



**Ingado v One Acre Fund (Employment and Labour Relations Appeal E003 of 2023) [2024] KEELRC 1074 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1074 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2023**

**JW KELI, J  
APRIL 25, 2024**

**BETWEEN**

**PHILIS INGADO ..... APPELLANT**

**AND**

**ONE ACRE FUND ..... RESPONDENT**

*(An Appeal from the Judgment of Hon. L. Kassam (CM), Kakamega, delivered on 26th April 2023 in Kakamega MCELRC Cause No. 64 of 2021)*

**JUDGMENT**

1. The Appellant, being dissatisfied with the Judgment of Hon. L. Kassam (CM), Kakamega, delivered on 26<sup>th</sup> April 2023 in Kakamega MCELRC cause No. 64 of 2021 Between Philis Ingado and One Acre Fund filed a Memorandum of Appeal dated 26<sup>th</sup> May 2023 and a Record of Appeal received in Court on the even date, seeking the following orders: -
  - a. The appeal be allowed.
  - b. The Honourable Court do set aside the judgement delivered on 26/04/2023 by Hon. L. Kassan, CM Kakamega, and instead be pleased to replace it with orders granting prayers as in the Statement of Claim dated and filed on 30/08/2021; and
  - c. The costs both at the trial and this appeal be awarded to the appellant.
2. The Appeal was premised on the following grounds that:-
  1. The Learned magistrate erred in both law and fact when he failed to consider the evidence presented by the appellant which had indeed proven that, on a balance of probability, the respondent had unfairly summarily dismissed the appellant from her employment without considering her explanation to allegations levelled against her.



2. The trial court erred in law when he held that the appellant's summary dismissal was not unfair yet the evidence presented by the appellant clearly showed that the appellant had in no way committed gross misconduct and/or fundamental breach against the respondent.
  3. The learned trial magistrate erred both in law and fact when he failed to hold that the respondent's decision to dismiss the appellant from her employment was based on incomplete and biased investigations and thus was entirely unfair.
  4. The trial court made a mistake when he failed to consider that the appellant had given a reasonable explanation to effect that she had, on only one occasion, used the telephone number to pay qualification fees for a farmer who was elderly and who had sent her the qualification fees on the eve of the deadline.
  5. The learned magistrate indeed made a grave mistake when he failed to consider that since no warning had previously been issued to the appellant, the respondent's decision to summarily dismiss the appellant without notice was wrong, unfounded, and unfair.
  6. The Learned trial magistrate erred in law when he failed to make a finding that the fact that the respondent had not initiated criminal investigations against the appellant on allegation of loss of money, theft and/or fraud meant that the allegations were merely unsupported assertions which had not been proven and which could not be relied upon for lack of admissibility.
  7. The learned magistrate was misguided when he failed to appreciate the fact that the farmers who had been contacted by the respondent's investigator- DW-2 had indeed changed their initial statements which wrongly implicated the appellant.
  8. The learned magistrate erred in law and fact when he entirely disregarded the evidence presented by the appellant. In fact, in the whole judgment, the court failed to consider the appellant's evidence which proves that, the appellant who was the respondent's industrious employee was unfairly summarily dismissed from her employment. (Pg. 1-2 of the Record).'
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Luvayi F. & Company Advocates were dated 26<sup>th</sup> February 2024 and received in court on an even date. The Respondent's written submissions drawn by L.G Menezes & Company Advocates were dated 1<sup>st</sup> March 2024 and received in court on 5<sup>th</sup> March 2024.

### **Background to the appeal**

4. The Appellant filed a suit Kakamega MCELRC Cause No. 64 of 2021 against the Respondent for unfair dismissal through the Statement of Claim dated 30<sup>th</sup> August 2021 and filed on an even date, seeking the following reliefs:-
  - a. An order directing the respondent to immediately without condition reinstate the claimant to employment.
  - b. A declaration that the respondent unfairly dismissed the claimant from her employment and thus the respondent be directed to compensate the claimant for unfair and unlawful termination at a rate of 12 month's salary.
  - c. Compensation for failure to accord leave, overworking and underpayment and salary in lieu of notice.



