



REPUBLIC OF KENYA



Nzioki v Lazizi Premiere Ltd t/a Crowne Plaza Nairobi Airport Hotel (Cause E981 of 2021) [2024] KEELRC 1 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 1 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E981 OF 2021
JK GAKERI, J
JANUARY 22, 2024**

BETWEEN

CONSTANCE MWONGELI NZIOKI CLAIMANT

AND

**LAZIZI PREMIERE LTD T/A CROWNE PLAZA NAIROBI AIRPORT
HOTEL RESPONDENT**

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 29th November, 2021 alleging unfair termination of employment by the Respondent.
2. It is the Claimant's case that she joined the Respondent in 2017 as a Sales Account Manager and was promoted to the Deputy Sales Market Manager in 2018, a position she held until her employment was terminated on 30th August, 2021 and her monthly gross salary was Kshs.205,000/=.
3. The Claimant avers that she was hardworking and diligent.
4. The Claimant avers that the General Manager of the Respondent, Mr. Barnabas Wamoto was pursuing unknown personal vendetta against her, that he accused her of having attended an interview at the Sheraton, referred to her as a driver and also accused her of having filed false Daily Sales Report and was thus biased against her.
5. The Claimant avers that she received a notice to show cause on 13th July, 2021 which accused her of using the Respondent's motor vehicle for personal errands and running personal errands at the expense of company time and responded within 2 days as required by the letter.
6. That the hearing conducted on 12th August, 2021 was adjourned to accommodate the hearing of the supervisor's case who was summarily dismissed.



7. The Claimant avers that on 14th August, 2021, the Respondent took away her computer and phone and directed her to proceed home but was recalled for the continuation of the disciplinary on 23rd August, 2021 and the Respondent relied on another ground principally, breach of confidentiality, an issue the Claimant had not responded to.
8. That employment was terminated on 30th August, 2021.
9. The Claimant prays for;
 - i. A declaration that termination of employment by the Respondent violated the Claimant's constitutional right to fair labour practices under Article 41(1) of *the Constitution* of Kenya, 2010.
 - ii. A declaration that termination of the Claimant's employment was wrongful and unfair.
 - iii. A declaration that reduction and/or withholding of some of the Claimant's dues including sales incentives and commissions are irregular and unlawful and in violation of Section 25 of the *Employment Act*, 2007.
 - iv. General damages for wrongful/unfair termination.
 - v. Payment of all the monies as tabulated at paragraph 22.
 - vi. Costs of this suit.
 - vii. Interest on (iv) and (v) above.
 - viii. Any other relief the court deems just to grant.

Respondent's Case

10. In its response dated 21st December, 2021, the Respondent admits that the Claimant was its employee as alleged but denies having issued a new contract in 2020.
11. It is the Respondent's case that the Claimant's performance was wanting.
12. The Respondent avers that the Claimant was accorded an opportunity to respond to the issue of confidentiality prior to the disciplinary hearing and was given a chance to defend herself against all allegations against her and termination was in accordance with the procedural requirements.
13. The Respondent prays for dismissal of the suit with costs for lack of merit.

Claimant's Evidence

14. On cross-examination, the Claimant confirmed that employees were entitled to Kshs.300/= for lunch and had on 16th June, 2021 taken lunch and claimed Kshs.300/=.
15. It was her testimony that when Mr. Wamoto joined the Respondent, employment was contractual and renewal was based on performance but it was not his sole decision.
16. The witness admitted that segmentation of accounts was an executive decision.
17. That other members of the department had alleged that the Claimant had forged a Sales Report but she reported them to the Head of Department.
18. It was the Claimant's testimony that she had indicated that she had visited a place while she had not at the behest of the Head of Department who allegedly told her to lie.



