



**Gitonga v Unilever Kenya Limited (Cause 1326 of 2018)
[2024] KEELRC 1315 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1315 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1326 OF 2018
NJ ABUODHA, J
MAY 27, 2024**

**BETWEEN
RACHAEL WACHIRA & REUBEN GITONGA CLAIMANT
AND
UNILEVER KENYA LIMITED RESPONDENT**

JUDGMENT

1. This matter is consolidated with cause number 1325 of 2018. Both claimants filed a memorandum of claim dated 20th August, 2018 in which they alleged inter alia that:

1st Claimant- Rachel Wachira

2. ...

- I. This claim is founded upon events immediately prior to and during the Claimant’s employment with the respondent and relates to the actions and conduct of the Respondent through its agents who were at all times the Claimant’s employer and/or supervisors.
- II. Prior to her dismissal from employment the Claimant was employed as Exports Co-Ordinator based at the Commercial Road Nairobi working under an immediate superior and supervisor who had throughout the period of the Claimant’s employment treated the Claimant with open hostility and malevolence due to the fear that she would take up his position.
- III. On 9th October 2017 the Claimant’s immediate superior and supervisor, one Rohit Khurana, whose official designation was Customer Service Excellence Manager wrote to the Claimant a letter under the heading Notice To Show Cause in which he, Rohit, accused the Claimant of 1. Sharing of log on credentials which violates COBP policy. 2. Complicit in a conspiracy to steal Unilever goods / gross negligence and gave her two days in which to show cause why disciplinary proceedings including dismissal should not be taken against her. It is the



Claimant's averment that these accusations could not of themselves be the basis of dismissal from employment as the Claimant was at all times working under the express supervision and direction of her immediate Manager Rohit Khurana the author of the said dismissal letter. If at all, which is denied, there was any failures as alleged the person responsible for the same was Rohit Khurana and not the Claimant and the Disciplinary Committee wrongfully failed to so find to the prejudice of the Claimant.

- IV. The Claimant duly responded to the show cause letter which to her appeared to be part of a pattern of conduct by the Respondent to lay groundwork for her dismissal without any good cause and without following laid down procedures under the Unilever Code of Business Practices despite her 11 years blameless and loyal service to the Respondent.
- V. Following receipt of the Show Cause letter referred to in paragraph 5 above and her detailed response thereto the Claimant was served with a dismissal from employment letter dated 27th February 2018 which letter was a repeat of allegation 1,2 in paragraph five to the effect that she was guilty of:
 - a) Sharing of log in credentials with a colleague hence COBP breach.
 - b) Complicit in conspiracy to steal stocks/ gross negligence.
- VI. The said letter was signed by Rohit Khurana an interested party who was not and could not be considered impartial and/or independent due to his work relationship with the Claimant.
- VII. It is the Claimant's averment that the letter itself was by a person who was not impartial or independent and the allegations forming the reasons for her dismissal were false, without foundation, malicious and defamatory and could not in law or in fact be the basis for her dismissal.
- VIII. The Claimant avers that the disciplinary proceedings to which she was subjected to and upon which her dismissal was based were neither independent nor impartial as is required by law and/or natural justice and the decision and the Disciplinary proceedings to which she was subjected, neglected and/or failed to consider and find that the Notice to Show Cause was from a person who was conflicted and/or had a direct interest in having the Claimant dismissed.

2nd Claimant- Reuben Gitonga

3. ...

- I. This claim is founded upon events immediately prior to and during the claimant's employment with the respondent and relates to the actions and conduct of the Respondent and relates to the actions and conduct of the Respondent through its agents who were at all times the claimant's employer and/or supervisors.
- II. Prior to his dismissal from employment the Claimant was employed as Customer Service Excellence Assistant Manager based at the Commercial Road Nairobi working under an immediate superior and supervisor who had throughout the period of the Claimant's employment treated the Claimant with open hostility and malevolence due to the fear that he would take up his position.
- III. On or about 15th November 2017 the Claimant's immediate superior and supervisor, one Rohit Khurana, whose official designation was Customer Service Excellence Manager wrote to the Claimant a letter under the heading Notice To Show Cause in which he, Rohit, accused the Claimant of 1. Failure to Provide Accurate Records, Reporting and Accounting; 2. Failure



to Report COBP Breaches and, 3. Failure to Protect Unilever Assets and financial interests/ Gross Negligence and gave him two days in which to show cause why disciplinary proceedings including dismissal should not be taken against him. It is the Claimant's averment that these accusations could not of themselves be the basis of dismissal from employment as the Claimant was at all times working under the express supervision and direction of his immediate Manager Rohit Khurana the author of the said dismissal letter. If at all, which is denied, there was any failures as alleged the person responsible for the same was Rohit Khurana and not the Claimant and the Disciplinary Committee wrongfully failed to so find to the prejudice of the Claimant.

