



**Gicharu v Safaricom Limited & 3 others (Cause 884 of 2019)
[2024] KEELRC 2598 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2598 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 884 OF 2019
NJ ABUODHA, J
OCTOBER 25, 2024**

BETWEEN

MOSES MBURU GICHARU CLAIMANT

AND

SAFARICOM LIMITED 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The Claimant filed his Amended Memorandum of Claim dated 22nd October, 2020 and pleaded inter alia as follows: -
 - a. That the Claimant was employed by the 1st Respondent on the 7th July,2008 on probation as a retail center agent on a basic salary of Kshs 45,000/= and was later confirmed on the 6th February,2009. That he rose through the ranks and on or about April 2014 he was promoted to the position of Team leader at Thika Road Retail Shop earning a consolidated salary of Kshs 134,070/= plus allowances and other statutory benefits.
 - b. The Claimant averred that he had diverse roles and at all material times he was reporting to Stella Aura who was also the supervisor and manager in charge of the 1st Respondent’s Thika Road Retail Shop. That since employment he served the 1st Respondent diligently, in good faith, honesty and with efficiency and in accordance with terms of employment contract for a period of more than 10 years.
 - c. The Claimant averred that because of his diligence and dedication he was never subjected to any disciplinary action and/or even issued with a warning during the entire period of employment



until September,2017 when he was falsely accused of stealing money by the 1st Respondent's shop Manager. That on 27th September,2017 as part of his duties he reconciled the books of account for the day's collection in accordance with the cash Handling Procedure and processes and thereafter deposited a total amount of Kshs 250,000/= at the 1st Respondent's Barclay's Bank Account at TRM Branch and locked the remainder of the money in the shop's safe for it to be banked the following day by the Team leader who was on duty.

- d. The Claimant averred that he ensured that the books reflected the money banked and the money in the safe was equal to the total amount that had been collected that day and all the amount reconciled with that day's cash collection. That however, on 28th September, 2017 at around 10: 00 am the Claimant received a call from the shop manager, Stella Aura alleging that the money locked in the safe was not tallying with the money collected at the end of business on 27th September,2017.
- e. The Claimant averred that he clarified to the 1st Respondent's shop manager that indeed the amount she was alleging to be missing from the shop, a sum of Kshs 250,000 had been banked the previous day and the banking slip was in the safe. That without any factual basis at all the said shop Manager Stella Aura continued to maliciously insist that the money was missing and went on ahead to wrongfully accuse him of having stolen the money despite the bank deposit receipts being present in the shop for proof.
- f. The Claimant averred that he requested the 1st Respondent's shop manager to give him time to reconcile the books to prove that he had indeed not stolen any money but his request was denied. Further he was logged out and he was unable to access his company email or any part of the company's system to substantiate the same. That he was reported by the shop manager to the 1st Respondent's management and he was suspended from his duty by the 1st Respondent vide a letter dated 28th September,2017 but sent via his personal email 30 days later.
- g. Th Claimant averred that based on the accusations of Stella Aura the 1st Respondent conducted its investigation which confirmed that indeed the sum of Kshs 250,000 alleged to have been stolen was banked on 27th September,2017. Therefore, there was no money lost and all the sale transactions for the said date duly reconciled with the records.
- h. The Claimant averred that he received a call from Mr. Athman the 1st Respondent's HR business Partner informing him of his suspension for 30 days to enable conclusive investigations. That on 3rd October,2017 he received a number of calls one from Stella Aura to return his copy of TRM shop keys which he did return and other calls from Gideon the risk department of the 1st Respondent to present himself at the company's headquarters where they agreed he goes there on 4th October,2017. That he also received calls from his colleagues stating that he was wanted by police for stealing money from the 1st Respondent.
- i. The Claimant averred that he was arrested by 3rd Respondent's plain clothed police officers at 9.000pm outside his gate and presented to Ruaraka Police station where he was detained overnight and later transferred to Kasarani police station where he was remanded until 5th October,2017. That on 4th October,2017 the man who stated was Gideon visited the Claimant who maintained that the alleged missing money had been banked by himself on 27th eptember,2017. He proceeded to explain where he kept the bank slips and urged Gideon to contact the finance department as they would have easier access to the company' banks records.
- j. The Claimant averred that later after the interview with Gideon the Police officers at Kasarani Police station presented him with papers requiring him to undertake to pay the total amount



of Kshs 250,000 but he refused to sign. That on 5th October,2017 he was arraigned in Kiambu Law Courts by the 2nd and 3rd Respondents and charged with stealing by an officer of a company contrary to section 282 of the Penal Code in criminal case No. 1581 of 2017 R v Moses Mburu Gicharu.