19. The witness admitted having visited Greenspan but not EA School of Aviation which was the H.O.Ds account.
20. That she had a representative during the disciplinary hearing but was unaware of her responses during the hearing.
21. CWI admitted that she was invited for the second hearing which was a continuation of the previous hearing but before the hearing date, she was called to the office on a Saturday and the laptop she was using was taken away.
22. That she was given a questionnaire to respond to the issues of confidentiality and responded to the questions.
23. It was her testimony that on the hearing date (17/05/2021), she was indisposed and had communicated the decision to the Respondent and attended a hearing thereafter on a date she could not recall.
24. The witness testified that the period in question was during the COVID-19 Pandemic and could not recall whenever any commission was being paid to staff.
25. Finally, the witness confirmed that she signed the Final Dues Form on 9th September, 2021 and did not raise the issue of any outstanding commission and was given a certificate of service.
26. On re-examination, the Claimant testified that on the date she was accused of using the official car to run personal errands, she was in the company of the supervisor. Although the Claimant alleged that the supervisor was invited for a hearing on the basis of her testimony at the hearing, she provided no proof.
27. The Claimant testified that she could not attend the last hearing because she could not access the network.

Respondent's Evidence

28. RWI, Mr. Samuel Macharia confirmed that the Notice to Show Cause had only two allegations and had no allegation on confidentiality.
29. He denied that the Claimant and her supervisor faced the similar allegations.
30. He confirmed that the Claimant was given the documents she requested for although the Respondent had no video recording.
31. Strangely, the witness could not tell with whom the Claimant shared the alleged confidential information.
32. The witness confirmed that the Claimant brought clients to the Respondent's hotel during the COVID-19 Pandemic and was promoted.
33. On re-examination, the witness testified that the hearing on 12th August, 2021 was adjourned to enable the committee visit two accounts to confirm the Claimant's allegations and when hearing resumed on 17th August, 2021, the Claimant was unwell and the hearing was concluded on 23rd August, 2021.

Claimant's Submissions

34. As to whether termination of the Claimant's employment by the Respondent was unlawful and unfair, counsel for the Claimant cited the sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* on the elements of a fair termination of employment to urge that the Claimant was not



- accorded fair administrative action by the Respondent's introduction of allegations not in the notice to show cause.
35. Counsel submitted that the Claimant was not granted documents the Respondent would rely on the allegation of confidentiality and those sought were denied in that out of the 25 documents requested for, only 4 were granted thus denying the Claimant a fair hearing.
 36. Counsel submitted that the questionnaire given to the Claimant was not a notice to show cause.
 37. According to the Claimant's counsel, the Respondent's response to the demand letter was clear that the reason for dismissal was the breach of confidentiality as it was reiterated on appeal.
 38. Counsel urged that the Respondent was shifting goal posts.
 39. Counsel further urged that the provisions of Section 41 of the *Employment Act*, 2007 were not complied with as the reasons for termination were not explained to the Claimant in a language she understood and relied on the decision in *New Kenya Co-operative Creameries Ltd V OLGA Auma Adede* (2019) eKLR.
 40. Counsel further submitted that the Respondent did not substantiate the allegations made against the Claimant and the Claimant was acting under her supervisor's instructions.
 41. That the General Manager was biased and disrespected the Claimant and participated at the hearing on zoom and conducted the proceedings.
 42. Reliance was made on the sentiments of the court in *Joseph Mwaniki Nganga V United Millers Ltd* (2022) eKLR on the import of Section 43, 45(2) and 47(5) of the *Employment Act*, 2007.
 43. On the reliefs sought, counsel submitted that the Claimant was entitled to them as her right to fair labour practices was violated.
 44. Reliance was made on the decisions in *Elizabeth Kioko V Beyene Haire Warde & another* (2018) eKLR and *Enock Thiong'o Kibathi V Directline Assurance Co. Ltd* (2021) eKLR on entitlement to the reliefs.

