



**Andanje v One Acre Fund (Also known as Tupande by One Acre Fund) (Cause E076 of 2023) [2024] KEELRC 13361 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13361 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E076 OF 2023  
CN BAARI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**DANIEL INGUTIA ANDANJE ..... CLAIMANT**

**AND**

**ONE ACRE FUND (ALSO KNOWN AS TUPANDE BY ONE ACRE FUND) ..... RESPONDENT**

**JUDGMENT**

1. Before Court is the Claimant's Statement of Claim dated 18<sup>th</sup> September, 2023, wherein, the Claimant seeks the following reliefs:
  - i. A Declaration that his dismissal was unfair, unprocedural and illegal;
  - ii. An order reinstating him to his position;
  - iii. General damages for unfair termination;
  - iv. A refund of Kshs. 930,000/= being school related expenses;
  - v. A refund of Kshs. 10,100/= being work related out of pocket expenses;
  - vi. Costs of the claim; and
  - vii. Any other relief that this Honourable court may deem just
2. The Respondent filed a Reply/Defence to the Memorandum of Claim dated 17<sup>th</sup> October, 2023, denying the Claimant's averments.
3. Conversely, the Claimant filed a Reply to Defence dated 15<sup>th</sup> November, 2023 restating its case.



4. The Claimant's case was heard on 16<sup>th</sup> July, 2024, when the Claimant Mr. Daniel Ingutia Andanje, testified in support of his case. He adopted his witness statement dated 18<sup>th</sup> September, 2023 and produced his List and bundle of documents of even date as exhibits.
5. Subsequently, the Respondent's case was heard on 23<sup>rd</sup> September, 2024. The Respondent's Interim People Lead Officer, Mr. John Velker, testified on behalf of the Respondent, adopted his witness statement dated 23<sup>rd</sup> April, 2024 and produced documents filed in support of the Respondent's case as exhibits.
6. Submissions were received from both parties.

### **The Claimant's case**

7. It is the Claimant's case that he was employed by the Respondent on the 10<sup>th</sup> April, 2010 on a permanent and pensionable basis as a finance specialist.
8. The Claimant states that he rendered services to the Respondent leading to promotions to wit, on 2<sup>nd</sup> September, 2021, he was promoted to Regional Retail Lead - Nyanza region based in Kisii, and on a monthly salary of \$2,480.
9. The Claimant avers that in addition to the monthly salary, he was entitled to the following benefits:
  - a. Child education cover at 100% per child for amount of USD 4,000 per child;
  - b. A sum of \$117.50 per month out of pocket, health summing to \$1,410 per year;
  - c. A sum of \$235 per month for legacy flight benefit summing up to \$2,820 per year; and
  - d. A sum of \$1,000 per year for legacy retirement benefit.
10. The Claimant states that he had 47 leave days which were unutilized and that the Respondent only paid him 15.25 unutilized leave days on termination.
11. It is averred that on 19<sup>th</sup> January, 2023 while on leave, he was issued with a letter notifying him to stay away from work to pave way for investigations over allegations of breach of company procedures.
12. The Claimant avers that on 24<sup>th</sup> April, 2023, the Respondent served the Claimant with notice of disciplinary hearing listing the alleged six breaches of company policy against him. He states that he responded to the allegations and explained why his services should not be terminated.
13. It is his case that on 5<sup>th</sup> May, 2023, he attended a Virtual disciplinary hearing where he responded to the allegations captured in the investigation report and the notice to show cause letter.
14. It is the Claimant's case that his termination was unfair, irregular and unreasonable for reasons that he was not subjected to due process; the grounds for his termination were unreasonable and unjustifiable; the allegations that he withheld work related information is flimsy as all individuals with the organization's credentials had access to all log-ins by him and would view his activities in real time; that his work laptop was dispatched to the organization's vendor for repairs the organization's operations director being fully aware, and that the forensic analysis was unnecessary as his work related activities were readily available and could be retrieved as and when needed.
15. The Claimant claims that being aggrieved by the decision to terminate his services, he forwarded his grounds of appeal to the Human Resource Manager of the Respondent, on the basis of which the Respondent extended his temporary leave vide a letter dated 18<sup>th</sup> May, 2023, to enable the hearing of his appeal.