- k. The Claimant averred that despite the investigation conducted by the 1st Respondent confirmed that the money was banked and there was no deficit the 2nd and 3rd Respondents maliciously continued to press charges just to frustrate and cause unnecessary psychological pain and suffering to him. That the criminal case proceeded to a full hearing but was discontinued on 10th September,2019 under section 210 of the criminal Procedure Code for lack of evidence.
 - l. The Claimant averred that the arrest, detention and prosecution by the 2nd and 3rd Respondent's complaints were malicious, capricious and ill motivated. That he is a man of valuable stock in the labour market and due to the stigma emanating from the above longstanding criminal case he has lost opportunity to resurrect his career, he has suffered loss of employment, his career progression was impaired and his employability was lowered and he claims general damages against the Respondents.
 - m. The Claimant averred that on 15th December,2017 he appeared before a disciplinary committee at the 1st Respondent's headquarters. That the committee panel included Stella Aura to whom he had objected to being a panelist as she had lodged the complaint against him and had been the key witness in his court case. That the 1st Respondent's committee findings concluded that there was no money lost since every amount was duly accounted for and duly reconciled with all sale transaction for the 27th September,2017.
 - n. The Claimant averred that despite the findings of the 1st Respondent Disciplinary Committee that no money was lost the 1st Respondent summarily terminated his employment vide a letter of summary dismissal dated 8th January,2018. That the 1st Respondent failed to follow the staff manual on issues of termination as there was no just cause to terminate him. That the 1st Respondent never issued him with any warning letter for the entire period he was in employment for he was a good employee and the 1st Respondent could have warned him not to bank the money late.
 - o. The Claimant averred that the 1st Respondent violated the law and terminated him unfairly. That decision to dismiss him was un-procedural, null and void contrary to statute, disproportionate, irrational, unreasonable, contrary to legitimate expectation, unlawful and not justified in the circumstances of the case. That he was denied his right to fair labour practices as per Article 41 of the Constitution and violated provisions of the Employment Act.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. A declaration be and is hereby issued that the acts of the 1st, 2nd and 3rd Respondents complained of above are and were unlawful, null and void ab initio.
 - b. A Declaration that the Notice of summary Dismissal of Claimant's employment dated 8th January,2018 was and in unlawful, null and void ab initio.
 - c. A declaration that the arrest and detention of the Claimant between 3rd October,2017 and 5th October 2017 was unlawful, malicious and ill-motivated.



- d. A declaration that the prosecution of the Claimant in Kiambu criminal case No. 1581 of 2017 R V Moses Mburu Gicharu was malicious and ill-motivated
 - e. An award of 12 month's gross salary equivalent to Kshs 1,608,840.00 as compensation for unlawful termination
 - f. An award of one Month's gross salary equivalent to Kshs 134,070.00 being payment in lieu of notice.
 - g. An order directing that the Respondents to unconditionally reinstate the Claimant to their employment services and former position without loss of benefits
 - h. An order that the Claimant be awarded general damages for un lawful arrests, wrongful detention, malicious prosecution and diminished employability.
 - i. Costs plus interest of this Claim.
3. The 1st Respondent filed its Amended statement of Response dated 30th November,2020 and averred inter alia as follows;
- i. The Respondent admitted the factual part of the Claimant's averments and averred that the Claimant was found culpable of gross misconduct and gross violation of inter alia the 1st Respondent code of conduct and Retail Cash Management Procedure as well as his terms and conditions of employment. That these formed the basis of his summary dismissal from employment on 8th January,2018.
 - ii. The Respondent averred that the Claimant was at the material time based in its retail shop at Thika Road Mall. That his line manager was Stella Munoko Aura who submitted an incident report to it reporting that the Claimant had underbanked Kshs 250,000 from the expected bankings for 27th September,2017. That when contacted on 28th September,2017 the Claimant could not adequately explain the variance in that he said it was a receipting error. That it was clear that the Claimant had picked the cash and he was asked to immediately return the cash for banking. That the Claimant informed Stella Aura that he would bring the cash to the shop, he failed to do so and asked Stella Aura not to escalate the issue.
 - iii. The 1st Respondent averred that the Claimant on 28th September,2017 tendered a resignation from employment which he withdrew on the same day. That the Claimant was suspended vide a letter dated 29th September,2017 for a period of 30 days to allow for conclusive investigations. That the suspension was extended by letters of 28th October,2017, 29th November,2017 and 29th December,2017.
 - iv. The Respondent averred that the Claimant was paid all his salary while on suspension but prohibited from transacting any business on its behalf. That his suspension was in accordance with clause 7.1 of its Disciplinary Policy and Procedure. That its Ethics and Compliance Department conducted investigations on the allegations of the Claimant's gross misconduct and prepared an investigation report.
 - v. The Respondent averred that the investigation report revealed the following findings against the Claimant: _
 - a. On 27th September, 2017 the Claimant being a team leader was involved in carrying out the end of day MPESA reconciliations and the opening and closing balances of the Respondent's three MPESA tills.



- b. A cash reconciliation certificate shared at the Respondent's Finance Office indicated that amount which was to be banked was Kshs 646,900/= which amount was less by Kshs 250,000/=
- c. Cash deposit receipts as raised by the Claimant on the 1st Respondent Oracle system for the date of 27/09/2017 was Kshs 646,900/=
- vi. The 1st Respondent's Ethics and Compliance Department conducted further review beginning 1st May,2017 to 28th September,2017 and noted that on several occasions the Claimant failed to bank all the cash as required and that there were instances where direct deposits were made to the bank other than the ones receipted. The department also noted that there were days when the Claimant authorized and overbanked cash. That after reconciliation between what was banked and total MPESA cash collected (May-September, 2017) the department noted that there was a variance of Kshs 299,790/=
- vii. The 1st Respondent averred that based on the findings of the investigations the Ethics and Compliance department recommended that disciplinary action be taken against the Claimant. That the Claimant was therefore invited for a disciplinary hearing on 1st December,2017 at 10.00am by letter dated 27th November,2017. That the Claimant was informed of his right to be accompanied by his colleague who needed to be current employee of the 1st Respondent in the letter. That he was informed to be ready to state his case.
- viii. The 1st Respondent averred that the Claimant attended the disciplinary hearing as scheduled. That he was explained to the purpose of the hearing and was given opportunity to present his case. That by a letter dated 15th December,2017 the 1st Respondent considered the Claimant's case and came up with recommendations based on evidence, investigations and disciplinary hearing which included summary dismissal of the Claimant among others.
- ix. The 1st Respondent averred that pursuant to the above recommendations it proceeded to summarily dismiss the Claimant by the letter of 8th January,2018 with immediate effect on grounds of gross misconduct and loss of trust. That according to the dismissal letter the Claimant while on duty on 27th September,2017 failed to account for an amount of Kshs 250,000/= during the end of day reconciliation as provided in its Retail cash Handling Procedure and Processes. That the said amount was only banked at 5.58pm on 28th September,2017 after enquiry from the Claimant's immediate line manager Stella Aura regarding accountability of the same. That the Deposit was done without following its Retail Cash Handling Procedure and Processes which required that the cash collected be banked by team leader through cash in Transit(G4S)
- x. The 1st Respondent averred that the Claimant in the dismissal letter was informed he would be paid his final dues in accordance with terms of his contract taking in to account any money owed to it and that the dues would be ready for collection by 31st December,2017. That he was informed of his right to appeal his dismissal within 10 days but he did not. That the Claimant did not serve diligently as alleged and the reasons for his termination were genuine and valid which he 1st Respondent believed to have existed at the time of termination within the meaning of section 43 of the *Employment Act*.
- xi. The 1st Respondent denied allegations of malicious prosecution and related allegations. That the acquittal of the criminal case did not automatically render him immune to disciplinary action. That criminal trial and internal disciplinary proceedings initiated by the 1st Respondent