- d. An order directing all the benefits accruable to the claimant and general damages for loss of income and earnings.
  - e. Costs of this suit and interests at courts rate.
  - f. Any other relief the court may deem fit and necessary to so grant.
5. The Statement of Claim was supported by the Claimant's Verifying Affidavit of 30<sup>th</sup> August 2021 and accompanied by her List of Witnesses dated on an even date, the witness statement dated 30<sup>th</sup> August 2021, her List of Documents of even date, and her Bundle of Documents (page 3-30 of the record was the Appellant/Claimant's case).
  6. The Respondent entered an appearance on 20<sup>th</sup> September 2021 and filed a Reply/defence to the Statement of Claim dated 24<sup>th</sup> September 2021 received in court on 4<sup>th</sup> October 2021.
  7. The Reply/Defence to the claim was accompanied by the Respondent's List of witnesses dated 24<sup>th</sup> September 2021; the Witness statements of Titus Masinde and Victor Mukisira Amugune, all dated 28<sup>th</sup> September 2021, the Respondent's List of Documents dated 24<sup>th</sup> September 2021 and the Respondent's bundle of documents (Pages. 31-159 of the record is the Respondent's case in the lower court).
  8. The Appellant filed a Reply to defence dated 14<sup>th</sup> October 2021 and received in court on an even date (pg.160-161).
  9. The Trial Court proceeded with the hearing of the Appellant/Claimant's case with her as the only witness on the 8<sup>th</sup> June 2022. The defence case was heard on the 21<sup>st</sup> of September 2022 with Titus Mosika(DW1) and on the 12<sup>th</sup> of October 2022, Victor Umuvune (DW2) as the defence witnesses (pg. 180-189 of the Record).
  10. The parties filed written submissions before the lower Court after the closure of the defence. The Appellant/Claimant's submissions were dated 15<sup>th</sup> November 2022 and filed on 16<sup>th</sup> November 2022 (pg. 162-173 in the record of Appeal). The Respondent's filed written submissions were not in the record but are in the lower court file.
  11. The Trial Court (Hon. L. Kassam (CM) delivered its judgment on the 26<sup>th</sup> of April 2023 (pg. 192-206 of the Record ) and held that the termination of the Appellant's employment by the respondent on 31.07.2021 was not unfair and/ or unlawful and awarded the Respondent costs of the suit.

## **Determination**

### **Issues for determination**

12. The Appellant in her submissions identified the following issues for determination in the appeal.
  - a. Whether the summary dismissal of the appellant was unfair.
  - b. Whether the appellant had committed an offence against the respondents.
13. The Respondent in its submissions identified the following issues for determination in the appeal: -
  - a. Whether the termination of employment of the Appellant was wrongful, unfair, and unlawful in the circumstances
  - b. Whether the Appellant is entitled to the reliefs sought.



14. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123.
15. The court guided by Selle's decision, that the court sitting at first appeal has to evaluate the facts and evidence before the trial court while making allowance of not having seen the witnesses to reach its own conclusion, finds the issues for determination in the appeal are as follows: -
  - a. Whether the Appellant was unfairly and unlawfully terminated from employment
  - b. Whether the Appellant is entitled to the reliefs sought.
  - c. Whether the appeal was merited