16. The Claimant states that he was served with another termination letter on 24<sup>th</sup> May, 2023 without being heard on his appeal and which date was before the lapse of the temporary leave period which he claims was unfair, unprocedural and unlawful because he was not given an opportunity to ventilate his appeal.
17. The Claimant avers that the notice to show cause letter contains general unsubstantiated allegations; that the reasons for termination are baseless and unfounded, that he was not afforded an opportunity to interrogate the evidence or cross-examine his accusers, and investigators.
18. On Examination in Chief, the Claimant stated that the allegations against him by the Respondent were that he facilitated and defrauded the Respondent, facilitated fraud concealment through data alteration through balancing of books, lack of oversight and conflict of interest in the recruitment process.
19. The Claimant stated that he was entitled to Kshs. 900,000/- being school fees for his children, a benefit he was entitled even during his suspension.
20. On cross-examination, the Claimant stated that the letter of temporary leave required that he stays away from work. He was informed of the allegations against him which he responded to. He admitted to receiving a disciplinary notice which informed him of the hearing date and how the hearing was to be conducted.
21. The Claimant confirmed that he was advised to appear with a representative and that 8 days were enough for him to prepare his defence. He admitted that the hearing was conducted and later a termination letter was issued to him listing the reasons for the termination, and which informed him of his right to appeal.
22. The Claimant confirmed that he received payments on his payslip and his certificate of service.
23. On re-examination, the Claimant stated that he did appeal against the dismissal and that he had issues with the reasons provided for termination.
24. The Claimant prays that judgment be entered against the Respondent, and he be awarded the reliefs in his statement of claim.

### **The Respondent's case**

25. It is the Respondent's case that the Claimant was its employee from 10<sup>th</sup> April, 2010, but denies that he served on a permanent and pensionable basis as a financing specialist.
26. The Respondent denies that the Claimant rendered services diligently or faithfully leading to several promotions as claimed by the Claimant.
27. Further, the Respondent denies that the Claimant was promoted to Regional Retail lead, Nyanza region based in Kisii on 2<sup>nd</sup> September, 2021 on a monthly salary of \$2,480.
28. It is further denied that the Claimant was entitled to the benefits particularized at Paragraph 7(a) -(e) of the Statement of Claim, The Respondent denies that the Claimant had accrued 47 leave days for which the Respondent only paid for 15.25 leave days.
29. The Respondent avers that on 19<sup>th</sup> January, 2023, while the Claimant was on leave, he was issued with a letter notifying him to stay away from work, to pave way for investigations over allegations of breach of company procedures. The Respondent avers that it served the Claimant with a notice of disciplinary hearing dated 24<sup>th</sup> April, 2023 listing 6 alleged breaches of the company policy against the Claimant.



30. The Respondent denies that the Claimant satisfactorily responded to the allegations, or showed cause why his services should not be terminated.
31. It is claimed that on 5<sup>th</sup> May, 2023, the Claimant attended the virtual disciplinary hearing, but his responses to the allegations were inadequate and unsatisfactory.
32. The Respondent denies that the Claimant's termination was unfair, irregular and unreasonable and instead, avers that on 15<sup>th</sup> May, 2023, the Claimant's employment was procedurally, validly, lawfully and justifiably terminated. It states further that the reasons given for the Claimant's termination were clear, valid and justified and constituted acts in breach of the Company's code of conduct policy.
33. The Respondent denies that the Claimant forwarded his grounds of appeal to the Human Resource Manager of the Respondent; acknowledging receipt of the Claimant's appeal nor extending the Claimant's temporary leave to enable the hearing of the said appeal.
34. The Respondent refutes that by extending the Claimant's leave, it effectively reinstated him to his position.
35. It is further denied that on 24<sup>th</sup> May, 2023, the Respondent served the Claimant with a second termination letter without being given an opportunity to be heard on his appeal and before the lapse of the temporary leave period.
36. The Respondent denies that the Claimant is entitled to a full refund of Kshs. 930,000/= being school fees expenses on the Claimant's children and Kshs. 10,100/= being refund of out of pocket expenses incurred at the behest of the Claimant's Manager, Richard Bell.
37. In addition, the Respondent avers that the Claimant attended the virtual disciplinary hearing scheduled on 5<sup>th</sup> May, 2023 and was heard. It states that it was subsequently resolved that in view of the gravity of the offences, the Claimant's employment be terminated for breaches of the Company Code of conduct policy.
38. The Respondent avers that on 15<sup>th</sup> May, 2023, it issued the Claimant with a termination of employment letter, and it further informed the Claimant of his right of appeal which appeal was to reach the Respondent before 17<sup>th</sup> May, 2023 with written reasons to be furnished on or before 22<sup>nd</sup> May, 2023 setting out the grounds of appeal and the outcome he was seeking.
39. It is the Respondent's case that the Claimant failed to furnish his written reasons as required before 22<sup>nd</sup> May, 2023 and was taken to have waived his right of appeal. Subsequently, the Claimant was issued with a termination letter dated 24<sup>th</sup> May, 2023.
40. The Respondent asserts that it issued the Claimant with a Certificate of Service dated 25<sup>th</sup> May, 2023.
41. The Respondent finally states that the Claimant's employment was procedurally, validly, justifiably and lawfully terminated.
42. The Respondent's witness (RW1) Mr. John Velker, in his testimony told this Court that the Respondent followed due process and that the Claimant's case has no merit.
43. On cross-examination, the witness stated that the Claimant was employed for a period of 5 years and rose through the ranks to Regional Lead.
44. He further stated that there was a cartel defrauding the Respondent which resulted in the need for the Respondent to investigate the Claimant, having changed cars twice since his appointment. He however stated that he did not have the number plates of the cars in issue.