against the Claimant were two distinct processes with different procedural and standard of proof requirements. The 1st Respondent had valid and reasonable grounds that justified the summary dismissal the acquittal notwithstanding.

- xii. The 1st Respondent averred that the Claimant at no given point did he raise any issue as to involvement of Stella Aura in the process. That the fact that the said Stella Aura made the complaint and was a prosecution witness this did not bar her from involvement in the disciplinary process. That the Claimant could challenge this vide appeal which he opted not to appeal.
 - xiii. The Respondent averred that the criminal case did not go to full hearing as the prosecutor applied withdrawal of the case under section 87 of the Criminal Code after one witness had testified. That the Claimant was acquitted under section 210 of the Criminal Procedure Code.
 - xiv. The 1st Respondent averred that sections 41,43 and 45 of the Employment Act and all other applicable provisions were complied with since the 1st Respondent had valid reasons to dismiss the Claimant which was in accordance with Section 44(4) of the Employment Act. That fair procedure was followed and the Claimant did not give satisfactory explanation and he refused to answer questions during hearing. That the dismissal was substantively and procedurally fair.
 - xv. The 1st Respondent denied the reliefs sought by the Claimant and prayed that the Amended claim be dismissed with costs.
4. The 3rd and 4th Respondents filed grounds of opposition dated 10th February,2021 and averred that the 3rd Respondent had legal mandate and duties as per the National Police Services Act under section 24 thereof. That this claim was between employer -employee hence the 3rd and 4th Respondent did not have a role in the matter. That the Claimant did not establish ingredients of malicious prosecution against them specifically the aspect of malice and that 3rd Respondent does not determine judicial outcomes after arresting suspects. That the Claimant's claim was frivolous and vexatious thus an abuse of court process and should be dismissed with costs.

Evidence

- 5. Both the Claimant's and 1st Respondent's case were heard on 11th July, 2024. The Claimant herein Moses Gicharu (CW1) testified and adopted his statement and documents filed as his evidence in chief. CW1 testified that he was an employee of the Respondent and that he joined in July 2008.
- 6. CW1 testified that his role involved reconciliation, banking and updating financial records as a team leader. That he was dismissed because on 27th September,2017 he was accused of not banking Kshs. 250,000/- which was not true according to him as the money was banked. That the Respondent confirmed the banking via an email of 5th October, 2017 from Barclays Bank.
- 7. CW1 testified that he was not issued with a show cause letter prior to his dismissal. That he was accused of not accounting for Kshs 299,000/= at the disciplinary hearing which was not true as they were four of them performing the same role and working on rotational basis. That he was not aware of the said variance which arose from him.
- 8. CW1 testified that the criminal case was dismissed for lack of evidence and that he was charged of stealing Kshs 250,000/= from the Respondent. He blamed the Respondent for the prosecution as they are the ones who furnished the police with the information. It was his position that his dismissal was unfair.



9. In cross examination CW1 stated that the dismissal letter talked of failure to account and not failure to bank. On the Retail cash Management procedure, CW1 stated that the policy does not talk about Team Leader doing the banking and that he collected more than Kshs 250,000/= on the material day and left money in the safe and banked the rest. That they used to close past 8pm when banks were closed. It was his evidence that he would post daily total collections including the amount banked.
10. CW1 confirmed that Kshs 250,000 was not included as it was banked. That investigations were made on allegations of Stella Aura where the policy required reporting of shortages. That he did not receive the email on underbanking since he had already been disconnected from the Respondent's system. CW1 further stated that the time he sent his resignation he had not been disconnected from the respondent's system. That he retracted the resignation because he did it over pressure of accusations of theft and that he was informed of his suspension verbally and during suspension he received his full salary during suspension and he was invited to give his statement during investigations.
11. CW1 further informed the Court that he mentioned his team in the minutes and that he never appealed the dismissal. That he did not have a copy of the manual permitting him retain Kshs. 250,000/= because he had been logged off the system.
12. In re-examination CW 1 clarified that in the staff manual appeal was not mandatory. That there was deposit of Kshs 250,000/= at Barclays Bank TRM and there was email from the bank showing the same was banked.
13. CW1 clarified that the Cash Handling Manual was reviewed in September, 2017 which was the time he was under investigations and that he was not trained on the same. The claimant further stated that the practice was that you bank any time of the day and reconcile with the cash collected at the end of the day. That emails to his colleagues Martha and Anthony were not addressed to him and the same issues were never raised with him.
14. CW1 clarified that he was not issued with show cause letter and there was shortage because some money had already been banked.
15. The 1st Respondent had two witnesses. The first witness Stella Aura (RW1), the Respondent's Manager testified and adopted her witness statement as her evidence in chief and also the 1st Respondent's documents filed with the response as her evidence in chief. RW1 stated that the banking of the Kshs 250,000/= was the issue because the Claimant could have attach a certificate of shortage. It was her evidence that the MPESA Banking was less by the said amount which was underbanking and required explanation from the Claimant.
16. RW1 testified that it was the role of CIT to collect money from the respondent's shops and take it to the bank. That CIT collected cash for safety/security purposes and minimized loss and improved security of the money collected. It was her evidence that employees were not allowed to bank directly as banking was through CIT and this had been the practice since the establishment of Safaricom retail shops.
17. In cross examination RW1 confirmed that the Kshs 250,000/= was not accounted for and that they received the confirmation from the Barclays bank that it had been banked. The Claimant was asked to account for the money and that she made her statement in September before she received the confirmation from Bank that the money had been banked.
18. RW1 stated that the Claimant should have presented the banking slip when she raised the query and that the email from the bank came in October, 2017 and that was when she learnt of it. RW1 further stated that she participated in the disciplinary process because she was a member. That she was the Claimant's Line Manager and the Centers Retail Manager and the one who escalated the issue. That