### **Whether the Appellant was unfairly and unlawfully terminated from employment**

16. All the grounds of appeal raised by the appellant, relate to the substantive and procedural fairness.
17. The Appellant accused the Trial Magistrate of failing to consider all the evidence submitted on a balance of probability, by failing to consider the appellant's explanation of the allegations against her, which resulted in her unfair dismissal, as the evidence presented did not show she had fundamentally breached her contract.
18. The Appellant claimed that the trial court failed to consider that the respondent's decision to terminate her employment was based on incomplete and biased investigations as the investigations were undertaken by one of the Respondent's employees and which the respondent solely relied upon to dismiss the appellant.
19. The Appellant argues that she did not grossly misconduct herself and her action of using her number contrary to the norm was only to ensure an illiterate and elderly farmer qualified (pg. 186 para. 12-16 of Record).
20. The Appellant submitted that the farmers made payments to the respondent, resulting in the respondent making millions in profit, and they had complained of the respondent's USSD Mode of payment as being hectic, and the farmers often engaged the Appellant and others on the ground to help them pay through the USSD mode, although they had been trained. The appellant argued that the amount paid through her number was paid to the elderly lady's account and the Respondent confirmed the money was received and no evidence of theft was adduced warranting the appellant's dismissal.
21. The appellant argued that on the substantive level, there was no valid reason to terminate her employment.
22. On the procedural front, the Appellant contended that during the trial (pg. 49-145 of Record), investigations by DW2 were conducted via phone calls and text messages, and not in person with the farmers. The appellant argued that DW2 had testified that the calls lasted a few seconds or minutes and the time spent on the calls could not indeed establish that the appellant was at fault.
23. The appellant argued that the respondent's evidence indicated that DW2 seemed to place words in the mouths of the farmers implicating the appellant, and where DW2 sent messages, he did not receive any responses. The appellant states that DW2 admitted he had no expertise to give an expert opinion that could be used in implicating her and DW2 had confirmed that he was a mere employee of the respondent who had not undertaken investigations for long, a position he had no evidence of.



24. The Appellant submitted that the co-investigator, one Rodgers Ogara did not testify to corroborate the investigation report.
25. The appellant submitted that some of the farmers retracted their initial evidence as they viewed DW2 as a conman (Pg. 53 pra.53 of Record) and their evidence could not be relied upon.
26. The Appellant stated that the trial court failed to consider that she had only on one occasion used her mobile phone to pay qualification fees for an elderly lady who had sent her the fees on the eve of the deadline for qualification. That the trial court failed to consider that the respondent had not given the appellant any previous warnings, there were no criminal investigations instituted against the appellant on any alleged loss, theft, or fraud relating to money, and that the allegations against the appellant were unsupported.
27. The Appellant argued that loans and payments for items loaned to farmers were only paid and disbursed through the farmers' accounts and no charges against the appellant had been preferred against the appellant for theft by servant.
28. The Appellant argued that the trial court failed to consider that the farmers contacted by DW2, the Respondent's investigator, had changed their initial statements that implicated the appellant and had exonerated the appellant. The Appellant submits that the trial court disregarded all of the appellant's evidence and failed to recognize that the appellant was an industrious employee.
29. The Appellant submits that no express or implied evidence was presented by her immediate supervisor, Adelight Rao, accusing her of having failed to follow instructions and that during the trial before dismissal, the appellant's supervisor had no adverse questions to the appellant that could infer guilt on the appellant and indeed her supervisor was not aware of any investigations into the appellant's conduct. To buttress her position that the trial magistrate failed to consider the evidence before him, The Appellant relied on the authority in *Mckinley v BC Tel*(2001)2 SCR 161, 2001SCC 38(CanLII) relied upon by the court in *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & Another*(2022)eKLR where the court held that:-
  - “29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of alleged insubordination. Within this analysis, a finding of misconduct does not by itself, give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship can no longer viably subsist.”
39. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, courts have held that factors such as the nature and degree of misconduct, and whether it violated the essential conditions of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.”
30. The Respondent on its part submits that the Appellant's dismissal was fair as per section 43(2) of the *Employment Act*, the reasons for the Appellant's dismissal were what the Respondent reasonably believed to exist at the time of the dismissal, which was based on the test of what a reasonable employer in the circumstances would have done relying on the decision of Lord Denning in *British Leyland UK limited V Swift*(1981)I.R.L.R 91.



31. The Respondent submits that the court is not called to substitute the employer's decision in the internal disciplinary process but to consider whether the respondent acted lawfully and in a reasonable manner relying on the decision in *Paul Wigiri Muriuki V Nairobi Water Sewerage Company Limited Nairobi ELRCNO. 1955 OF 2011*.
32. The Respondent submits that investigations were conducted (R-Exh-2) and the appellant vide an email of 29<sup>th</sup> June 2021(R-Exh-3) attended the Virtual session on the issuance of the show cause letter. She was later served with a show cause letter dated 30<sup>th</sup> June 2021(R-exh-4) and she replied on 6<sup>th</sup> July 2021(R-Exh-6). The appellant subsequently attended a disciplinary hearing on 8<sup>th</sup> July 2021 and on 13<sup>th</sup> July 2021, she was dismissed in accordance with Section 44(4)e of the *Employment Act* for breaching the respondent's human resource policy and procedure manual, especially policies relating to fraud, negligence, and client data protection. The dismissal letter was dated 13<sup>th</sup> July 2021(R-Exh-17) and her Certificate of Service was produced(R-Exh-16).
33. The Respondent submits that they complied with all legal provisions in sections 41, 43, and 47 of the *Employment Act*, before dismissing the appellant and relied on the decision in *Antony Mkala Chitavi v Malindi Water & Sewerage Company Limited Industrial Court Cause No. 64 of 2021*.
34. The trial magistrate entered judgment in favour of the Respondent as follows:

“.....having carefully considered the evidence and submissions presented by parties. I am satisfied that the respondent had reasonable grounds for suspecting or concluding that the claimant had committed a criminal offense against them and to their financial detriment. The said offense amounted to gross misconduct within the meaning of section 44(4)(g) of the *Employment Act* and the organisations Human Resource policies.

Such misconduct amounted to valid reason that justified summary dismissal.

For the reason that the respondent has proved by evidence that the reason for terminating the claimant's contract was valid and that a fair procedure was followed, I find that the claimant has failed to discharge his burden of proof under section 47(5) of the *Employment Act* which provides as follows:-

“for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination or wrongful dismissal rests on the employer.”

In view of the foregoing finding, I hold that the termination of the claimant's employment by the respondent on 31.07.2021 was not unfair and unlawful within the meaning of section 45 of the *Employment ACT*.

I further award the respondent costs of this suit. .”(pg.205 to 206 of Record)

35. The trial court understood the appeal to be against both procedural and substantive fairness. I wish to first deal with the burden of proof and standard of proof in employment claims of unfair termination.

### **The applicable standard and burden of proof**

36. The employment claims are civil in nature and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b to the extent



the termination is unfair if '(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee'.

37. Section 43 of the *Employment Act*, 2007 provides that:

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) of the Act provides that:

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

38. As rightly held in *Josephine M. Ndungu & others v Plan International Inc (2019)*e KLR observed: '68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity, and compatibility or based on the employer's operational requirements...."

39. The reasons for the Appellant's suspension were set out in the summary dismissal letter of 13<sup>th</sup> July 2021(pg. 26) for breach of the respondent's policies on fraud and negligence by failing to drop inputs to farmers as requested leading to financial losses; and client Data Protection by using details of "Vinaywa Maple, Imali Mable, Dancan Fedha, Mable Endesia to enroll for inputs without their consent". The detailed particulars of the allegations against the appellant set in the show cause letter were contained in the investigation report of 24<sup>th</sup> June 2021(pg. 49 of Record). The appellant replied to the show cause letter(pg.20 of record).

40. The Appellant during cross-examination (pg. 184) read out her response during the Disciplinary hearing and she confirmed in the said hearing that she had indeed received money from a client at night, and that since she had enrollment challenges and feared she could not meet her targets she agreed, she had violated the policy relating to fraud and negligence in dealing with money, as she was afraid of losing clients (pg 23 of the Record). The Appellant testified that she sent the money using her phone to meet her target, since the deadline was on 31<sup>st</sup> December, and the money had been sent at 11 pm



yet the deadline was at midnight. The money sent using the appellant's number (pg.22) was related to the Gimomoi Group which the appellant confirmed that she could have done better by not using her phone to pay the qualification fee by qualifying the farmer. In the minutes of the disciplinary hearing(pg24), the Appellant confirmed that she had been trained on the Respondent's policy of fraud and negligence, and agreed that she was not supposed to make payments on behalf of farmers.