45. The Respondent told court that the Claimant was deemed part of the cartel for having bought a plot in Kisii at Kshs. 600,000/=. He stated that the Claimant had told the investigators that he had bought the land from a bank loan facility, which he had no prove of.
46. The Respondent intimated that the Claimant's children being in expensive schools was cited by the Investigators as part of evidence. The Respondent's witness acknowledged that the Claimant was entitled to \$4000 as an education benefit.
47. The Respondent denied that the reasons indicated in the show cause letter were different from the ones contained in the termination letter.
48. The Respondent admitted that the notice of disciplinary hearing was sent via email to the Claimant. That the Claimant was communicating to the Respondent via email and on phone during his temporary leave. The witness stated that the Claimant was intentionally accessing emails to obscure the investigation.
49. The Respondent stated that the Claimant appealed after the end of the period allowed for appeal and Ms. Tina acknowledged the Claimant's appeal. He confirmed that there was no appeal hearing.
50. On reimbursement of school fees, the Respondent's witness testified that on 2<sup>nd</sup> May, 2023, the Claimant was still fully paid up as an employee and was entitled to benefits as at that period.
51. The witness further testified that the allegations of fraud were based mainly on circumstantial evidence and evidence from whistle blowers.
52. On re-examination, the Respondent witness clarified that the reimbursement relating to school fees was only claimable at the end of the year as that was the practice.
53. The witness stated that the reason why the Claimant's Appeal was not heard is that there were no grounds of appeal provided by the Claimant, that he only stated that he wished to appeal, but no additional ground of evidence was provided.
54. On leave days, the Respondent claimed that the annual leave days were paid. It is his evidence that the 47 unutilized leave days claimed by the Claimant was not accurate.

#### DIVISION -The Claimant's Submissions

##### PARA 55.

The Claimant submits that there was no valid reason to warrant his dismissal as the reasons given by the Respondent as contained in the letter dated 15<sup>th</sup> May, 2023, were fully and satisfactorily responded to through his affidavit and during the disciplinary hearing.

##### PARA 56.

The Claimant submits further that by virtue of Sections 43 and 45(2) of the [Employment Act](#), the Respondent bears the burden of proof to justify the reasons for terminating his services.

##### PARA 57.

It is his submission that page 50 of his bundle of documents shows a chat to Mr. Richard bell indicating the date and time when he submitted his 1<sup>st</sup> work laptop. That further, his Affidavit and statements at the disciplinary hearing, explained the circumstances under which his 2<sup>nd</sup> Laptop got damaged backed by treatment notes and Wells Fargo Courier Receipt. The Claimant maintains that he submitted his laptop, hence his termination was unfair.