she was there to give overview of the processes of the retail shop and that there was no requirement for an Independent Line Manager. RW1 confirmed that she read in the minutes that the Claimant had issues with her presence in the Committee and stated that she could not stay aside as she was invited to the meeting. It was further her evidence that she informed the Claimant of the variance and further that Team Leaders used to work in shifts and each would get two days off in a week. She further stated that she did not see similar email to the claimant done by Mwazighe to Martha and Anthony.

19. In re-examination RW1 clarified that at the time of the statement they could not trace any document to give visibility of the cash and that the Claimant was the one on duty. That it was physical cash variance. RW1 further clarified that they did not have control over how police conduct their investigations. That cash was reconciled at the end of the day and what the Claimant did was not procedural as he was not allowed to bank the money directly. That electronic receipts were created to correspond with banking which had unique identifiers.
20. RW1 clarified that she informed the Claimant of the variance on 1.30 pm and that the Claimant had 3 hours to account for the money and that he told her he would account by 5.00 pm but he did not do so and further that she did not deny the Claimant access to the shop. She requested the Claimant to produce evidence of banking via email. That the Claimant never provided explanation.
21. RW1 clarified that once CIT collects money from the shop they did not dictate which money was to be banked. That Ethics Team confirmed that the Kshs 250,000/= was banked since the report was done in November 2017. The Claimant was not the one who accounted for the money. That her statement at Paragraph 11 could be incorrect.
22. RW1 clarified that she testified at Kiambu law courts. That picking and banking money directly was out of procedure. That there were other Team Leaders at TRM. That the Claimant did not respond on under-banking issues and that the Claimant stated that the variance was a receipting error while it was cash error and by 5pm he had not accounted for the cash.
23. The second Respondent's witness was Odhiambo Ooko (RW2) the Senior Manager Employee and Labour Relations of the 1st Respondent. RW 2 testified and adopted his witness statement as his evidence in chief. RW2 testified that the Claimant was dismissed for reasons contained in his statement. That there was cash management procedure where cash was collected and stored in safe to be collected by CIT.
24. RW2 testified that in this case cash was collected and left the Respondent's premises in unclear circumstances and later banked by the Claimant which was unprocedural. It was his evidence that the cash management system was for the protection of employee and the Respondent. He confirmed that proper procedure was followed in dismissing the Claimant.
25. In cross examination RW2 confirmed that he had worked for the Respondent for 8 years and had Masters in HRM from KCA University among others. Further that he had worked in HR for 30 years and was familiar with procedures for disciplinary matters. He was aware the Barclays bank and Ethics Committee confirmed the money was banked. That paragraph 20 of his statement was a typo error. That he was aware there must be justifications for dismissal and procedure followed.
26. RW2 confirmed that the disciplinary hearing was held on 14th December, 2017 and by the time of the hearing money had been accounted for. That a notice to show cause ought to have been issued but there was no document titled notice to show cause but the Claimant recorded statement which statement culminated to a report by the Ethics Committee.



27. RW2 confirmed that the money was deposited at 5.58pm without sufficient explanation offered. That he was part of the disciplinary hearing Team. That Stella Aura was part of the team. That the ethics team prepared the report which factored that the money had been accounted for.
28. RW2 confirmed that in the dismissal letter the Claimant was dismissed on account of failure to account for Kshs 250,000/= on daily reconciliation which was breach of Cash Handling Procedures. That the Claimant complained of the presence of Stella Aura in the disciplinary hearing.
29. RW2 confirmed that Stella raised the issue of variance and she was a witness as she was to explain the procedure at the shop. That the Claimant was given chance to cross-examine Stella but did not do so. That the letter inviting the Claimant for the hearing did not inform him of the right to cross-examine witnesses.
30. RW2 confirmed that the Claimant had no previous warnings and he had worked for more than 10 years. That the Claimant had left when the document at P117 of Respondents documents was reviewed and they did not produce the previous version. That the Claimant did not appeal which was not mandatory.
31. RW2 confirmed that the Cash Handling Procedure was reviewed in September,2017 and he did not produce evidence that the Claimant was trained on the same.
32. In re-examination RW2 clarified that Kshs 250,000/= was missing from the shop safe. That the procedure for removing cash from the safe was not followed. That the Ethics team recommended disciplinary action against Claimant. That the Claimant never explained satisfactorily failure to bank Kshs. 250,000/- with the rest of the money. That they had no control of prosecution procedure.