- IV. The Notice to Show Cause letter had been preceded by another one dated 19th June 2017 which the Claimant had responded to and the matter had ended hence demonstrating that the conduct of Rohit was based on ulterior motives and personal interest.
- V. The Claimant duly responded to the show cause letter which to him appeared to be part of a pattern of conduct by the Respondent to lay groundwork for his dismissal without any good cause and without following laid down procedures under the Unilever Code of Business Practices despite his 18 years blameless and loyal service to the Respondent.
- VI. Following receipt of the Show Cause letter referred to in paragraph 5 above and his detailed response thereto the Claimant was served with a dismissal from employment letter dated 22nd January 2018 which letter was a repeat of allegation 1,2 and 3 in paragraph five to the effect that he was guilty of:
 - a) Failure to provide Accurate Records, Reporting and Accounting;
 - b) Living the Code: Failure to Report COBP Breaches;
 - c) Failure to Protect Unilever Assets and Financial interests/ alternatively: Gross Negligence.
 - d) The said letter was signed by Rohit Khurana an interested party who was not and could not be considered impartial and/or independent due to his work relationship with the Claimant.
- VII. It is the Claimant's averment that the letter itself was by a person who was not impartial or independent and the allegations forming the reasons for his dismissal were false, without foundation, malicious and defamatory and could not in law or in fact be the basis for his dismissal and the Claimant will crave leave of the Honourable Court to refer to his letter of Appeal addressed to the Human Resource Director dated 26th January 2018 to prove that the reasons adduced as justification for his dismissal had no basis in fact and in law.
- VIII. In addition, and without prejudice to the above the Claimant pleads that his letter of dismissal was the result of malicious and unwarranted campaign by his immediate superior and officer who was also his immediate supervisor and who signed the letter of dismissal and was therefore influenced by self interest and/or conflict of interest to protect his own job and/or cover up for his own failure and incompetence.
- IX. The claimant avers that the disciplinary proceedings to which he was subjected to and upon which his dismissal was based were neither independent nor impartial as is required by law and/or natural justice and the decision and the Disciplinary proceedings to which he was subjected, neglected and/or failed to consider and find that the Notice to Show Cause was from a person who was conflicted and/or had a direct interest in having the Claimant dismissed.

4. The respondent filed a response to the 1st Claimant's claim in which it averred inter alia:



- a) The Respondent denies that the Claimant was unlawfully dismissed from her employment as alleged or at all. As such, the Respondent denies that the Claimant is entitled to the orders sought and it states as follows:
- i) The Claimant was summarily dismissed from employment on grounds of gross violation of the Respondent's Code of Business Principles Policy (the Code).
 - ii) The Claimant's summary dismissal was fair, procedural and was carried out in accordance with the applicable laws.
 - iii) The Claimant's summary dismissal on grounds of gross violation of the Code was justified and warranted in the circumstances.
- b) The Respondent further avers that during the tenure of her employment, the Claimant was expected to and agreed to be bound by the Respondent's conditions of employment and its rules, regulations and policies. Under clause 12 of her contract of employment, the Claimant was subject to dismissal without notice or payment of salary in lieu upon such grounds as allowed under the law for summary dismissal.
- c) Under the Respondent's Code of Business Principles, the Claimant was required to ensure that she only uses credentials allocated to her when using the Respondent's IT systems and to keep her passwords confidential. A copy of the Code of Business Principles is attached at pages 1 - 54 of the Respondent's Bundle of Documents.
- d) Between 2016 and 2017, the Respondent experienced losses amounting to approximately KES 79,000,000 arising from Systems Applications and Products (SAP) system stock manipulation and theft of finished goods.
- e) As part of her duties, the claimant was responsible for performing the system stock clearance procedure on SAP system and was part of the team that would support monthly stock take processes.
- f) On or about July 2017, the Claimant's SAP log-in credentials were used By a fellow employee to perform various irregular stock write off transactions.
- g) The Respondent believed that the stock cleared had been stolen and that the clearance was aimed at concealing this theft.
- h) The Respondent had reasonable cause to believe that the Claimant was complicit in this theft due to the use of her credentials.
- i) The Respondent issued the Claimant with a Notice to Show Cause Letter on 9th October 2017. The letter informed the Claimant that the Respondent believed that her conduct amounted to gross misconduct as envisaged in Human Resources Policy manual and Section 44 and the [Employment Act](#) 2007. A copy of the NTSC is attached to the Claimant's Bundle of Documents.
- j) The letter set out in detail the allegations of misconduct against the Claimant and she was given adequate time to respond to the allegations.
- k) The Claimant however failed to satisfactorily address the allegations made against her. By her response dated 13th October 2017, the Claimant admitted that she shared her password on at least one occasion.



- l) By a letter dated 23rd October 2017, the Respondent invited the Claimant to attend a disciplinary hearing on 17th January 2018. The summons further informed the Claimant that:
- a) She had a right to attend the disciplinary hearing with a work colleague of her choice;
 - b) She had a right to summon any witnesses to testify on her behalf.

A copy of the Summons is attached to the Claimant's Bundle of Documents.

