaricom PLC [2022] KEELRC 180 (KLR) and Mbaru J in Jonah Mwaura Ngugi versus Safaricom Plc 2019 (KLR) KEELRC 615 KLR matters which are similar to this matter came to the same conclusions as this case. That this was a situation where the ASMs, were deliberately set up to fail by the Respondent and the reasons for the failure of the registration project, where inherent in the process applied by the Respondent. Mbaru J. stated in Jonah Mwauura Ngugi (Supra)
- “Inherently, the Claimant having raised concerns with regard to the outsourced TRDs, the issued devices being open and subject to and for use in other networks and competitors, without any support over any alleged poor performance or improper work performance to enable him address same, the Respondent as the employer failed and cannot rely on such grounds to dismiss him from employment. Had such matter occurred and brought to the Claimants attention in a manner that he knew would result into summary dismissal if not addressed resulted in unfair labour practice against him and in this regard the sanction of summary dismissal in the circumstances is not justified.
81. The court thus finds that summary dismissal of the Claimant by the Respondent was not lawful and fair contrary to the provision of section 45 of the *Employment Act*, 2007. The same was not justified and lacked substantive justice.”
82. This finding by Mbaru J, applies mutatis mutandis to all the Claimants herein. The Respondent indeed engaged in unfair labour practice by setting up its qualified ASMs for failure and summarily dismissed them without admitting the overwhelming portion of blame attributable to the Respondent.

Discrimination

83. There is insufficient evidence to prove that the Respondent deliberately violated constitutional rights of the Claimants set out in the memorandum of claim. All the 39 Area Sales Managers were summarily dismissed for negligence. They were all subjected to the impossible standards expected from a deficient project; were given inadequate time and opportunity to explain the negligence attributed to them and only 5 of them were reinstated to work after hearing of the appeals. There is no evidence before court to show that the reinstatement had any element of discrimination as defined under section 5 of the *Employment Act* as read with Article 27 of *the Constitution*.
84. The Claimants have therefore failed to prove discrimination and or violation of any of the human rights protected under *the Constitution* of Kenya 2010. Accordingly, the claim fails and the reliefs of general damages for alleged violation are not available to the Claimants.



Reliefs

85. The court has found that the summary dismissal of the Claimants was unlawful and unfair. It follows that the Claimants are entitled to some of the reliefs sought as follows: -

i. Notice pay

86. All the Claimants were summarily dismissed without notice and without payment in lieu of notice. The Claimants have proved that they are entitled to one month salary in lieu of notice as pleaded in the memorandum of claim and in each witness, statement admitted by consent of the parties.

ii. House allowance

87. The letters of appointment given to the Area Sales Manager on diverse dates provided a “Guaranteed pay.”

88. The starting guaranteed pay was stated in respect of each Claimant and was referred to as a “gross per month” The gross pay was then broken down to include “starting base salary per month and car allowance per month”

89. The Respondent did not break down the base salary to include house allowance. The Claimants had the burden of proving that the base salary did not include housing allowance by providing evidence that they had demanded an explanation of the base salary they were offered in writing and specifically seeking clarification from the employer if a house allowance component was part of the basic salary. None of the Claimants produced any such letter or demand for payment of house allowance before they were summarily dismissed by the respondent. The Claimants have failed to discharge the burden of proof placed on them under section 107 and 108 of the *Evidence Act* Cap 80 laws of Kenya in respect of the claim for house allowance. The burden of rebuttal did not shift to the Respondent in the circumstances of this case there being not the slightest evidence of denial of house allowance to the Claimants by the Respondent. The court finds that the basic salary included a house allowance component in the absence of any demand for housing or payment of house allowance by the Claimants during their tenure of employment. The claims for house allowance are accordingly dismissed.

90. iii. The claims for payment of per diem, future earnings and aggravated damages have not been proved, are unmerited and dismissed accordingly.

Compensation

91. All the Claimants were unlawfully and unfairly summarily dismissed. The Claimants are entitled to compensation in terms of section 49(1)(c) and 4 of the *Employment Act*, 2007. In this respect, the Claimants served under same job position of ASM. The Claimants were subjected to the same unfair and impossible work conditions by the Respondent and were wrongly accused of negligence when failures of the project were as a result of deficiencies in the operational procedures, policies and systems of the project.

92. The Respondent reverted to the manual 180# system of subscriber registration upon a flop of the registration as it dismissed the Claimants. This was a patent admission of failure by the Respondent. The court finds therefore that the Respondent did not prove contribution by the Claimants to the dismissal. The Claimants did not pay required terminal benefits to the Claimants upon summary dismissal including notice pay. The Respondent did not give any time to the Claimants to prepare for the termination and so they suffered loss of support and income instantly. The Claimants had worked



for the Respondent for relatively similar period as set out in their witness statements. The Claimants suffered loss and damage.