41. On the failure to deliver inputs and fraud and negligence policies, the record of the hearing (pg.23) shows that the appellant confirmed that, in an incident involving Titus-Edith Musembi(OAF ID -75952), she had remained with Grevillea Tree and 4kgs meant for Edith, as Edith's maize had gone missing during delivery and Edith refused to take the other inputs. She confirmed that they tried to raise money with other group leaders to replace the maize lost for Edith, but the same was never done.
42. On the issue of money repayments, the appellant also confirmed that relating to Titus-Nelson Gwiloni OAF-ID 85452- Msamalia Group, that she had in August 2020 in the company of some Group Leaders(GLs) collected repayment from the group of Kshs. 5,860 through one of the Group Leaders, who was to pay on behalf of the farmers, but she did not follow up to confirm if the same amount had been paid(pg 23 of Record). The amount was never paid by the Group Leader and she could not identify who the Group leader was, resulting in a loss to the Respondent.
43. On the issue of the use of data, Titus-Selina Vugutsa-OAF ID-76014-GL -Mavuno-(pg. 22), Selina confirmed that she did not enroll for inputs, and James confirmed that the Appellant had issued him with 15 Iron Sheets using Selina's account, he had paid through Selina account, but later on, the iron sheets had been repossessed and the appellant confirmed that the iron sheets were reissued to someone else. The main issue was that the appellant had used another farmer's account to issue inputs to different farmers(James used Selina's account)(pg. 23 of Record).
44. The accusations against the appellant related to compliance with the Respondent's policies (pg. 154-159), which the appellant confirmed she violated on Personal data, by using another farmer's(Selina) information to issue inputs to another farmer(James), in this case, James had the personal account details of another farmer against the policy stating "Never share client financial data, including size of loan and repayment information, is restricted information. Staff handling client data should follow these measures to ensure that it is kept secure."(pg. 55-59). The appellant never denied the issue of issuing inputs with another client's account, her issue was that Selina could not have confirmed that information because she was dead.
45. The Appellant argued that the trial magistrate did not consider her explanation of the allegations against her. The court considered the Appellant's response during the virtual disciplinary hearing, where she confirmed that she had issued iron sheets to one James using another person's account(Selina) and later on reissued the iron sheets when James defaulted, without giving a record of how the inputs were re-allocated and to whom. The Appellant also confirmed that she had breached the Respondent's policy by using her mobile number to pay a registration fee for a farmer since she was eager to meet targets (pg.204). on page 25 of the Record, the Appellant stated that she "risked" to qualify farmer. The "Risk" meant she flouted the Respondent's policy to register a farmer.
46. The appellant submitted that farmers had complained about the respondent's mode of payment through USSD, but she did not show any evidence that she had raised the issue with the Respondent. On the delivery of inputs, during hearings, she confirmed that she had not delivered some items to Edith(pg.23) contrary to her response to the show cause letter(pg.146 of record) that she had delivered; as she retained them when Edith refused to collect them, as her Maize had gone missing. The investigation report captured all input and repayment variations depending on the Appellant's



responses during the investigations. The appellant only claimed that the investigator did not have the qualifications to prepare the report but did not dispute her responses to the said investigator.

47. The Appellant had signed the Respondent's policies (pg. 16 of Record) (pg.154-159). They were the operational requirements outlined by the respondent in undertaking the Appellant's duties. The appellant confirmed that she indeed bypassed the policy relating to repayments, by paying on behalf of a farmer so that she could meet her targets. The Appellant confirmed that she had been trained on the same policies and pressure to meet deadlines should not have led her to break the norm. She had also confirmed having not given all the inputs to a farmer Edith, and all these allegations related to the Appellant's position as a field Officer, where she was to "Follow the stipulated compliance policies on Mobile and Repayment compliance" as per her Appointment letter(pg.14). The reason for the appellant's termination was valid. The trial court was only called to evaluate whether a reasonable employer could have reached the same decision based on the circumstances, as per the test defined by Lord Denning in *British Leyland UK LTD V Swift* (1981) I.R.L.R 91 where the reasonableness test was defined to wit:- ' the correct test is: ' was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair..''
48. The Court finds that the trial court rightly found that the Appellant had indeed flouted the Respondent's policies. The reason for the termination was related to the Appellant's conduct and the employer's operational requirements (see section 45(2) of the *Employment Act*). The Court upholds the decision of the Learned Magistrate on substantive fairness.