Claimants' Submissions

33. The Claimant through his Advocates Nyaanga & Mugisha Advocates filed written submissions dated 27th August, 2024. On the issue of whether the Claimant's summary dismissal for gross misconduct was procedurally and substantially unfair, wrongful and against the law counsel relied on section 47(5) of the *Employment Act* on each party's burden of proof and section 45 on the what amounts to unfair termination.
34. On the substantive fairness counsel relied on section 43 of the Act on prove of the reasons for termination and the Court of Appeal decisions in Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR and National Bank of Kenya vs Samuel Nguru Mutonya(2019) eKLR. Counsel submitted that the allegation that the Claimant did not account for Kshs 250,000/= by end of day on 27th September,2017 was not true because the Claimant banked the money on 27th September, 2017 at 5:58 PM and not on 28th September,2017.
35. Counsel further submitted that on 5th October, 2017 at 12.45 pm the 1st Respondent received an email from Barclays Bank TRM Branch confirming that the money was deposited on 27th September, 2017 at 5:58 Pm using code SAF046.
36. Counsel further submitted that in November, 2017 the 1st Respondent's Ethics & Compliance Department, Risks Management Division conducted investigation and prepared a report confirming that indeed the money was banked on 27th September,2017. That the 1st Respondent did not give the Claimant opportunity to explain and or retrieve the deposit slip which was in the shop at TRM. That Stella Aura requested him to explain in one hour. Further he was locked from the shop and locked out of the system.



37. On the allegation that the Claimant violated the Retail Cash Handling Procedure and Processes by banking the money instead of using the Cash in Transit (G4S), counsel submitted that the same were unsubstantiated because the Claimant was never trained or issued with the alleged Retail Cash Handling Procedure and Processes produced by the 1st Respondent and they did not produce evidence that he was trained on the same. Further that the 1st Respondent's witnesses confirmed that the Retail Cash Handling Procedure and Processes was last reviewed in September 2017 after the Claimant had been suspended and there was no evidence that the Claimant was trained. Counsel submitted that the Claimant stated that it was a practice at the shop to deposit the money during the day in order to reduce work load and reconciliation. That the Claimant did not carry money in street as alleged as the Barclays bank and the shop are within TRM.
38. Counsel submitted that no money was lost by the 1st Respondent as the Kshs 250,000/= was accounted for and its witnesses confirmed that his dismissal was a mistake. Counsel submitted that the 1st Respondent did not have valid or justifiable reasons to summarily dismiss the Claimant hence the same did not meet the substantive fairness.
39. On the issue of procedural fairness counsel relied on section 41 of the Act and the cases of Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited (2013) eKLR and Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR among others on importance of following the procedure outlined under section 41 and which was mandatory.
40. Counsel submitted that the Claimant was not given a show cause letter to respond to the allegations thereon as a paramount right to be heard. That the Claimant was accused by Stella Aura on 28th September, 2017 for failure to account for Kshs 250,000/= and thereafter suspended from duty on 29th September, 2017 and subsequent letters up to the one of 29th December, 2017 until he was dismissed on 8th January, 2018.
41. Counsel submitted that the Claimant was invited for disciplinary hearing on 27th November, 2017 for the hearing to take place on 1st December, 2017. The charges were failure to account for Kshs 250,000/= and Kshs 299,790/= between 1st May, 2017 and 28th September, 2017. On 1st December, 2017 the 1st Respondent conducted the hearing which according to Counsel was trial by ambush as the Claimant was not given time to prepare and the said Stella Aura who was the accuser was in the meeting. The Claimant protested her presence but the committee rejected his protest.
42. Counsel further submitted that the 1st Respondent did not inform the Claimant of his right to cross-examine Stella Aura the key witness who testified on all his allegations without being cross-examined. Counsel relied on the cases of Civil Appeal No. 263 of 2019, Judicial Service Commission (JSC vs Beatrice Nyambune Mosiria and M v Batuk (Cause 242 of 2016)(2017) KEELRC 152(15 December 2017) Judgment on the right to cross-examine witnesses.
43. Counsel further submitted that the 1st Respondent did not provide the Claimant with evidence available including the Ethics investigation report of November, 2017 and the email correspondence with Barclays bank on the unaccounted Kshs 250,000/=. That they also failed to disclose evidence of the unaccounted Kshs 299,790/= as the Claimant met the said allegations for the first time on the hearing invitation letter. That the 1st Respondent did not avail the other reconciliation documents in support of the Kshs 299,790/= claim in order to interrogate them.
44. Counsel submitted that the 1st Respondent ignored the Claimant's explanation that the money was banked as supported by the Barclays email and Ethics investigation report. Counsel relied on the case of Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) (2021) KECA 95 (KLR) (22