Respondent's Submissions

45. Counsel isolated three issues for determination, namely; reason for termination of employment, procedural fairness and costs.
46. As to whether the Respondent had a valid and fair reason(s) to terminate the Claimant's employment, counsel submitted that it had as the notice to show cause had two grounds on the use of the Respondent's vehicle to run personal errands on the pretext of doing sales at the expense of the Respondent and the issue of breach of confidentiality arose during the hearing and the Claimant gave responses to the Respondent's questionnaire dated 14th August, 2021.
47. Counsel relied on the decisions in *Kenya Electrical Traders & Allied Workers Union V Kenya Power & Lighting Co. Ltd* and *CFC Stanbic Bank Ltd V Danson Mwashako Mwakuwona* (2015) eKLR to urge that the Respondent had valid and fair reasons to terminate the Claimant's employment and had proved the same.
48. Counsel used case law to urge that the test under Section 43(2) of the *Employment Act*, 2007 was subjective.



49. That the Claimant admitted having used the Respondent's car for personal errands and shared confidential information and the Respondent genuinely believed that it had reasons to terminate the Claimant's employment.
50. As to whether the Respondent observed procedural fairness, counsel submitted that the Respondent complied with the procedure meticulously.
51. That as early as June 2021, the Respondent had notified the Claimant the issues raised against her and required a response that it provided the documents requested for and was heard and the termination was procedurally fair.
52. Reliance was made on the decisions in *Judicial Service Commission V Gladys Boss Shollei* (2014) eKLR and *Kenya Power & Lighting Co. Ltd V Aggrey Lukorito Wasike* (2017) eKLR.
53. Counsel urged that the Claimant was invited for the first and subsequent hearing, was informed of the right to a representative and exercised the right and made oral and written representations and appealed the decision.
54. Counsel submitted that the Claimant's allegation of violation of Article 50(2) of *the Constitution* of Kenya, 2010 was unfounded as he was elevating disciplinary proceedings to criminal or quasi criminal proceedings as held in *Judicial Service Commission V Shollei* (Supra).
55. That the Claimant was at all times aware of the allegations against her and had received all the documents she requested for.
56. Counsel urged the court to reject the allegations of bias as it did not arise at the hearing and the Claimant did not request the General Manager to recuse himself.
57. That the issue of confidentiality arose during the hearing and was raised on 14th August, 2021 and 23rd August, 2021 and the termination of employment met the threshold of fairness.

Findings and Determination

58. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Whether the Claimant waived her rights to pursue further claims against the Respondent.
59. Before delving into the foregoing issues, it is essential to dispose of the relevant and peripheral issue of allegation of vendetta by the Respondent's General Manager, Mr. Wamoto.
60. In her written statement, the Claimant catalogues four (4) justifications or reasons in support of the allegation namely, being referred to as "a driver" ostensibly for being in the same vehicle with the supervisor, allegations regarding an interview at the Sheraton, false Daily Sales Report and being stripped of opera rights.
61. While there is no tangible evidence of the "driver" tag and no corroborative evidence what adduced of the context in which the phrase was used to appreciate the intention and the alleged interview at Sheraton, the alleged false Daily Sales Report was one of the reasons for determination and the disciplinary committee made a finding based on the evidence before it.



62. Finally, as regards the opera rights, giving Mr. Thuo the Leisure Productivity, email communication between the Claimant, General Manager and others reveal that the decision on the leisure accounts was made by the General Manager on 25th June, 2021 in the Claimant's presence and the Claimant admitted on cross-examination that segmentation of the accounts was an executive decision.
63. In fact, the email from the Claimant to Anne Nzuya, the Supervisor only faulted the timing of the action as opposed to the action itself.
64. As regards discrimination, the Claimant testified that they were three (3) in the department of Sales but tendered no evidence of how the others were treated or that her treatment was unjustifiably different from the other two.
65. In the absence of verifiable evidence of the General Manager's alleged vendetta against the Claimant coupled with discrimination, it is the finding of the court that foregoing allegations were not proved and are no consequence in this judgement.
66. As regards termination of the Claimant's employment, the law is unambiguous that for a termination of employment to pass the fairness test, the Respondent must prove that it had a valid and fair reason to do so and conducted the same in accordance with a fair procedure.
67. In other words, it must be demonstrated that there was a substantive justification for the termination of employment and procedural fairness as held in *Naima Khamis V Oxford University Press EA Ltd* (2017) eKLR.
68. Needless to belabour, the provisions of Section 43, 45(2) and 47(5) of the *Employment Act* prescribe the requisite burden of proof in a case of termination of employment as held in *Joseph Mwaniki Nganga V United Millers Ltd* (Supra) cited by the Claimant's counsel.