- m) The Claimant attended the disciplinary hearing on 13th December 2017. She stated that she would not be calling any witnesses or bringing a representative to the hearing. A copy of the Minutes of the Disciplinary Hearing is attached to the Claimant's Bundle of Documents.
- n) At the disciplinary hearing, the Claimant was given an opportunity to answer the allegations in the NTSC. She was also allowed to access her laptop and retrieve evidence in her favour. As earlier, she admitted sharing her password but said she did so with good intentions. The claimant further admitted that she was aware that sharing of passwords was prohibited under the Respondents policies.
- o) Upon considering the Claimant's responses, the Respondent concluded that, by the Claimant's own admission, she had breached the Code. As a result of her breach, the Respondent was exposed to theft of finished goods. Consequently, the Respondent issued the Claimant with a termination letter on 27th February 2018.
- A copy of the termination letter is attached to the Claimant's Bundle of Documents.
- p) Paragraphs 8, 9, and 10 of the Statement of Claim are denied and the Claimant put to strict proof. Contrary to the allegations made by the Claimant therein, the Respondent's employee executed the Notice to Show Cause letter in his capacity as the Claimant's Line Manager. The Respondent had justifiable grounds to issue the Show Cause letter to the Claimant.

With respect to the 2nd Claimant, the respondent averred that:

- A. The Respondent denies that the Claimant was unlawfully dismissed from his employment as alleged or at all. As such, the Respondent denies that the Claimant is entitled to the orders sought and it states as follows:
- i. The Claimant was summarily dismissed on grounds of gross violation of the Respondent's Code of Business Principles Policy (the Code).
 - ii. The Claimant's summary dismissal was fair, procedural and was carried out in accordance with the applicable laws.
 - iii. The Claimant's summary dismissal on grounds of gross misconduct was justified and warranted in the circumstances.
- B. The Respondent further avers that during the tenure of his employment, the Claimant was expected to and agreed to be bound by the Respondent's conditions of employment and its rules and regulations. Under clause 12 of his contract of employment, the Claimant was subject to dismissal without notice or payment of salary in lieu upon such grounds as allowed under the law for summary dismissal.
- C. Under the Respondent's Code of Business Principles, the Claimant was required to:



- a) Provide accurate records, reporting and accounting;
- b) Report any actual or potential breach of the Code;
- c) Protect the Respondent's assets and financial interests.

A copy of the Code is attached hereto at pages 1 - 54 of the Respondent's Bundle of Documents.

- D. Between 2016 and 2017, the Respondent experienced losses amounting to approximately KES 79,000,000 arising from stock manipulation and theft of finished goods.
 - E. In particular, on or about 8th July 2017, a truck collected goods at the Respondent's factory disguised as a direct delivery to a customer but was diverted and subsequently recovered in Garissa.
 - F. The Respondent had reasonable cause to believe that the Claimant was complicit in the theft of finished goods as well as various breaches of its Code.
 - G. The Respondent issued the Claimant with a Notice to Show Cause Letter on 14 November 2017. The letter informed the Claimant that the Respondent believed that his conduct amounted to gross misconduct as envisaged in Human Resources Policy manual and Section 44 of the Employment Act 2007. A copy of the NTSC is attached to the Claimant's Bundle of Documents.
 - H. In response to Paragraph 6 of the Statement of Claim, the Respondent Subpara ad mits that it issued the Notice to Show Cause letter of 19th June 2017. The said Notice to show cause was in respect of separate and distinct infractions from the infractions giving rise to this claim. The Respondent denies that was prompted by ulterior motives or personal interest as alleged.
 - I. The Claimant however failed to satisfactorily address the allegations made against him.
 - J. By a letter dated 14th November 2017, the Respondent invited the Claimant to attend a disciplinary hearing on 13th December 2017. The summons further informed the Claimant that:
 - a) He had a right to attend the disciplinary hearing with a work colleague of his choice;
 - b) He had a right to summon any witnesses to testify on his behalf.
- A copy of the Summons is attached at pages 55 - 59 of the Respondent's Bundle of Documents.
- K. The Claimant attended the disciplinary hearing on 13th December 2017. He stated that he did not have any witnesses and was comfortable to go on with the hearing.
A copy of the Minutes of the Disciplinary Hearing is attached to the Claimant's Bundle of Documents.
 - L. At the disciplinary hearing, the Claimant was given an opportunity to answer the allegations in the NTSC.



M. Upon considering the Claimant's responses, the Respondent concluded that there was sufficient reason to believe that the Claimant neglected to perform his duties as was required the result of which caused material financial losses to the Respondent. Consequently, the Respondent issued the Claimant with a summary dismissal letter on 22nd January 2018.

A copy of the termination letter is attached to the Claimant's Bundle of Documents.

N. By a letter dated 26th January 2018, the Claimant appealed the decision to summarily dismiss him from employment. A copy of the letter is attached to the Claimant's Bundle of Documents.