- October 2021) (Judgment) on termination being unfair for violation of right to be heard. That the 1st Respondent did not adhere to the mandatory provisions of section 41 of the Act hence his summary dismissal fell short of the procedural fairness hence unfair and wrongful.
45. On the issue of whether the Claimant's prosecution was malicious counsel submitted that this court had jurisdiction to address this issue under section 12 of the *Employment and Labour Relations Court Act* as a matter arising or related to the employment relationship. Counsel relied on the court of Appeal case of Chimweli Jangaa Mangale & 3 Others v Hamisi Mohamed Mwawasaa & 15 others, Civil Appeal No. 51 of 2015(2016) eKLR among others on this assertion. That the arrest and subsequent prosecution of the Claimant on the charges of stealing Kshs 250,000/ arose from his employment hence the court had jurisdiction.
 46. On the issue of malicious arrest and prosecution counsel relied on the case of Susan Mutheu Muia v Joseph Makau Mutua (2018) eKLR on the ingredients to be proved which are the same as those in tort. Counsel on what amounts to probable cause relied on the case of Anthony Mkala Chitavi(Supra) which quoted the case of Kagame & Others v AG & Another(1969) EA 643.
 47. Counsel submitted that the Claimant was arrested on 3rd October, 2017 and kept in police custody until 5th October,2017 when he was presented before Kiambu Magistrate Court. That the 1st Respondent received confirmation from the Barclays bank on 5th October,2017 that the money in question, the Kshs 250,000/= was banked on 27th September,2017 but still proceeded to charge the Claimant on the same despite the confirmation.
 48. Counsel further submitted that despite the Ethics investigation report of November 2017 confirming that the money was banked on 27th September,2017 Stella Aura testified on 2nd February,2018 in the Kiambu Court by giving a misleading evidence contrary to what was confirmed earlier. That after hearing the one witness the Criminal case was dismissed on 9th October, 2019 under section 210 of the Criminal Procedure Code for lack of evidence. That the Claimant was kept in police custody for more than 24 hours which was against article 49(1) (f) of *the Constitution*.
 49. Counsel further submitted that after receiving the Barclays bank confirmation as well as the Ethics Team Report the 1st Respondent ought to have withdrawn or discontinued the charges as per the law. Hence the arrest, detention for more than 24 hours and the prosecution was wrongful, ill-motivated, unfair, null and void ab initio.
 50. On the issue of whether the Claimant was entitled to prayers sought counsel submitted that the Claimant was entitled to prayers sought since the dismissal was unfair as well as the arrest and prosecution. That the Claimant was entitled to 12 months' salary compensation as per section 49(1) (c) of the *Employment Act* as well as one months' pay in lieu of notice as per termination clause of his contract.
 51. Counsel submitted that the Claimant was entitled to reinstatement as per section 49(3) (a) of the Act while relying on the case of Kenya Airways Limited v Alex Wainaina Mbugua (2019) eKLR on grounds for reinstatement among other cases.
 52. On the prayer for general damages for unlawful arrest, wrongful detention and malicious prosecution, counsel submitted that the Claimant was entitled to the same while relying on among others the case of James Alfred Koroso v Attorney General (2008) eKLR and requested this court to award the Claimant Kshs 10,000,000/= for the unlawful arrest, detention and malicious prosecution.
 53. On the prayer for general damages for diminished employability, counsel submitted that the Claimant was entitled to the same while relying on the case of Ezekiel Nyangoya Okemwa v Kenya Marine &



Fisheries Research Institute (2016) eKLR while requesting this court to award the Claimant Kshs 10,000,000/= as damages for diminished employability.

Respondent's Submissions

54. The 1st Respondent through its Advocates Munyao, Muthama & Kashindi Advocates filed its written submissions dated 4th September, 2024. On the issue of whether the 1st Respondent had valid reason for termination of the Claimant, Counsel submitted that the Claimant was in breach of Cash Handling Procedures in that the 1st Respondent policy did not allow Team Leaders or other employees to personally engage in banking of the cash collected at the 1st Respondent branches. The same should be stored at cash safes in the premises. Counsel submitted that the Claimant personally banked the cash worth Kshs 250,000/= on 27th September, 2017 which was irregular.
55. Counsel submitted that reconciliation for the collections at the TRM branch were carried out by the Retail Centre Manager the next day 28th September, 2017 and there was no proof at the time that the Claimant had personally banked the Kshs. 250,000/= hence this was recorded as cash shortage. The shortage was reported to the 1st Respondent investigations team in accordance with clauses 11.1.10 and 11.1.20 of the Retail Cash Management Procedure.
56. Counsel submitted that when the Claimant was contacted by Stella Aura vide the email of 28th September, 2017 at 4.39 pm informing him that it had been noticed that he underbanked Mpesa for 27th September, 2017 by Kshs. 250,000/-. He ought to have provided the banking slip as proof which he did not. That the Claimant resigned on 28th September, 2017 at 5.43 pm and at 6.15 pm retracted his resignation without providing any proof of banking.
57. Counsel relied on section 44(4) of the [Employment Act](#) which allows for summary dismissal on gross misconduct. The Claimant did not illustrate that he was not aware of the 1st Respondent procedures since he did not deny them. By keeping Kshs. 646,900/= in the safe showed he knew the procedures and the 1st Respondent produced extracts from its system showing previous inputs by the Claimant.
58. Counsel further submitted that there was no reason why the Claimant chose to bank the Kshs 250,000/= and leave Kshs. 646,900/- in the safe which was higher amount if at all he banked the Kshs 250,000/= for security reasons. Counsel submitted that the Claimant was in breach of 1st Respondent's Retail Cash Management Procedure which was a valid ground for terminating his employment. Counsel relied on the case of Mark.T Mwangi v Gateway Insurance Company Limited(2013) eKLR and John Mbugua v Jamii Bora Limited(2019) eKLR where the court observed that an employer is justified in dismissing employee for breach of its procedures.
59. On the procedural fairness counsel submitted that clause 6.6 of the staff handbook provided for investigations before disciplinary action. The case was first investigated where the Claimant was interviewed and he wrote a statement in he admitted to having banked Ksh 250,000/= and left the rest at the safe. The Claimant was initially suspended on 29th September, 2017 and for a further two months and paid his full salary during the suspension.
60. Counsel submitted that as investigations continued, on 5th October, 2017 they received the bank confirmation that the said cash was banked by the Claimant on 27th September, 2017 at 5:58 pm. That the investigations revealed that a total variance of Kshs 299,790/= had occurred at TRM Branch traceable to Claimant's entries into system. By a memorandum of 27th November, 2017 the Claimant was informed of the outcome of the investigations and he was invited for disciplinary hearing on 1st December, 2017 with three days to prepare and if he had issues with the date he could have requested for extension of time.