93. The court relies on the Supreme Court decision in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR where the Court held that;

Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4) (a) to(m).

94. The Court having considered the aforesaid circumstances under section 49 (4) of the *Employment Act*, 2007 including the fact that most of the claimants had not gotten alternative employment at the time of the hearing awards the Claimants the equivalent of ten (10) months' salary in compensation for the unlawful and unfair summary dismissal.

95. In the final analysis judgment is entered in favour of the Claimants in the consolidated suit against the Respondent as follows:

a. Compensation equivalent to ten (10) months gross salary, Ksh 212,422.55 x 10 = 2,124, 225.5

b. One month salary in lieu of notice = Ksh. 212,422.55

2nd Claimant Richard Alenga Inyumuli

(a) Compensation equivalent to twelve (12) months' salary Kshs. 326,181.95 x 12 = Kshs. 3,914,183.40

(b) One month salary in lieu of notice = Kshs 326,181.95

3rd Claimant Martin Mutuma Miriti

a. Compensation equivalent to ten (10) months' salary – Kshs. 274,174.00 x 10 = Ksh. 2,741,740

b. One month salary in lieu of notice = Kshs. 274,174.00

4th Claimant James Omondi Onyango

a. Compensation equivalent to ten (10) months' salary – Kshs. 120,000 x 10 = Kshs. 1,200,000.

b. One month salary in lieu of notice = Kshs. 120,000

5th Claimant James Nguthu Musyoka

a. Compensation equivalent to ten (10) months' salary – Kshs. 120,000 x 10 = Kshs. 1,200,000

b. One month salary in lieu of notice = Kshs. 120,000

6th Claimant Hellen Wambui Mburu

a. Compensation equivalent to ten (10) months' salary – Kshs. 120,000 x 10 = Kshs. 1,200,000



b. One month salary in lieu of notice = Kshs. 120,000

7th Claimant Hawa Wanjiku Ali

a. Compensation equivalent to twelve (10) months' salary – Kshs. 274,174 x 10 = Kshs. 2,741,740

b. One month salary in lieu of notice = Kshs. 274,174

8th Claimant George Kariuki Njeru

a. Compensation equivalent to ten (10) months' salary – Kshs. 199,000 x 10 = Kshs. 1,990,000

b. One month salary in lieu of notice = Kshs. 199,000

9th Claimant Erick Mwenda Mutuma

a. Compensation equivalent to ten (10) months' salary – Kshs. 274,174 x 10 = Kshs. 2,741,740

b. One month salary in lieu of notice = Kshs. 274,174

10th Claimant Crispus Gachuhi Wachira

a. Compensation equivalent to ten (10) months' salary – Kshs. 246,994.00 x 10 = Kshs. 2,469,940

b. One month salary in lieu of notice = Kshs. 246,994

11th Claimant Bismark Shimuli Litiema

a. Compensation equivalent to ten (10) months' salary – Kshs. 199 000 x 10 = Kshs. 1,990,000

b. One month salary in lieu of notice = Kshs. 199,000

12th Claimant Anthony Opiyo

Compensation equivalent to ten (10) months' salary – Kshs. 380,000.00 x 10 = Kshs. 3,800,000

a. One month salary in lieu of notice = Kshs. 380,000

13th Claimant Anjela Sanja Sirengo

a. Compensation equivalent to ten (10) months' salary – Kshs. 199,000 x 10 = Kshs. 1,990,000

b. One month salary in lieu of notice Ksh 199,000

14th Claimant Paul Keeru Gakinya

a. Compensation equivalent to ten (10) months gross salary 85,000 x 10 = Ksh 850,000

b. One month salary in lieu of notice Ksh 85,000

15th Claimant Benard Kibet Ronoh

a. Compensation equivalent to ten (10) months gross salary 277,000 x 10 per month = Ksh 2,770,000



b. One month salary in lieu of notice Ksh 277,000

16th Claimant Chris Muasya Muvaka

a. Compensation equivalent to ten (10) months gross salary Ksh 120,000 x 10 = 1,200,000

b. One month salary in lieu of notice Ksh 120,000

17th Claimant Harun Kithinji Mbae

a. Compensation equivalent to (10) months gross salary Ksh 199,000 x10 = 1,990,000

b. One month salary in lieu of notice ksh 199,000

96. Interest at court rates from date of judgment till payment in full

97. Costs of the suit

DATED AT NAIROBI THIS 26TH DAY OF MAY 2025

MATHEWS NDUMA

JUDGE