##### PARA 58.



It is submitted that the Respondent's claim that there were "red flags" that led it to believe that the Claimant was involved in fraud, by allegedly living beyond his means (his children going to expensive schools, owning a club in Kisii, changing vehicles twice) were not substantiated and no prove was tendered on the allegations by the Respondent to associate the Claimant with fraud.

PARA 59.

The Claimant submits that there is no justifiable basis for the Respondent to believe that he was part of the cartel thus not a valid ground for his termination.

PARA 60.

The Claimant submits that even if the Respondent underwent losses, it was unreasonable and unjust to levy investigation costs on the Claimant.

PARA 61.

It is his submission that the Respondent witness' assertions that fraud was deduced from certain patterns, were not clearly illustrated.

PARA 62.

It is further submitted that the Respondent failed to discharge the burden of proof to justify the reasons for termination being valid or fair and therefore fails the substantive fairness test.

PARA 63.

The Claimant submits that Article 47 of *the Constitution* requires a person likely to be affected by an administrative decision to be given a fair hearing. It is his submission that he was served with a notice to show cause letter which he responded to both in writing and orally before a disciplinary committee, but disputes the nature of the notice dated 24<sup>th</sup> April, 2023 which put forth the allegations without any particulars to it to enable him reply with specificity. The Claimant placed reliance in the case of Nicholas Muasya Kyula- Vs- Farmchem Ltd [2012] eKLR to support this position.

PARA 64.

Additionally, the Claimant submits that the allegations on providing false statements was not particularized or backed by evidence. He submits that on the forensic costs, the receipts of the amounts should have been provided.

PARA 65.

The Claimant submits that he was shocked to be issued with a termination letter dated 24<sup>th</sup> May, 2022 on allegations that he failed to provide sufficient written reasons before 22<sup>nd</sup> May, 2023, which the Claimant avers to be false.

PARA 66.

The Claimant submits that the Respondent ought to have accorded him an opportunity to appeal based on the law and the legitimate expectation. That it was only upon the hearing of the appeal, that the Respondent would determine whether the reasons were sufficient or not.

PARA 67.

Relying on the cases of Judith Brenda Onyango -vs - Sanlan General Insurance Limited [2020] eKLR and Mary Chemweno Kiptui -Vs- Kenya Pipeline Company Limited [2014] eKLR, the Claimant submits that the Respondent did not discharge its burden of proof to show that the hearing process was followed as required under the Employment Law.



PARA 68.

On the prayer for reimbursements, the Claimant submits that the letter of offer shows that he is entitled to \$4,000 annually per child. He submits that he paid for his two daughters a sum of Kshs. 930,000 on 2<sup>nd</sup> May, 2023, and the receipts have been produced in evidence.

PARA 69.

The Claimant submits that he expended out of pocket expenses in the sum of Kshs. 10,000 at the behest of the Respondent's Manager Mr. Richard Bell, which sums should be reimbursed.

PARA 70.

Finally, the Claimant urges the Court to grant the orders sought in his Statement of Claim.

### **The Respondent's Submissions**

71. It is the Respondent's submission that Section 47(5) of the *Employment Act*, provides for the standard of proof of employment cases and that the Claimant must discharge his burden for the Court rule in his favour.
72. Relying on the provisions of Section 43 of the *Employment Act* and the holding in the case of Antony Mkala Chitavi -Vs- Malindi Water and Sewerage Company Limited Industrial Cause No. 66 of 2012, the Respondent submits that Courts have held that the decision to dismiss ought to be hinged on the objective test, loosely referred to as a range of reasonable response test which is applicable in determining whether a reasonable employer in similar circumstances would have dismissed the employee.
73. It is further submitted that any reasonable employer would have made the decision made by the Respondent under the circumstances, taking into account that the Claimant acted negligently in discharging his mandate which resulted in his termination.
74. It had reliance in the case of *Paul Waigiri Muriuki -Vs- Nairobi Water and Sewerage Company Limited Nairobi ELRC Cause No. 1955 of 2011*, to submit that it complied with all the relevant provisions of the *Employment Act* before terminating the Claimant's Employment.
75. It is the Respondent's submission that the Claimant's claims have no basis. That he was lawfully terminated after a lawful procedure being carried out.
76. It submits that the Claimant's responses and explanations to the allegations was inadequate and unsatisfactory, and the reasons for termination were valid and justified. It is the Respondent's case that the Claimant is not entitled to any compensation.
77. On the prayer for reinstatement, the Respondent submits that the prayer is misconceived, ill-informed, unlawful and legally untenable since the Claimant was fairly and justifiably terminated in accordance with Sections 41, 43 and 47 of the *Employment Act*.
78. The Respondent contends that the Claimant has no claim for general damages for unfair termination as the Claimant was terminated for gross misconduct arising from the breach of the Company's code of conduct policy.
79. On the claim for the refund of the sum of Kshs. 930,000/= for school related expenses and the sum of Kshs. 10,000/= being work related expenses out of pocket expenses, the Respondent asserts that the sums are unsubstantiated and unknown under the Employment Law.
80. The Respondent urges the Court to dismiss the Claimant's claim with costs.