61. Counsel submitted that the memorandum dated 15th December, 2017 gave the summary of the disciplinary hearing and the Claimant produced in court the minutes of the hearing hence he was given an opportunity to be heard but did not provide any reasonable explanation. That after the hearing the Claimant was summarily dismissed and paid his final dues apart from notice pay since he was summarily dismissed.
62. Counsel submitted that the Claimant was given ample opportunity to make representations both in writing and orally before he was terminated. That proper procedure was followed hence his termination was both procedurally and substantively fair.
63. On the issue of malicious prosecution counsel submitted that the Office of the Director of Public Prosecutions was an independent constitutional entity and the 1st Respondent did not have control over the actions of the police or the decision ODPP makes in prosecution of cases. It therefore could not be held responsible for any alleged malicious prosecution. Counsel relied on the case of *Gichanga v BAT Kenya Ltd (1989) eKLR* where the court dismissed claims of malicious prosecution.
64. Counsel submitted that the acquittal under section 210 of the CPC instead of withdrawal under section 87 of the CPC is unlawful and contrary to Article 157(7) of *the Constitution* that acquittal could be allowed once prosecution closes its case hence the Prosecution had not closed its case and the Claimant not entitled to order of malicious prosecution in this case.

Determination.

65. The court has reviewed and considered the pleadings, testimonies, submissions and authorities relied on by both parties and has I have come up with three main issues: -Aa. aa.
 - a. WhetherWhether the Claimant's summary dismissal from employment was unfair and unlawful
 - b. Whether the Claimant's arrest, detention and prosecution was malicious, wrongful, ill-motivated and unfair
 - c. Whether the Claimant are entitled to the reliefs sought.

Whether the Claimant's summary dismissal of employment was unfair and unlawful

66. It is now an established requirement that for termination to pass fairness test there must be both substantive and procedural fairness. This was the principle established in the case of *Janet Nyandiko-vs-Kenya Commercial Bank Limited (2017) eKLR* among other cases. On substantive fairness the Respondent was under duty to prove and justify the reasons for the termination as per section 47(5) of the *Employment Act* while the Claimant under the same section was required to prove that indeed he was unfairly terminated. Section 43(2) of the *Employment Act* provides that the reasons for the termination must be fair and valid and which the employer must have believed to have existed at the time of termination.
67. In the instant case, the Respondent alleged that they summarily dismissed the Claimant on grounds of failure to account for Kshs. 250,000/= during the end of day reconciliation of 27th September, 2017 as provided in the Retail Cash Handling Procedure and Processes. The said amount was only banked on 28th September, 2017 at 5:58 pm after enquiry from the immediate line manager. This was as per the summary dismissal letter.
68. The claimant did not deny the subject matter of the enquiry by the respondent, to wit, the apparently missing Kshs. 250,000/- which according to the respondent was not banked at the close of business



as per the respondent's Retail Cash Handling Procedure. According to the claimant, all cash was accounted for and that he personally banked the money that his Line Manager Ms. Aura was asking about. From the record (page 107 RBD), on 28th September, 2017 at 4:39 pm, the claimant's line manager penned an email to him as follows:

“ Good afternoon Moses,

From the below reconciliation, I have confirmed that you underbanked the Mpesa cash for yesterday 27th September, 2017 by Kshs. 250,000/.

Please explain why you banked Kshs. 646,900/- instead of Kshs. 896,900/-

Kindly treat as urgent and respond immediately.

69. From the record and document's exhibited by both parties, there seemed to have been no response to the email above which the claimant's Line Manager considered urgent. However by an email in reply, of the same date sent at 5:43 pm.(approximately an hour later), the claimant penned an email to one Athman Ahmed and copied to his Line Manager Ms. Aura, tendering his resignation from work. This email was recanted at around 18:15 the same day.
70. In cross-examination during oral hearing, the claimant stated that according to the Retail Cash Management Procedure, Team Leader (which he was one of them) was to sign and retain a copy of the deposit slip and that the CIT ought to bring back a stamped banking slip the following day. He confirmed that the Retail Cash Management Procedure did not talk about the Team Leader doing the banking. He further stated that on the material day he collected more than Kshs. 250,000/- he left the rest of the money in the safe but banked the Kshs. 250,000/- and that he did not include the Kshs. 250,000/- because it had already been banked. On resignation, the claimant stated that he did so because he was under stress for being accused of theft.
71. The respondent's witness Ms. Aura, the claimant's line manager stated in Court that it was the role of CIT to collect cash from retail shops and bank the same. This was for safety and security purposes. According to her, it minimized losses and improved security for the money and staff. It was her evidence that employees were not allowed to bank cash directly and that this was the work of CIT.
72. From the foregoing, it is clear that the respondent considered the claimant's act of not using the authorized procedure for handling a cash, a case of gross misconduct. It is curious to note that the whereas the claimant claimed he had banked the money subject of the enquiry, he was hesitant when called upon, to immediately account for it by providing evidence that the same had been banked and producing the banking slip. It is further curious that whereas the claimant alleged that he did not receive Ms. Aura's email asking him to account for the money because he had been blocked from the system, he was still able to pen an email using his official email address, to Athman Ahmed on the same day at around 5:43 pm purporting to resign and soon thereafter (5:58pm.) purport to bank the money and later recall his resignation. The conduct of the claimant so far, in the Court's view smacked of dishonesty and someone who had a guilty conscience that he did not do things right.
73. Reason for termination of employment is within the discretion of an employer and this court will not substitute itself with the employer and embark on a rigorous merit review of the reason termination. Provided the reason is plausible, the Court would be reluctant to interfere unless for other circumstances and processes that heavily impinge on the reason for termination such as gross violation



of procedural fairness. Lord Denning in the now oft cited case of *British Leyland UK Ltd v. Swift* [1981]IRLR 91 observed thus:

‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him’