5. At the hearing the 1st Claimant (Rachel Wachira) testified that she adopted her witness statement dated 23rd May, 2022 as her evidence in chief. She also relied on her documents filed with the claim. In cross-examination she stated that she was the Exports Coordinator and that she was aware of the respondent's business principles and further that she was aware of SAP System. It was used for sales and that sharing of passwords was prohibited. She admitted receiving the Notice to Show Cause letter dated 9th October, 2017. The letter raised two allegations against her. That is, breach of business principles and sharing of password. The Show Cause Letter was written by a Mr. Rohit who was her line manager. She responded to the Show Cause Letter and admitted sharing her password with one Martin and that she did so in good faith.
6. It was the 1st Claimant's further evidence that "Code Clearing 999" was a transaction which could only be approved by her line manager and that Martin cleared the transaction. Regarding disciplinary hearing, she stated that she attended the same and that Rohit was not at the disciplinary hearing and that the hearing was chaired by the Head of Security. It was her evidence that the charges against her were read to her at the hearing and was given an opportunity to defend herself. She stated at the disciplinary hearing that she gave her password under pressure. She was summarily dismissed after the disciplinary hearing and informed of her right of appeal. The summary dismissal letter was signed by Mr. Rohit whom she claimed was biased against her but she never complained about him earlier before the incident that led to her termination.
7. In re-examination she stated that her role was Export Coordinator but had been assigned a new role by Mr. Rohit that required her to be trained however no training was provided but was asked to work closely with Martin. She further stated that she received a call from the Warehouse to write off stock and was told if she did not do so, the respondent would lose sales. The write off was approved by Mr. Rohit.
8. The second Claimant Mr. Reuben Gitonga stated that he recorded a witness statement on 20th August, 2018 which he adopted as his evidence in chief. He also adopted the documents filed with the claim. In cross-examination, he stated that he worked for the respondent as Customer Service Excellence Assistant Manager and that he was aware of the respondent's business principles. He was served with Notice to Show Cause on 14th November, 2017. It was signed by Mr. Rohit and contained allegations against him. He responded to the Show Cause. According to him, on 19th August, 2017, Motor Vehicle KCF 612N was to load stock and get invoiced. This was done by a Mr. Ndung'u. The request was given to security and was also given to the transporter who responded. The truck initially given was KBU 149A but the transporter came and replaced it with KCF 612N. For that to happen, new instructions had to be given by him or his team. The truck came at night and he asked a Mr. Otieno to issue instructions on his behalf. The truck was loaded but the next day there were challenges with giving out the invoices at the factory. The alternative was to send the truck to Embakasi where the initial invoicing was to be done. The 2nd Claimant however stated that this was not the usual way of handling invoices.



9. Asked if Otieno was his witness he said no and further that he had not recorded any statement on his behalf. A stocktake was done on 21st August, 2017 and there was a large variance. He was made aware and confirmed it was his responsibility to protect the respondent's assets. It was further his evidence that he was not the one handling the matter and that he never reported the variance to his employer. Concerning passwords, it was his evidence that there was password sharing at Bolore and he informed his employer about it. He further stated that there was an email and WhatsApp Group and that the email attached as annexure 10 in his bundle of documents. He stated that sharing of password was a breach of respondent's IT policy.
10. Regarding disciplinary hearing he stated that he was invited for a disciplinary hearing and was informed of his right to call witnesses but never called any. He admitted being heard but his arguments were not considered. The minutes were taken of the hearing and he signed the same. He dismissed after the disciplinary hearing and that he understood the contents of the letter of dismissal and that he appealed against the same.
11. In re-examination he stated that the sale to motor vehicle KCF was unusual because the respondent declined to set up a second invoice point which was at the factory. The usual invoice point was at Bolore's Warehouse at Embakasi. He further stated that he reported the sharing of passwords to Rohit and that the problem could not be blamed on him alone. Regarding stock system he stated that he had no access because it was not his duty.
12. The respondent on the other called one witness Ms. Mercy Wanyonyi who informed the Court that she worked for the respondent as Human Resource Officer and that she had worked for the respondent for fourteen years. She record a statement on 16th October, 2023 which she relied on as her evidence in chief. She further relied on the bundle of documents filed with the claim as her exhibits in the case. In cross-examination she stated that she was not working for the respondent when the claimants got terminated but had familiarized herself with the records. Concerning password sharing, it was her evidence that the management knew about it after the investigations were done. Concerning the WhatsApp message screenshot, she stated that the same ought to be put in context. There was a problem with password sharing but password sharing was not allowed. According to her, the 1st Claimant was Exports Coordinator and that the assignment on stocktaking was not sudden. She was trained through handing over and that handing over was part of training. There was no classroom training.
13. Regarding the disciplinary hearing, it was her evidence that Mr. Rohit was not present during the disciplinary hearing. According to her, there was functioning HR Department and that the dismissal was not done in isolation. It was after a disciplinary process. It was her evidence that the dismissal letters and Show Cause Letters were signed by Mr. Rohit and that the claimant was not provided with the statements and investigation report before the hearing but they were availed during the hearing however the claimants' never raised any concern.
14. Regarding the 2nd Claimant, it was her evidence that the motor vehicle was found in Garissa and claimant blamed for negligence. The truck was to go to Mombasa but was found in Garissa. It was her evidence that the 2nd Claimant was not responsible for transport. He was in charge of stock but worked with transporters. His work entailed loading of goods at the factory and receipt at customer's site. The claimant was to confirm that what was dispatched was what was received by the customer. The transporter had a tracker and could locate where the vehicle was. It was her evidence that the vehicle was found with the goods intact and that the driver was with the truck.
15. Concerning loading, it was her evidence that there were to two ways. One was primary loading and the other was secondary loading and that it was an ongoing project at the time and the system was



still being used. It was further her evidence that there was no loss of stock but two trucks were loaded using the same order. The stocks were later sold and that the 2nd Claimant found a buyer for the stock. The negligence on the part of the 2nd Claimant was loading same order in two different trucks to two different customers. She further stated that the claimants were issued with Notice to Show Cause and suspension letters.