### **Procedural Fairness**

49. For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
50. While the accusations that were leveled against the Appellant related to her conduct and operational requirements of the employer, she alleged that the investigations were incomplete and partial as DW2, was an employee of the Respondent and the investigation Report (D-Ex-2) was prepared by an unqualified investigator. The claimant alleged that the minutes of the virtual disciplinary hearing were tailored to show the appellant's guilt which was the respondent's already adopted position. She raised an issue with the contents of the minutes and sought for correction of the minutes to show her position. The Appellant alleged that the respondent only used the investigation report to dismiss her and never considered her response. The appellant alleged that she did not understand the process of how she was to appeal the decision to dismiss her as it was not stated.
51. The trial court in the judgment as regards procedural fairness held that:\_

"...in the instant case, it is not disputed that the Claimant was informed of the allegations against him vide a show cause letter and given opportunity to respond in writing. Thereafter she was invited to a disciplinary hearing where she was allowed to make her representations.

It is also common ground that the claimant was further informed of her right to be accompanied to the said hearing by a fellow employee of his choice, but opted not to be accompanied to the said hearing. To that extent, the court is of the opinion that the procedure followed before dismissing the claimant was in accordance with the mandatory provisions of section 41 aforesaid. The claimant was given an opportunity if she felt that the termination was unfair and that the decision was also not fair but she opted not to appeal."



52. The court proceeds to re-evaluate the evidence and decide whether the trial court was right regarding the procedural fairness test.
53. In *Josephine M. Ndungu & others v Plan International Inc (2019)e KLR* the court observed that -  
 “Fair procedure, on the other hand, refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under sections 43(1), 45(2), and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed.” The court holds that the 4 corners of legal threshold referred to in the foregoing decision are stated in section 45)2(b) of the [Employment Act](#) namely:- (i) related to the employees conduct, capacity, or compatibility; or (ii) based on the operational requirements of the employer;”
54. Section 41 of the [Employment Act](#) which provides as follows:-
- “(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
55. It was not disputed that the Appellant was dismissed from employment on 13<sup>th</sup> July 2021(C-Exh-7-pg.26). She was given the show cause letter (C-Exh-3- pg 18 ) dated 30<sup>th</sup> June 2021 and on 6<sup>th</sup> July 2021 and she responded to the show cause letter(P-Exh-4-pg 20). She was invited to appear virtually for a disciplinary hearing on vide email on 29<sup>th</sup> June 2021(pg. 150) on 30<sup>th</sup> June 2021 at 3.30 pm. The Appellant was issued with a confirmation of show cause letter dated 30<sup>th</sup> June 2021 and informed to respond in 7 days at the same time invited for a disciplinary hearing on 8<sup>th</sup> July 2021 at 10.00 am. In the letter the appellant was informed of the right to call any witness from the Respondent’s staff(pg. 18). The Hearing was conducted on 8<sup>th</sup> July 2021 when the appellant testified as evidenced by the minutes of the said date(pg.21-24).
56. The appellant raised an issue with the record of the minutes on 12<sup>th</sup> July 2021, stating that her position was not well recorded as follows:-
- “Hello,
- With regard above subject, I kindly request you to review these.
1. I didn’t agree to have violated fraud and negligence policy but just did customer service to a farmer who sent cash to me late at night forcing me to risk and make him qualify as a farmer using my number.
  2. As for Esinasi Agwero I clearly stated that she was a farmer and she received all her inputs though she defaulted, as for the witness Selina she is dead, the



number you call claiming is Esther she's not the Ester you are to be calling, so kindly check the minutes if possible and allow me to append to them.....”