Reason For Termination

69. As to whether the Respondent had a valid and fair reason to terminate the Claimant's employment, counsels have adopted opposing positions with the Claimant's counsel arguing that the Respondent had neither a valid nor fair reason to do so.
70. The Respondent's counsel urges the opposite.
71. It is common ground that the notice to show cause dated 10th July, 2021 listed various charges against the Claimant. These are;
 - i. Use of sales vehicle KCV 346Z to run personal errands in the pretext of doing sales calls.
 - ii. Dishonesty on account of issuing conflicting details on physical visits.
72. The letter details the days on which the Claimant is alleged to have misused the Respondent's vehicle to run personal errands such as 15th June, 2021 when the Claimant drove to the East African Aviation College with the supervisor to pick her daughter and dropped her home at Green Span.
73. Similarly, on 22nd June, 2021, the Claimant is accused of having indicated that she made two physical visits to Sika East Africa Ltd and Norda Industries Ltd which was not the case.
74. The Respondent characterised the Claimant's refusal, failure or neglect to comply with the Respondent's policies and procedures as gross misconduct and demanded a response on or before 15th June, 2021.



75. In her response, the Claimant explained how she had used the motor vehicle and confirmed that she had two physical visits on 22nd June, 2021.
76. During the Disciplinary hearing on 12th August, 2021, the Claimant's defense was that she was in the company of the supervisor and could not disobey her instructions as it would amount to insubordination.
77. The Claimant admitted that she was aware that her supervisor had a challenge with alcoholism but did not report the same to anyone and could not explain whether the supervisor was in her right state of mind on 15th June, 2021.
78. During the hearing, the Claimant admitted that she visited one of the sites and called the other, having reported in writing that she visited both and confirmed having picked her daughter from the East African Aviation College.
79. Indeed, the Claimant further confirmed that she did not visit Norda Industries Ltd but logged it into their account.
80. Puzzlingly, the Claimant's supervisor Annah, confirmed that the Claimant had reported that she visited the two sites yet she had not visited any on that day nor did she visit Trans Africa Air and DOD.
81. In order to verify the Claimant's allegations of having visited Sika and Norda, members of the Disciplinary Committee did an experiment by visiting on 13th August, 2021 in the company of the Claimant. The team walked from the Smokeyard to Sika in 4 minutes and were ready to walk to Norda when the Claimant informed them that she had not walked there as she could not do so in 4 minutes as she had indicated in her response. The committee confirmed that the 2 minutes drive was 1.5 kilometres thereby confirming that the Claimant was lying.
82. Hearing continued on 23rd August, 2021, when the team comprising Samuel, Maureen, Nicholas, Chrispine, Constance and Susan reported the outcome to the committee.
83. During the hearing, Mr. Samuel Macharia, the Human Resource Manager reported that the Claimant had in the meantime shared guest information with an unauthorised third party in breach of the confidentiality secrecy and non-salutation clause of the contract of employment and the Claimant admitted to having contacted her advocate and shared the information via email with one Steven Haggai.
84. The disciplinary committee concluded that the Claimant was deceitful and did not adhere to company policies as she had provided false DSR reports on the visits to Trans Africa Air, Sika and Norda as confirmed by her supervisor and the Claimant confirmed having lied to the Respondent.
85. Finally the committee was satisfied that the Claimant had breached her contract by sharing guest confidential information with unauthorised 3rd party, a fact she admitted during the hearing on 23rd August, 2021.
86. The committee was satisfied that the Claimant's conduct amounted to gross misconduct.
87. The Claimant signed the minutes of the disciplinary hearing and did not contest the contents.
88. Significantly, the Human Resource Manager gave the Claimant a questionnaire on the confidential information and the Claimant completed the same by responding to the 8 questions asked on 14th August, 2021.