16. In re-examination she stated that Rohit's number was not on the WhatsApp Group and that Rohit could not authorise password sharing because it was not allowed. Further, the 1st Claimant was given an opportunity to raise concerns but never did. She also did not appeal the decision. She also stated that investigation was conducted but no formal report was compiled. The 2nd Claimant's role was to receive orders when they come and collaborate with transporters on the dispatch with correct documentation and ensure the goods reached the customer. Every truck had a tracker and veering off the path would be noted and action taken. In this particular case no notification was done until security picked it up. It was not possible to have one similar order loaded on two trucks and the 2nd respondent ought to have picked that and raised it with his line manager.

Submissions

17. Ms Ikonge for the Claimant submitted among others that the Notice to Show Cause letters were signed by Mr. Rohit who was an interested party hence could not be considered impartial or independent due to his work relationship with the claimants. Further that the allegations forming the reasons for the claimants' dismissal were without foundation, malicious and could not in law or fact be a basis for dismissal. The letters of dismissal were as a result of malicious and unwarranted campaign by the claimants' immediate supervisor who was influenced by self-interest to protect his own job or cover up for his own incompetence.
18. Concerning disciplinary proceedings, Counsel submitted that the same was neither independent nor impartial as required by law or natural justice. The decision reached failed to consider and find that the Notice to Show Cause letter was from a person who was conflicted or had a direct interest in having the claimants dismissed from employment. Counsel further submitted that whereas RW1 in her statement stated that the respondent lost Kshs. 79,000,000/- out of the claimants' negligence, no evidence was produced to support this allegation. The claimants were never supplied with any piece of evidence the respondent had relied upon in terminating their employment. Further, the losses alleged and the conspiracies supposed to have been committed to aid the theft were never proved by the respondent.
19. It was Counsel's contention that from the notice to show cause, dismissal letters and disciplinary hearing that took place, it was clear that the claimant's had not been informed in clear terms the allegations against them to enable them prepare for their defence. The claimants' were not given reasonable opportunity to gather evidence that could only be accessed through the respondent's machines. Ms Ikonge further submitted that there was no evidence showing that the claimants' worked independently without any supervision since their jobs entailed a chain of command and approvals before any dispatch of goods could take place. The claimants had faithfully worked under Mr. Rohit who was their line manager and any of the allegations contained in the notice to show cause ought to have been blamed on the supervisor as he gave the team a strict go ahead to perform their duties. Further the said Mr. Rohit was never called to give evidence.
20. On the issue of compensation for breaches of claimants' rights, Counsel submitted that the respondent breached the claimants right to fair labour practice as provided under Article 41 of [*the Constitution*](#) when they were dismissed over unfounded allegations and were denied adequate time to prepare to defend themselves against the allegations levelled against them. In that regard Counsel urged the Court to award the claimants Kshs. 10,000,000/- each and relied on the cases of Adam Isilu Mutinda v.



- AG [2019]eKLR, VMK v. Catholic University Eastern Africa [2013] eKLR and Ol Pajeta Ranching Limited v. David Wanjau Muhoro [2017]eKLR.
21. Regarding compensation, counsel submitted that the claimants' were entitled to salaries and dues for the remainder of their working life up to retirement. That is to say Kshs. 31,200,000 for the 1st Claimant and Kshs. 48,960,000 together with bonus for Kshs. 654,955/- for the 2nd Claimant.
 22. On the issue of whether there were valid reasons to terminate the claimants employment, Counsel relied on section 107 of the *Evidence Act* concerning burden of proof. Concerning proof of reasons for termination, Counsel relied on section 43 of the *Employment Act* and the cases of *Walter Ogal Anuro vs. TSC [2013]eKLR*, *Pamela Nelima Lutta v. Mumias Sugar Co. Ltd [2017]eKLR* among others.
 23. On whether the termination was fair and lawful, Counsel relied on section 45(2) of the *Employment Act* and article 47 of *the Constitution* and the cases of *Namai v. National Bank of Kenya Ltd [2023]KEELRC1497* and the case of *Moses Ochieng vs. Unilever Kenya Limited [2018]eKLR*.
 24. Ms Onyango for the respondent on the other hand submitted that section 43 of the *Employment Act* provided that the burden of proof of reasons for termination lies with the employer but was limited to matters that the employer genuinely believed to exist at the time of termination. In this regard Counsel relied on the case of *CFC Stanbic Bank v. Danson Mwashako Mwakuwona [2015]eKLR*, *Kenya Revenue Authority v. Renwel Waitbaka & 2 Others [2019]eKLR*. In this case the 1st claimant admitted to sharing the SAP's login credentials with a fellow employee, which clearly violated the respondent's Code of Business Principles Policy. In doing so, she was guilty of the second charge in the Notice to Show Cause by being in gross negligence of her duties by not following the laid down protocol in the adherence to stock write off procedures and the use of respondent's IT policy.
 25. Regarding the second claimant, Counsel submitted that he failed to provide accurate records, reporting and accounting and that he failed to report any actual or potential breach of the Code as well as to protect the respondent's assets and financial interests. As a result of his actions, the respondent incurred significant business loss. Counsel was therefore of the view that the decision to dismiss the claimants summarily was a reasonable response in the particular circumstances and falls squarely within the band of what a reasonable employer may have done in the circumstances.
 26. Concerning the allegation of password sharing, Counsel submitted that the supposed transcript of the WhatsApp chat that allegedly showed there was password sharing was in word format and was not dated hence there was no telling that it was an actual transcript of WhatsApp chat as alleged. It further did not show the phone numbers of the alleged chat users. The document therefore did not pass the muster with respect to the strict requirements of the *Evidence Act* on digital evidence. While section 78(1) of the *Evidence Act* provides for admissibility of electronic and digital evidence, section 106B(4) states that such evidence must be proved by way of a certificate. In that regard Counsel relied on the case of *Samwel Kazungu Kambi vs. Nelly Ilongo & 2 Others [2017]eKLR*.
 27. Regarding whether the procedure followed in the dismissal was lawful and fair, Ms Onyango submitted the same was fair and procedural as governed by the *Employment Act*. The Claimants were issued with a Notice to Show Cause, they responded in detail setting out their considered response to the same. They were duly notified of the disciplinary hearing in good time and informed of their right to attend with a colleague of their choice and right to summon witnesses to testify on their behalf. The Claimants attended the disciplinary hearing and were given an opportunity to defend themselves before the disciplinary panel. Upon conclusion of the hearing the claimants were summarily dismissed and were granted the right to appeal the decision. Only the second claimant appealed and the appeal was subsequently dismissed.