57. The Trial Magistrate did not consider the issue relating to the record of minutes, the qualifications of DW2, or the admissibility of the Investigation Report raised by the Appellant.
58. The appellant alleged that the minutes were not changed and thus the allegations against her were false. The court noted that the Appellant did not dispute the other issues in the minutes and as relates to violating the policy, the appellant during the hearing confirmed that she had been trained on the policy and she had been forced to make payments using her mobile against the policy due to enrollment targets she was chasing and apologized (pg.24). As relates Selina, investigations indicated that one James had confirmed that, he was using Selina's account to make payments. The appellant did not refute the allegations that the said Selina's account was used by James, but only that Selina is dead. There was no indication that the Record of the Respondent's statements was false.
59. The Appellant stated that the investigations by the Respondent were partial and the Investigation report was inadmissible as the same was prepared by DW2 who was an employee of the Respondent and who had no qualifications.
60. DW2 testified that he was engaged by the Respondent as an investigator (PG188). The Appellant confirmed that indeed DW2 was an investigator employed by the Respondent. DW2 testified that he was investigating the misappropriation of funds in an internal process within the respondent. The investigations carried out by DW2 involved the confirmation of data as entered by the Appellant and others in the systems JIT and Client Handle and verifying information input in the system and on the Input Delivery Sheets, which did not require scientific analysis. The Appellant claimed that DW2 did not have the qualification to undertake the investigations, but there was no proof produced that DW2 conducted himself beyond the call of his duty.
61. The Court finds that the investigations by the respondent were an internal mechanism by an employee engaged by the Respondent as its investigator (DW2). The investigations by the Respondent did not require the standard of criminal proceedings as they were to follow an internal procedure, where DW2 considering the advent of COVID-19 had to undertake the interviews with the farmers through mobile calls and text messages on the information that had been input in the system (JIT/Client Handle) by the Appellant and other persons. There was no evidence by the Appellant that the investigator was partial. The appellant had responded to the investigator and she confirmed through the email of 11<sup>th</sup> June 2021 that her responses to the investigator were right (pg. 146) in the terms that: ".....I hereby write to confirm the above response from the previous conference call as the right responses I gave of my knowledge...." (pg.146).
62. On the procedure of appealing, the dismissal letter was clear that the Appellant was to appeal within 30 days and to whom the appeal was to be addressed (pg.27). The appellant testified that she opted not to appeal as she had no faith in the respondent (pg.184).
63. The appellant further argued that she had not been given a warning previously, and the trial court failed to find that the summary dismissal was without notice thus wrong and unfair. The Respondent's HR policy was not availed, but the Appellant's Appointment letter indicated that, in disciplinary cases, in the event of gross misconduct as per the Employment Act, the respondent had a right to summarily dismiss an employee (pg. 16 para. 10). A gross misconduct under Section 44(4) the Employment Act includes:-
  - “(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of



such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

- (a) .....
- (b) ...
- (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- (d) ....
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
- (f) ...
- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

64. The Court holds that the Appellant could be dismissed without notice or any prior warning letter in the event of gross misconduct under section 44 of the *Employment Act* subject to procedural fairness. The court having evaluated the evidence before the trial court upholds the finding of the Learned Trial Magistrate that procedural fairness was met in the dismissal of the Appellant from employment of the Respondent.

#### **Whether the Appellant was entitled to the reliefs Sought?**

65. While the Trial court set out the parties' submissions on the reliefs sought, apart from finding that the appellant's dismissal was unfair, the trial court did not pronounce itself on the other prayers.

66. The appellant had sought for the reliefs that:-

- a. An order directing the respondent to immediately without condition reinstate the claimant to employment.
- b. A declaration that the respondent unfairly dismissed the claimant from her employment and thus the respondent be directed to compensate the claimant for unfair and unlawful termination at a rate of 12 months' salary.
- c. Compensation for failure to accord leave, overworking and underpayment and salary in lieu of notice.
- d. An order directing all the benefits accruable to the claimant and general damages for loss of income and earnings.



- e. Costs of this suit and interests at courts rate.
  - f. Any other relief the court may deem fit and necessary to so grant.
67. The Learned Trial magistrate found the termination of employment by the respondent on 31<sup>st</sup> July 2021 was not unfair and unlawful and awarded the costs to the respondent. The court at appeal will not interfere with the said finding. Only a point of correction is that the trial court held that the termination had been on 31 July 2021, while the appellant's termination was on 13<sup>th</sup> July 2021.
68. An order for reinstatement was not available to the appellant, as her termination was found to be lawful and fair.
69. The court is called to look into the facts and the law and consider whether the Appellant was entitled to the other reliefs sought being:-
- c. Compensation for failure to accord leave, overworking and underpayment, and salary in lieu of notice.
  - d. An order directing all the benefits accruable to the claimant and general damages for loss of income and earnings.