89. The Claimant admitted knowledge of the confidentiality secrecy and non-solitation clause and her obligation not to share information with unauthorised 3rd parties.
90. The Claimant admitted having shared the information.
91. The summary dismissal letter dated 30th August, 2021 catalogued the grounds of termination of employment as;
- i. The Claimant used the Respondent's motor vehicle KCV 346Z to pick her daughter from the East African Aviation College on 15th June, 2021 without approval.
 - ii. Submission of false Daily Sales Report (DSR) for 16th and 22nd June, 2021 on visitations to Sika East Africa, Norda Industries and Trans African Air yet she had not visited all the three places.
 - iii. Sharing of guest confidential information with unauthorised third party as admitted on 14th August, 2021 and confirmed the same during the hearing on 23rd August, 2021.
92. According to the Respondent, the Claimant was guilty of misuse of company sales vehicle to run personal errands, dishonest DSR to management on 16th and 22nd June, 2021 and failure to maintain confidentiality.
93. As regards the 1st reason, the Claimant's response was that she was permitted by the supervisor who was with her in the vehicle.
94. The Claimant admitted the fact that she had been dishonest in the Daily Sales Report on 16th and 22nd June, 2021 and had shared confidential information.
95. In determining whether the Respondent had a valid and fair reason to terminate the Claimant's employment, the court is guided by the provisions of Section 43(2) of the Employment Act, 2007 and judicial pronouncements.
96. Section 43(2) of the Act, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
97. In *Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR*, B.O. Manani J. stated as follows;
- “In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.
98. Similarly, in *Kenya Revenue Authority V Reuwel Waitaha Gitahi & 2 others (2019) eKLR*, the Court of Appeal stated that;
- “The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the claimant's services. That is a partly subjective test.”



99. The foregoing sentiments comport with the band of reasonableness test captured by Lord Denning MR in *British Leyland (UK) Ltd V Swift* (1981) I.R.L. R 91 as follows;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view . . .”
100. The court is guided accordingly.
101. From the evidence on record, it is clear that the Claimant was not truthful as the Respondent’s Deputy Sales Manager in her use of the Respondent’s Sales Motor Vehicle KCV 346Z and in her Daily Sales Report (DSR).
102. As a Deputy Sales Manager, the Respondent had entrusted the Claimant with the motor vehicle in good faith for purposes of discharging her duties effectively for the benefit of the Respondent but it would appear that the Claimant breached the trust.
103. The argument that the Claimant could not disobey her supervisor’s instructions could not avail the Claimant as she was aware that the Supervisor had challenges which the Claimant refused or neglected to confide or disclose to anyone.
104. It is unclear to the court why the Claimant could not do so to assist her supervisor. Perhaps she was benefiting from it, an issue that arose during the disciplinary hearing.
105. Sales employment is based on trust and the employer can only hope and trust that any resources availed to the employee will be expended for the intended purposes and accounted for.
106. Counsel for the Claimant insisted that the Respondent did not issue a new notice to show cause for the charge of sharing confidential information with a 3rd party and the Claimant had no opportunity to respond on it.
107. Needless to belabour, the Respondent discovered the occurrence after the 1st hearing on 12th August, 2021 had been adjourned and the Respondent’s Human Resource Manager sent a questioner to the Claimant on the issue and she responded accordingly confirming that she had shared confidential guest information with her advocate, a fact she admitted at the hearing.
108. Although this charge was not among those in the notice to show cause, the Claimant did not contest it and voluntarily admitted the same at the hearing. The situation, in the court’s view, would have been different if she had contested the allegation.
109. Contrary to the Claimant’s evidence that the Respondent abandoned the notice to show cause dated 10th July, 2021, it did not as it prosecuted the three (3) grounds of termination and all were reflected in the dismissal letter.
110. In the circumstances, the court is satisfied that the Claimant was aware of the charge, responded to and admitted it.
111. More significantly, although the Claimant’s counsel submitted that the Claimant’s summary dismissal was anchored on the sharing of confidential information, that was not the case as the summary dismissal letter addressed the three reasons.
112. The foregoing notwithstanding, the Respondent in the court’s view, had sufficient grounds to terminate the Claimant’s employment even in the absence of sharing of confidential information.