28. The foregoing, Counsel submitted, proper procedure was followed prior to the summary dismissal. In this regard, Ms Onyango relied on the case of *Postal Corporation of Kenya v. Tanui* [2019]eKLR and *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013]eKLR. On the allegation that the claimants were never given adequate time and resources to respond to the allegations against them, Counsel submitted that claimants were given adequate time to respond to the Show Cause letters and prepare for the disciplinary hearing. Further, the claimants did not adduce any evidence that they requested for more time and further, they did not request to be provided with additional documents or evidence necessary for the preparation of their defence. Additionally, the respondent agreed to the request to postpone the disciplinary hearing for the 1st Claimant from 30th October, 2017 to 17th January, 2018, a period of nearly two months. The second claimant was informed of the disciplinary hearing on 14th November, 2017 that the disciplinary hearing was scheduled for 13th December, 2017, a period of nearly a month.
29. On the issue whether the claimants are entitled to the reliefs sought, Counsel submitted that the claimants were summarily dismissed from employment on valid grounds after lawful and fair procedure had been followed. They were therefore not entitled to any of the reliefs sought. On the issue of compensation equivalent to the residual contract, Ms Onyango submitted that this was not tenable because it was not guaranteed that the claimants could have worked until retirement age. The claimants' contracts provided for an exit clause hence the respondent could lawfully terminate their contracts as long as the respondent had valid and fair reason to do so. In that regard Counsel relied on the case of *D. K. Njagi Marete v. TSC* [2020] eKLR and *Elizabeth Wakanyi Kibe v. Telkom Kenya Ltd* [2014] eKLR.
30. On the issue of maximum compensation, Counsel submitted that the respondent having demonstrated that it had valid reasons for the termination and after following due process, the claimants were not entitled to any compensation on account of summary dismissal from employment. On the issue of damages for breach of claimants' rights, Counsel submitted that the claimants were given opportunity to defend themselves in accordance with *the Constitution* and *Employment Act*. Further as was held in the case of Elizabeth Wakanyi Kibe (supra), Counsel submitted that there was no provision for damages for lawful termination of a contract of employment save for the compensation as statutorily provided. The claimants had not demonstrated any special circumstances that would warrant grant of damages.
31. This Court has held severally that it is outside its jurisdiction to over-interrogate a decision of an employer to terminate employment contract or dismiss an employee. The role of the Court is to ensure that in carrying out such termination or dismissal, the employer has adhered to the requirement of valid reason and procedural fairness in the process of termination. In seeking to establish the validity of the reason for termination or dismissal, the Court to a limited extent carries out a merit review of the reasons for dismissal. Lord Denning in the case of *British Leyland UK Ltd v. Swift* [1981]IRLR 91 observed:

‘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 a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him’