74. The Court would like to observe that that Mpesa service which is one of the segments of the respondent’s business is more like a quasi-banking business. It entails handling of cash sometimes in large volumes. The Court takes judicial notice that cash handling is risky and a security issue and no prudent business, especially the size of the respondent, would allow weak and a risky system in its handling. The claimant in cross-examination in court conceded to be familiar with the retail cash handling procedure, which entailed among others the Team Leader (which he was one of them) signing and retaining a copy of the deposit slip and the CIT returning a stamped banking slip the following day after doing the banking. He further confirmed that the Retail Cash Management Procedure produced by the respondent in Court did not talk about the Team Leader doing the banking. Whereas the Claimant alleged that he used a different Retail Cash Management Procedure, he unlike the respondent did not exhibit the one he claimed to have relied on that allowed him as a Team Leader to bank cash in place of CIT besides the Retail Cash Management Procedure filed by the respondent had been with the respondent’s documents and the claimant never raised any objection to it. To this extent the Court is persuaded that the claimant was guilty of gross misconduct and the respondent was justified in dismissing him summarily.
75. On the procedure followed while terminating the claimant, the respondent through a letter dated 27th November, 2017 invited the Claimant for disciplinary hearing. The letter outlined the accusations the claimant was to face at the hearing. They were the selfsame reasons contained in the suspension letter dated 29th September, 2017. Further the claimant was interrogated by the Ethics and Compliance Department of the respondent over the same issue and recorded a statement over the same in October, 2017 prior to appearing for the disciplinary hearing. All this through, the issue was the failure to account for the sum of Kshs. 250,000/- when called upon by his line manager to do so. The Court further notes the uncooperative attitude adopted by the Claimant during the disciplinary hearing as evidenced in the minutes filed by both parties. It is noted that the claimant was outright rude and chose which questions to answer and which ones he should not. This however could be understood against the background that the claimant was undergoing prosecution for the same issues he was required to answer before the disciplinary panel.
76. From the foregoing the contention by the claimant that he was not issued with a show cause letter does not hold water. In formal context, a show cause letter could be said to be is a formal letter issued by an employer to an employee. Its purpose is to inform the employee of specific concerns or allegations regarding their behavior, performance, or any other issue that requires clarification. The letter provides the employee with an opportunity to respond and present their side of the story before any further disciplinary action is taken.



77. *Employment Act* does not directly make provision for a show cause letter but it is an industry practice to issue an employee facing potential disciplinary action with a show cause letter to explain themselves before the matter is escalated further.

Section 41 of the *Employment Act* provides:

41(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 this explanation.

Subsection(2) of the said section reads

41(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. (underlining mine)

Under this section, an employer has two roles, first to explain to the employee in the presence of another employee or shop floor union representative of his choice, the reason for which termination is being considered. The second role is for the employer to hear and consider any representation which the employee and his chosen representative may make prior to the termination.

78. From the foregoing, it would seem the Act neither prescribes the format of the explanation to the employee nor the mode of hearing. This Court would surmise that this was so left by the drafters to accommodate the type and circumstances of each employment relationship since “a one size, fits all” approach could yield undesirable results in certain employment relationships. Justice (Prof.) Ojwang’ (as he then was) in the case of Kenya Revenue Authority -vs- Menginya Salim Murgani, Civil Appeal No. 108 of 2009 stated 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”

I cannot agree more.

79. From the foregoing, it is the Court’s view that no termination process can achieve the precision of a drone missile. The key concern of the Court is whether the employee had sufficiently interacted with the accusations against them and responded to them either through email, interrogation by lawful internal investigatory panel or through a formal response to a show cause letter. For the Court to hold that the omission to follow or observe a step in the termination procedure amounted to an unfair termination, the Court must be persuaded that the omission was so egregious that no reasonable employer could engage in such. That has not been demonstrated in this particular case. The Court is therefore persuaded that the termination of the claimant was done through a fair procedure.



Whether the Claimant's arrest, detention and prosecution was malicious, wrongful, ill-motivated and unfair

80. On the issue of whether the prosecution was malicious, wrongful and ill intended, the Court having found that the respondent had reasonable grounds to summarily dismiss the claimant, it cannot therefore fault the respondent on escalating the matter to the police for further investigation. The decision that the Police took after investigating the matter could not be blamed on the 1st respondent because no evidence was produced to show that the 1st respondent insisted on the claimant's prosecution even when the prosecuting authorities had considered the issue not worth pursuing further. In the case of *Murunga -vs- Hon. Attorney General* [1979] eKLR the Court stated as follows

“As to malicious prosecution the plaintiff must prove four things:-

that the prosecution was instituted by someone for whose acts he is responsible.that the prosecution terminated in the plaintiffs favour.that the prosecution was instituted without reasonable and probable cause; and, that it was actuated by malice”

81. It is the Court's view that an arrest arising from a genuine complaint made to law enforcement authorities cannot be said to be malicious. Moreover, the mere fact of acquittal is not proof that one's prosecution was malicious. One can be acquitted for a variety of reasons which include, lack of sufficient evidence, failure of witnesses to testify, technical reasons etc. In *Nzoia Sugar Company -vs- Funguti* [1988] KLR 339 the court of Appeal stated as follows:-

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the Appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”

82. In this particular case there was no evidence that the respondent made a “false” report or that it was actuated by “malice”, or that the claimant's prosecution was brought “without reasonable or probable cause”. The fact that he was acquitted of the criminal charges was not sufficient ground for bringing a claim for malicious prosecution and false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established. In any event as observed above, the 1st respondent had probable and justifiable cause to report the claimant to the police after he could not immediately account for the missing money and instead attempted to resign from work. It did not matter that he later on banked the money since in cases of suspicion of theft of money, it is not a defence that the accused intended or returned the money.

83. In conclusion the Court finds and holds as follows

- a. There existed valid and justifiable reasons for the termination of the claimant's service hence the claim for unfair termination is hereby dismissed.
- b. The termination of the claimant's service was in accordance with a fair procedure.
- c. Claim for unlawful detention and malicious prosecution has not been sufficiently proved and are hereby dismissed
- d. The suit in its entirety is hereby dismissed with costs

82. It is so ordered.



**DATED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024 DELIVERED VIRTUALLY THIS
25TH DAY OF OCTOBER, 2024**

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION.