## **Analysis and Determination**

81. Upon careful consideration of the pleadings, the evidence adduced, witnesses' testimonies and the parties' submissions, the following issues crystalize for determination:-
- i. Whether the Claimant's termination was fair, lawful and justified; and
  - ii. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant's termination was fair, lawful and justified**

82. In the statement of Claim, the Claimant contends that his employment was terminated unfairly, irregularly, unreasonably and unjustifiably without due process.
83. In determining whether or not an employee was unfairly terminated/dismissed, the court's duty is to interrogate the employer's adherence with both the tenets of procedural fairness as well as satisfaction of the substantive justification test.
84. Section 41 of the *Employment Act*, 2007 demands that before terminating an employment contract on the grounds of misconduct, poor performance or physical incapacity, the employer must grant the employee an opportunity to make representations either in the presence of a colleague or representative of a trade union.
85. It is now settled that even in instances of summary dismissal for gross misconduct, an employee is entitled to a hearing in accordance with Section 41 (2) of the *Employment Act*, 2007.
86. It is not contested that on 19<sup>th</sup> January, 2023, the Claimant was issued with a letter by the Respondent instructing him to stay away from work to pave way for investigations over allegations of breach of Company's policy and procedures.
87. It is also not in dispute that on 24<sup>th</sup> April, 2023, the Respondent served the Claimant with a notice of disciplinary hearing listing Six (6) charges contemplated against him, and required that the Claimant responds to the charges and attend the disciplinary hearing slated for 5<sup>th</sup> May, 2023. The court heard that the investigation report dated 5<sup>th</sup> April, 2023 conducted by the Respondent was enclosed in the said letter.
88. The Claimant admitted that he responded to the show cause letter vide an affidavit sworn on 4<sup>th</sup> May, 2023, addressing each of the charges levelled against him. It is also not in dispute that a virtual disciplinary hearing was conducted on 5<sup>th</sup> May, 2023, which the Claimant attended and made representations as evidenced by the minutes of the disciplinary hearing evenly dated.
89. Subsequently, on 15<sup>th</sup> May 2023, the Claimant was served with a termination letter laying out the basis for the termination, and further informing the Claimant that the termination was to take effect on 17<sup>th</sup> May, 2023. The Letter further indicated that the Claimant had a right to appeal against the decision.
90. It is the Claimant's evidence that he wrote an email on 17<sup>th</sup> May, 2023, to the Respondent's director of Global Human Resources, one Ms. Tina Ndolo, setting out his grounds of appeal, and which were acknowledged by Ms. Tina on the same date via email, who advised the Claimant to provide sufficient reasons for the appeal on or before 22<sup>nd</sup> May, 2023.
91. The Claimant was on 24<sup>th</sup> May, 2023, served with an updated termination letter terminating his employment, premised on the allegations that he failed to provide sufficient written reasons for his appeal before 22<sup>nd</sup> May, 2023.