32. In carrying out this merit review the Court is largely guided by sections 41, 43, 44, 45, 46 and 47 of the Employment Act. The Court is further guided by the provisions of Fair Administrative Action Act and article 41 of the Constitution. Section 43 of the Employment Act provides among others that the reason or reasons for termination of a contract are 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 (4) & (5) of the Act further provided that:
- (4) A termination of employment shall be unfair for the purposes of this Part
 - (a) the termination is for one of the reasons specified in section 46; or
 - (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. (emphasis supplied)
 - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (e) the existence of any pervious warning letters issued to the employee (emphasis supplied)
33. From the above it emerges that the Court in undertaking merit review of reasons for the termination or dismissal not only considers the validity of the reason and the process of executing it, but also the proportionality of termination or dismissal as a disciplinary measure in the circumstances.
34. From the Show Cause letter dated 9th October, 2017, the 1st Claimant (Rachel Wachira) was accused of sharing her SAP login credentials on 7th, 8th, 18th and 20th July, 2017 with a fellow employee, one Martin Ndung'u and the latter using the shared credentials, performed task of clearing code 999 transactions (stock write-off transactions) on the SAP system, a critical role which had been assigned to her to perform. This according to the respondent violated the respondent's Code of Business Principle Policy. The claimant in response to the Show Cause letter admitted to sharing her password with Martin and justified doing so because she was stuck and which is why she called Martin around 3:00 am requesting him to assist in the activity. According to her she did this in good faith. This remained her position throughout the disciplinary process and at the trial.
35. The 2nd Claimant (Reuben Gitonga), according to the Show Cause Letter dated 14th November, 2017, was accused of failing to provide accurate records, reporting and accounting. According to the letter, on 19th August, 2017, he was accused of ordering direct load from the respondent's factory, Commercial Street without adhering to the required process in that he failed to notify Bollore



Warehouse and Logistics Company of the load for purposes of invoicing. That is to say a stock of sunlight pink which was loaded on vehicle registration number. KCF 612N was transported to Bollore's warehouse without informing Bollore. That the truck arrived at Bollore on 19th August, 2017 without proper documentation. The 2nd claimant was accused of ordering direct load from the respondent's warehouse with the full knowledge that another truck had been allocated and loaded at by Bollore for the same product and invoiced by Bollore. That is truck number KBS 699K. The 2nd Claimant was further accused of failure to report COBP breaches. That is to say by the claimant's own admission he stated that he knew there was password sharing at Bollore Warehouse but failed or neglected to report the issue to his line manager thereby exposing the respondent's information to great risk. The third accusation against the 2nd Claimant was that he failed to protect the respondent's assets and financial interest. That is to say by virtue of the claimant's role he had full knowledge of stock movement on SAP and knew or ought to have known that there was good stock that was irregularly transferred to the stock location 999 for write off. The transfer and write off was aimed at concealing the theft of the said stock since there was no justification for the transfer.

36. The 2nd Claimant in his elaborate response to the accusations stated with regard to the 1st charge that there was a proposal from Africa Region Manager that to complement the existing sales system the respondent would engage in direct sales with some selected and key customers to avoid hassles of having to go through warehouse and detailed procedures. This was aimed at cutting operational costs by minimizing the use of warehousing and increasing speed of delivery of products to customers. This was piloted but it faced numerous hurdles with the IT system in existence which made it impossible to generate invoices from the factory site. Whenever they encountered the problem with the system, the respondent was compelled to send the goods to Bollore for invoicing. This according to the claimant was the context in which the goods in MV. KCF 612N ended up at Bollore where it was received in accordance with procedures at Bollore. According to the claimant, there was absolutely no loss to the respondent. The confusion in the two vehicles was as a result of lack of synchronization between the existing warehouse invoicing system and the new direct sales system that was being piloted.
37. As regards stocktaking exercise, the 2nd Claimant stated that sometimes in 2015 his Senior Manager one Mr. George Ousu did an analysis of all the people working under him with help of the respondent's IT department and advised that those who utilized the SAP system for less than 50% of the time were to be withdrawn from the system in order to cut down access fee. The recommendation was that the 2nd Claimant and his colleagues Mr. Gerishom Chege and Caroline Wanjiru were to have their access revoked. Their juniors were heavy users of the SAP system and could not function without it hence were retained. In the circumstances he could not send the variance report because he did not have access to the system.
38. On the issue of failure to report COBP breaches, the 2nd Claimant stated that it took two weeks for the SAP system to generate a password and for warehouse clerks it was crucial for them to have access to the SAP system to enable them receive goods into the warehouse. Sometimes in 2017 Bollore sacked all their three receiving clerks which meant in their absence no work could be done by any other person until the new passwords were generated by the respondent. The warehouse manager through an email dated 6th July, 2017, requested the respondent not to delete the old users until new employees had been issued with their own passwords. No objection was raised by the respondent over this request. Further, there were numerous issues with passwords which hindered smooth flow of business and specifically dispatch of goods to customers. This problem was brought to the attention of senior management whenever it arose.
39. At the disciplinary hearing captured in the minutes of 13th December, 2017 contained in the 2nd claimant's bundle of documents, he is captured to have in his defence read verbatim his response to the



show cause letter captured above. The Chairman of the panel is recorded to have asked the prosecutor if there was specific breach and his answer was that there was a duplicate transaction that was breached to steal in June and July, 2017 stock take in relation to KCF 612N but the respondent was fortunate that it was not actual theft. Further asked by the Chairman of Panel if there was evidence of request by the 2nd Claimant to sales team to give another customer the truck that had been loaded and the prosecutor replied that there was evidence as contained in the 2nd Claimant's response.