### **Leave, Overworking and Underpayment and Salary in Lieu of Notice**

#### **i. Leave**

70. The Appellant claimed that she applied for leave and leave was denied. She however had no proof that leave was denied.
71. The Respondent stated that the appellant was granted all her leave and when she was not granted the leave the same was compensated by the respondent (pg.41 of Record).
72. In the dismissal letter, the Respondent indicated that the Appellant was entitled to Kshs. 4,095.33 for untaken leave days. During the hearing, the appellant confirmed she was paid her terminal dues(pg.184) which included the untaken leave days. In her statement of claim, the appellant did not state that she had been paid for any leave.
73. The Appellant did not specify how much leave she was entitled to and for which period she had not gone for leave. With the dismissal letter, the claimant was aware of which leave days, if any, she had not taken, as the Respondent had indicated the leave days that were available to the Appellant.
74. The court finds no basis for the claim of unpaid leave days.

#### **ii. Claim for Overworking and underpayment**

75. The Appellant confirmed that she worked on Monday to Friday from 8 am to 5 pm and on Saturday from 8 am to 1 pm, with Monday being the only day she worked in the office and the other days in the field. She testified that she had no evidence that she had worked up to 9.00 pm as she alleged.
76. There was no evidence produced by the Appellant of which days she had worked overtime and the claim being special damage in nature must be stated clearly and proved. The claim on overtime fails.

#### **iii. Underpayment**

77. The appellant testified that she was underpaid as her monthly salary was below the minimum basic salary yet she was overworked. There were no particulars of how she was underpaid in the statement



of claim, but during the hearing, she testified that the Respondent should have at least paid her Kshs. 15,000/- as her work was a lot(pg.183).

78. The appellant in her submissions in the lower court submitted that she was underpaid as her salary of Kshs. 12,182.16 was below the minimum basic salary and attached the Regulation of Wages (General Amendment) order, 2015 to state she was employed in the salesman category and she was entitled to Kshs. 20,528.80 monthly.
79. The respondent argued that the Appellant was employed as a Senior Foreman under the Statutory Minimum wage for Agricultural workers and she was paid accordingly. The Appointment letter states that the appellant was employed as a “Senior Foreman under the Agricultural Wages Section”(pg.14 2. Details Compensation....”) and it provided her salary which as evidenced by the Respondent was increased gradually. There was no dispute on this position.
80. Parties are bound by their pleadings and the Appellant did not plead in her claim the specific amount of her underpayment nor did she plead the period when she was underpaid. The claim of Kshs. 20,528.80 as the monthly salary she was entitled to was only brought at the submissions stage. Submissions are not pleadings and the appellant thus failed to specifically plead for underpayment to be entitled to it. At the hearing she said her job was too much and she could have been paid at least Kshs. 15,000/-. In the instant case the appellant did not plead period of underpayment. There is no basis for the Court to interfere with the judgment of the trial court on the prayer.

#### **iv. Salary instead of Notice**

81. Having found that there was both substantive and procedural fairness as held by the Learned Trial Magistrate, the Appellant was not entitled to Payment of the salary in lieu of Notice.

#### **v. General damages for loss of income and earnings.**

82. The Appellant’s termination was found to be fair and thus a claim for general damages, which cannot be awarded for breach of contract, was not available to the Appellant. Award for termination of employment is guided by remedies stated under section 49 of the [Employment Act](#) and general damages is not one of the available remedies.

#### **Whether the appeal is merited.**

83. The Court holds that the Appeal fails in its entirety. The judgment of Hon. L. Kassam (CM), Kakamega, delivered on 26<sup>th</sup> April 2023 in Kakamega MCELRC Cause No. 64 of 2021 Between Philis Ingado and One Acre Fund, and consequential decree is upheld.
84. To temper justice with mercy the Court holds that the claim arising from an employment relationship and the trial court having failed to address the reliefs sought, the Court orders each party to bear its own costs in the appeal.

**DATED, SIGNED, AND DELIVERED ON THE 25<sup>TH</sup> DAY OF APRIL 2024 IN OPEN COURT AT KAKAMEGA.**

**J.W. KELI**

**JUDGE**

**IN THE PRESENCE OF**

C/A Lucy Macheso

For Appellant: Luvayi



For Respondent: Wangoda