92. The Claimant's contestation on procedure, is on the basis that he was not given an opportunity to be heard on appeal; that his appeal was not at all considered, and his right to be taken through due process was denied, and which actions he terms as unreasonable, unprocedural, unfair and unlawful.
93. On its part, the Respondent told court that the Claimant failed to furnish his written reasons on the appeal, as instructed before 22<sup>nd</sup> May, 2023, and was thus considered to have waived his right of appeal, and subsequently issued with a termination letter dated 24<sup>th</sup> May, 2023.
94. An appeal is no doubt an important step of the disciplinary process as it provides an employer an opportunity to remedy procedural and substantive defects that occur during a disciplinary hearing. Where an appeal is provided for in an employment contract, it becomes part and parcel of procedural fairness and an employer cannot be heard to treat an employee's appeal as a mere formality.
95. Having said that, Section 41 of the *Employment Act*, 2007, envisages a hearing and which hearing is mandatory. A right of appeal on the other hand, is a provision of an employer's Human Resources Manual, an employment contract or both. It is not a statutory requirement. In the case of Ahmed Addullahi v. Kenya Nut Company Limited (2016) eKLR, it was held that a right of appeal is not one of the statutory essentials of procedural fairness.
96. In the instant case, the Claimant's contract did not carry a provision for an appeal as forming part of the Respondent's disciplinary process. The Court is therefore slow to fault the Respondent's disciplinary process, based solely on the ground that the claimant was not heard on appeal, and especially since the procedural requirements contained in Section 41 of the *Employment Act*, have not been challenged.
97. It is sufficient in my view, that the employer/Respondent adhered to the provisions of Section 41 of the *Employment Act* and Section 4 of the Fair Administrative Actions Act.
98. In *Postal Corporation of Kenya -vs- Andrew K. Tanui* [2019] eKLR, the Court of Appeal had this to say on procedural fairness:-
- “Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct. The court stated that four elements must be discernible for the procedure to pass:
- a. an explanation of the grounds of termination in a language understood by the employee;
  - b. the reason for which the employer is considering termination;
  - c. entitlement of an employee to the presence of another employer of his choice when the explanation of grounds of termination is made
  - d. hearing and considering any representation by the employee and the person chosen by the employee.”
99. In light of the foregoing, I am convinced that the basic tenets of procedural fairness were adhered, and which renders the dismissal procedurally fair, and so I hold.
100. On the second limb, which is whether the Claimant's dismissal met the substantive fairness test, Sections 43 and 45(2) of the *Employment Act*, places the burden on the Employer to prove that the reasons for termination or dismissal are fair, valid and justified.



101. Section 43 (1) states:-

“(1)In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

102. Further, Section 45 (1) and (2) of the *Employment Act* provides that:-

- (1) No employer shall terminate the employment of an employee unfairly.(2)A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
  - b. That the reason for the termination is a fair reason:-
    - i. Related to the employee’s conduct, capacity or compatibility, or
    - ii. Based on the operational requirements of the employer; and
  - c. That the employment was terminated in accordance with fair procedure.”

103. In Peter Otabong Ekisa -vs- County Government of Busia [2017] eKLR , the Court stated as follows on the burden of proof:-

“The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done, the employer bears the burden of justifying the dismissal. In other words, the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.”

104. In this case, the reasons for the termination were captured in the termination letters dated 15<sup>th</sup> May, 2023 and 24<sup>th</sup> May, 2023 as follows:-

- a. Intentionally failing to provide the investigator with your work laptop. The work laptop was a crucial source of evidence
- b. Defying a direct order from HR and your Manager to submit all your work tools within the stipulated submission deadline
- c. Providing false statements that amounted to non-co-operation with the investigation
- d. Exposing OAF to unnecessary cost due to the provision of non-OAF work laptops for purposes of this investigation
- e. Unnecessary costs/ loss of USD 4,187.6 incurred by OAF as a result of engaging a forensic consultant to analyze the non-OAF laptops as detailed therein below.

“In accordance with One Acre Fund HR policy and in compliance with Kenya *Employment Act*, the organization has reached a decision to terminate your employment due to misconduct.”