40. The Court recalls from the evidence that RW1 informed the Court that the 2nd Claimant was not responsible for transport but in charge of stock but worked with transporters. RW1 further stated that the vehicle KCF 612N was found with the goods intact and that the driver was with the truck. She further confirmed that there were two ways of loading. One was primary loading and another secondary loading and that it was an ongoing pilot project at the time and that the system was still being used. The witness further informed the Court that the stock loaded in KCF 612N was ultimately sold to another customer.
41. What the Court can deduce from above is a question of the gaps and lapses in the respondent stock management system which could have been occasioned by what both the claimants and respondent's witness confirmed, was piloting of the secondary billing system side by side with the primary billing system. The respondent's witness further confirmed that the respondent incurred no financial loss over the activities the claimant's were accused of as a result of the confusion brought about by the pilot billing system. As observed earlier in this judgment, it is outside the mandate of this Court to over interrogate management decisions culminating in dismissal or termination of an employee. Hon. Justice Prof. Ojwang' J (as he then was) in the case of Kenya Revenue Authority Vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009 observed thus:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed”

42. The Court however, as earlier observed, has power to undertake a merit review of a decision to dismiss or terminate and one of the considerations is the proportionality of the disciplinary measure meted out against an employee vis a vis the accusations against such employee. This Court in the recent case of Leon Yang *Wang vs. Equity Bank Cause No. E945 of 2021* observed as follows:

“Reason for termination of employment need not be strictly proved but must however be reasonable and proportional in the circumstances. Termination of employment more often than not impacts on the life of an employee hence the decision to bring a contract of employment to an end ought to be governed by reasonableness and proportionality.”

43. In the case of R v Home Secretary; Ex parte Daly [2001] 2 AC 532. It was stated as follows concerning the proportionality test:

“Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations...”



44. This brings me to “reasonable test” applied by Lord Denning in the case of *British Leyland UK Ltd v. Swift* (supra). From the evidence so far analyzed in this matter, was it reasonable for the respondent to dismiss the claimants herein summarily? My answer is regrettably no. The breaches for which the claimants were dismissed were in the knowledge of the respondent and could have been remedied through systems audit and putting in place mechanisms to eliminate the lapses. Breaches if any by the claimants could have been adequately punished through warning letters and not summary dismissal. As observed above, both parties acknowledged that there was a new billing system being piloted alongside the one in use, second, it was common ground that there was password sharing problem in the respondent’s organization and thirdly, the actions the claimants’ were accused of as a result, never occasioned the respondent any financial loss. The respondent therefore failed to prove that there existed a valid reason to justify the summary dismissal of the Claimants herein with the consequence that the Court finds and holds that the termination of their employment was unfair. Regarding the procedure for termination, the Court is satisfied that the process was procedural and in accordance with the law.
45. The next issue is whether the claimants entitled to the reliefs sought. The claimants prayed for salary and dues for the remainder of the period they could have worked until retirement and damages for breach of their rights under *the Constitution*. As rightly submitted by Counsel for the respondent, it was not guaranteed that the claimants could have worked until retirement age. The claimants’ contracts provided for an exit clause hence the respondent could lawfully terminate their contracts as long as the respondent had valid and fair reason to do so besides the claimants too could terminate their employment in accordance with the contract. Further, vagaries of life such as death or incapacity can bring to an end an employment contract prematurely hence working until retirement could not be guaranteed. This prayer therefore is untenable and cannot be granted.
46. As regards breach of claimants’ rights under *the Constitution*, this prayer too will be disallowed as the claimants never demonstrated any egregious behaviour on the part of the respondent while carrying out the disciplinary process that amounted to violation of their rights under *the Constitution*. A termination of employment is a regular occurrence and is adequately catered for in the *Employment Act*. For a termination to meet the threshold of breach of Constitutional rights, the claimant ought to ably demonstrate that what happened went beyond an ordinary termination process. This has not been demonstrated in this case hence this claim will also be rejected.
47. The claimants admitted they were aware of the respondent’s Code of Business Principles Policy. This policy among others prohibited sharing of passwords and engaging in any activity that could jeopardise the respondent’s property and or business interests. As much as there may have been gaps and lapses in the respondent’s business operation procedures, the claimants had fiduciary duty to undertake mitigation measures and adopt regular reporting mechanisms to their supervisors on any activity they undertook in the course of their work that had a potential risk of exposing the respondent’s business to damage of loss. The claimants’ never demonstrated that they did anything in that regard. All they said was that password sharing was common. To this extent seven month’s salary would be adequate compensation for unfair termination.
48. In conclusion the Court awards the claimants as follows:
- Rachael Wachira
- Kshs.
- i) One month’s salary in lieu of Notice 130,000
 - ii) Seven months salary as compensation for unfair termination 910,000



Total 1,040,000

iii) Costs of the suit.

Reuben Gitonga

i) One month's salary in lieu of Notice 340,000

ii) Seven month's salary as compensation for unfair termination 2,380,000

Total 2,720,000

iii) Costs of the suit

49. This award shall be subject taxes and statutory deductions but shall attract interest at Court rates from date of judgment until payment in full.

50. It is so ordered.

DATED THIS 27^H DAY OF MAY, 2024 DELIVERED THIS 27TH DAY OF MAY, 2024

ABUODHA NELSON JORUM

JUDGE