113. For the foregoing reasons, the court is satisfied and finds that the Respondent has demonstrated on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

114. It is common ground that for a termination of employment to pass muster, it must be proved that it was conducted in accordance with a fair procedure.
115. Section 41 of the *Employment Act*, 2007 prescribes the mandatory process to be complied with.
116. The Court of Appeal underscored the mandatory nature of compliance with the provisions of Section 41 in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
117. The specific tenets of procedural fairness have been elaborated upon in legions of decisions of this court and the Court of Appeal, such as *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR and include; reason(s) or grounds of termination, explanation of the reasons in a language understood by the employee in the presence of another employee of the employee's choice or shop floor representative, right to make representations and finally hearing and considering the representations made by the Claimant and/or his or her representative.
118. In her response, the Claimant made reference to a meeting between her supervisor and the General Manager which she did not attend.
119. In this case, it is common ground that the Respondent issued a notice to show cause dated 10th July, 2021 and the Claimant responded by letter dated 13th July, 2021.
120. Relatedly, the Claimant was invited for a disciplinary hearing by letter dated 7th August, 2021.
121. The letter specified the date and time of the hearing and informed the Claimant of her right to a representative of her choice who had to be an employee of the Respondent or an ARC Member.
122. Email communication on record reveal that the Claimant requested for some information from the Respondent including EASA CCTV footage and the Respondent was prepared to accord her sufficient time to prepare her defence.
123. During the hearing on 12th August, 2021, the Claimant attended the proceedings with one Mr. Chrispine Otieno and the General Manager was present (via zoom) and the Human Resource Manager read the allegations according to the notice to show cause.
124. From the minutes of the meeting, it is clear that the General Manager, Mr. Wamoto was not chairing the meeting and Mr. Debur Raghunath was.
125. The detailed 8 page single spaced document reveals that the Claimant participated in the proceedings wilfully and responded to questions and comments voluntarily.
126. Minutes additionally reveal that the hearing on 12th August, 2021 was adjourned and was scheduled for continuation on 17th August, 2021.
127. The Claimant was invited for the continuation meeting vide letter dated 14th August, 2021 at 10.00 am and the same was received by the Claimant on the same day. However, the hearing did not proceed on 17th August, 2021 as the email from the Human Resource Manager dated 16th August, 2021 at 18.46 attests.
128. Records reveal that the Claimant was on sick off for 6 days from 16th August, 2021 to 21st August, 2021.



129. On 21st August, 2021, the Human Resource Manager talked to the Claimant and forwarded to her the invitation letter of even date for the continuation hearing slated for 23rd August, 2021 and she confirmed attendance and attended with Chrispine Otieno, Nicholas Mwangi, the IT Manager chaired the meeting.
130. During the meeting, the Claimant confirmed receipt of the CCTV footage and car tracking information requested for.
131. Counsel for the Claimant faulted the disciplinary hearing on the premise that the General Manager was conflicted and attended the meeting yet he was biased against the Claimant, disrespected her and called her “a driver”.
132. Counsel submitted that the General Manager was the one in conduct of the meeting.
133. However, the Claimant tendered no evidence of the alleged disrespect, as she admitted that she was the one driving the supervisor in many instances.
134. The fact that the General Manager could have used the word would not in the courts view amount to disrespect unless the context showed otherwise which was not shown.
135. On the alleged redistribution of accounts, the Claimant admitted that it was a managerial prerogative and had been agreed upon by her supervisor Annah and the General Manager as copies of emails on record reveal.
136. The Claimant adduced no evidence of discrimination.
137. Finally, if the Claimant had solid allegations against the General Manager, she ought to have confided to one of the Directors or any colleague or reduced it in writing as a complaint against him before the termination of employment materialised.
138. After the hearing on 23rd August, 2021, the Claimant was issued with a summary dismissal letter dated 30th August, 2021 which he received on the same day and appealed the dismissal vide letter dated 3rd September, 2021.
139. The Claimant argued that the allegations made against her were not particularised in the show cause letter.
140. That the allegation of sharing of confidential information had not been responded to in a notice to show cause and thus violated Article 50(2)(b)(c) and (j) of *the Constitution* of Kenya, 2010.
141. The Claimant participated in the appeal hearing with a representative and the grounds of appeal were canvassed.
142. Regrettably, the same members heard the appeal by the Claimant, though it noted that there was no new information/evidence to consider. The court is not persuaded that the fact that the same committee heard the appeal was prejudicial to the Claimant’s case as the committee accorded her a second chance to litigate her case.
143. As regards participation in the disciplinary hearing on 12th August, 2021, the Claimant’s counsel submitted that the General Manager was present (via zoom) and was the one in conduct of the meeting which is not the case. He is the one who requested that the proceedings be recorded and the Claimant agreed.
144. Similarly, the General Manager was aware of the allegations the Claimant had made against him in her response to the notice to show cause and did not chair the meeting.



145. Puzzlingly, none of the allegations against the General Manager respond to the charges the Claimant was facing on misuse of motor vehicle to run personal errands, dishonesty and breach of confidentiality.
146. The minutes show that Mr. Debur chaired the meeting.
147. There is no doubt the General Manager actively participated in the proceedings but did not dictate anything to the members of the committee.
148. The Human Resource Manager, Mr. Samuel Macharia and the IT Manager, Nicholas Mwangi were the main actors in the proceedings and the conclusions arrived at by the committee are reflective of the issues raised and responded to by the Claimant and the evidence at the disposal of the disciplinary committee.
149. In the court's view, the Claimant has failed to adduce sufficient evidence to show that the General Manager's presence at the disciplinary hearing vitiated the process as the committee had four other senior employees of the Respondent.
150. In *Kenya Power & Lighting Co. Ltd V Aggrey Lukorito Wasike* (2017) eKLR, the Court of Appeal stated as follows;
- “Having considered the matter before us, we are left with no doubt whatsoever, that Wasike was accorded a fair hearing before he was terminated. He was notified of the charge. He was invited to attend. He was advised of his right to have a representative present. Both made representations. He was notified of the decision. We are convinced that there was substantial if not full compliance with the requirement for a hearing under Section 41 of the *Employment Act* . . .”
151. The foregoing sentiments apply on all fours to the facts of the instant suit the appeal process notwithstanding.
152. For the foregoing reasons, it is the finding of this court that the Respondent has evidentiary demonstrated that it accorded the Claimant a fair hearing as ordained by the provisions of Section 41 of the *Employment Act*, 2007.
153. As to whether the Claimant waived her rights to pursue further claims against the Respondent, the law is well settled as captured by the Court of Appeal in *Coastal Bottlers Co. Ltd V Kimathi Mithika* (2018) eKLR that;
- “Whether or not, a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge agreement and secondly, whether the same was voluntarily executed by the concerned parties.”
154. In *Thomas De La Rue (K) Ltd V David Opondo Omutelema* (2013) eKLR, the Court of Appeal held inter alia;
- “. . . The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed, when the employee was seized of all the relevant information and knowledge.”
155. The court is guided by these sentiments.



156. In the instant suit, the Claimant signed the Final Dues Payment and Certificate of Service dated 21st September, 2021 as well the computation of dues form.

157. The final dues payments and certificate of service was signed by the Respondent's Human Resource Manager on 21st September, 2021.

158. The Claimant acknowledged the document as follows;

“I Constance M. Nzioki confirm receipt of my Final Dues Computation and Certificate of Service. In signing this document, I verify that I have read and checked my final dues computations and certificate of service and that the company has no further obligations to me in regards to my employment.”

ID No.

Signed

Date 21/9/2021.

159. The computation form was more explicit that;

I hereby agree to the above final dues calculations and I have no any further claims against Crowne Plaza Nairobi Airport . . .”

160. The Claimant confirmed on cross-examination, that she signed the final dues computation on 9th September, 2021 and was given a certificate of service.

161. On re-examination, the Claimant testified that she signed the final dues form because she needed sustenance for her family.

162. In *Trinity Prime Investment Ltd V Lion of Kenya Insurance Co. Ltd (2015) eKLR*, the Court of Appeal stated as follows as regards a discharge voucher;

“The execution of the discharge voucher, we agree with the learned judge constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free off misrepresentation, fraud or other. The appellant was thus fully discharged.”

163. The court re-emphasized the foregoing position in *Coastal Bottlers Ltd V Kimathi Mithika (Supra)* as follows;

In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the Respondent's termination . . . It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties . . .”

164. In the court's view, by signing the Final Dues Payment and certificate of service and the Final Dues computation, the Claimant discharged the Respondent from all its obligations to her as regards her employment and waived her rights to pursue any further claims against the Respondent pertaining to the employment relationship and the termination of employment, the amount of final dues paid notwithstanding.

165. In sum, the Claimant's action against the Respondent is unsustainable and is for dismissal.



Reliefs

Declaration

166. Having found termination of the Claimant's employment was substantively justifiable and procedurally fair, the declaration sought is unmerited and is declined.

General Damages for Wrongful/unfair Termination

167. The provisions of the *Employment Act*, 2007 have no remedy in general damages for termination of employment and judicial pronouncements are explicit on the position that general damages are not awardable in contracts of employment.

168. More significantly, the Claimant has not made a case for the award of general damages.
The prayer is declined.

12 Months' Salary

169. Having found as above, the prayer for compensation is unsustainable and is declined.

Salary For The Remainder Of Fixed Term Contract (15 Months)

170. Having found that the summary dismissal of the Claimant by the Respondent was not unfair, the prayer for the remainder of the unexpired contract is not sustainable.

171. Relatedly, this is a claim for anticipatory earnings whose legal basis the Claimant did not establish.
It is declined.

Termination Notice

172. Having found that the summary dismissal was not unfair, the prayer for pay in lieu of notice is unsustainable and is declined.

Commission For January, February, March, April, May And July 2021

173. The Claimant's written statement makes no reference to payment of commission. In her oral testimony adduced in court, the Claimant testified that she was entitled to commission and it was payable on meeting the target of Kshs.5,000,000/=.

174. It is unclear to the court as to how the amounts tabulated per month were arrived at.

175. In the absence of relevant particulars, such as the total sales made, formula to be applied and entitlement to the commission, the court is unable to award the sum of Kshs.90,267.32 as unpaid commission.

176. In the upshot, having found as above, it is evident that the Claimant's suit against the Respondent is not sustainable and it is accordingly dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF JANUARY 2024

DR. JACOB GAKERI



JUDGE

Order

*In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of **Section 1B** of the [Civil Procedure Act \(Chapter 21 of the Laws of Kenya\)](#) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.*