105. The Claimant's position is that the notice to show cause failed to meet the threshold required because the letter did not provide details of the laptop needed and since the work laptops were provided by the Respondent, and hence the Respondent should have known which work laptop was required for the investigation.
106. It is the Claimant's further assertion that the allegations on providing false statements were not particularized or backed by evidence. The Claimant while referring to the contents of the notice to show cause dated 24<sup>th</sup> April, 2024, submitted that the Respondent acknowledged that it had not detailed the allegations and that it would be done during the hearing. Consequently, the Claimant submits that the failure to afford the Claimant all requisite details goes against the right to fair hearing.
107. On the other hand, the Respondent contends that the Claimant's responses and explanations on the allegations were inadequate and unsatisfactory, and the reasons for termination were valid and justified.
108. The Respondent further opined that any reasonable employer would have made the decision made by the Respondent under the circumstances, taking into account that the Claimant acted negligently towards discharging its mandates which resulted in his termination.
109. The Court of Appeal in *Kenya Ports Authority & another v Joseph Makau Munyao & 4 others* [2019] eKLR while addressing the issue of validity of reason of disciplinary action and quoting Selwyn in Selwyn's *Law of Employment*, 6<sup>th</sup> Edition, paragraph 7.23 suggested the following threefold test for proof of reason for dismissal:
- "i. That the employer must establish that he genuinely did believe the employee is guilty of the misconduct;
  - ii. that belief must have been formed on reasonable grounds; and
  - iii. the employer must have investigated the matter reasonably."
110. The court went on to state thus:-
- "Putting it differently, the question is not whether or not the trial court or this Court is satisfied that the respondents were guilty but whether it is satisfied that the 1<sup>st</sup> appellant had reasonable grounds for believing that the respondents had committed the offences and had acted reasonably in disciplining them in the manner it did. See Section 43 (2) of the [\*Employment Act\*](#)."
111. The Respondent's witness, one John Velker, told this court that there was a cartel defrauding the Respondent which resulted in the need for the Respondent to investigate the Claimant. It is his testimony that the Claimant had changed cars twice since his appointment and bought a plot within Kisii at Kshs. 600,000/=. It was his evidence that the Claimant's children were studying in expensive schools, further pointing to the allegations of him belonging to a cartel that was defrauding the Respondent, even after acknowledging that the Claimant had an education benefit of USD 4000 per child per year.
112. The reasons for the Respondent terminating the Claimant as per the evidence adduced, have no link with the grounds listed both in the notice to show cause and the letter of termination. The reasons are in my view totally unrelated and one would be mistaken to think that the grounds for the termination related to two different employees.
113. Further, the reasons brought out by the Respondent's witness as informing the termination, are purely circumstantial and were not at all substantiated. There was no correlation between allegations of false



statements, non-cooperation and the Claimant's vehicles whose registration numbers were in any event not provided or the plots purchased by the Claimant.

114. The court was also not told how much if at all the Respondent lost to the 'cartel' through the alleged fraudulent activities. The Respondent simply made sweeping statements without attempting to link them to any losses occasioned to the employer by the employee.
115. In the premise, I find the reasons for the Claimant's termination expressed in the termination letters dated 15<sup>th</sup> May, 2023 and 24<sup>th</sup> May, 2023 unreasonable, unfair, invalid and unjustified.
116. The reasons badly fail the reasonable employer test and the substantive fairness test, rendering the termination unfair.

### **Whether the Claimant is entitled to the reliefs sought**

#### **Reinstatement**

117. The Claimant seeks an order for reinstatement into the service of the Respondent. He claims that the Respondent Company is of nationwide coverage and there would be no difficulty in reinstating him and putting him in a different region from where he served before.
118. Reinstatement denotes revival of the contract of employment. It is not an automatic right, but a discretionary remedy that involves the balancing of parties' interests.
119. Under Section 49(4) (c) and (d) of the [Employment Act](#), an order for reinstatement can only be issued upon considering its practicability and if there are any exceptional circumstances that would warrant reinstatement.
120. The Labour Appeal Court (LAC) of South Africa in the case of Passenger Rail Agency of South Africa and Others v Ngoye and Others [2024 45 ILJ 1228 (LAC), when dealing with a claim for specific performance in the face of an unlawful termination of an employment contract, made the following highlights:-The granting of specific performance where breach of contract has occurred is subject to the court's discretion, which must be exercised judiciously. Employment contracts are different to commercial contracts in that they are personal contracts. As such, exercising the discretion to grant reinstatement as specific performance, may entail satisfying the court that the continued employment relationship is tenable or that granting specific performance in the form of reinstatement will not lead to conflict within the workplace, particularly where the former employee was a senior employee or was required to interact with senior management. Financial prejudice that former employees may suffer as a result of losing their income does not constitute a basis for granting specific performance.
121. The reasons the Respondent terminated the Claimant, point to a loss of trust and confidence between the parties, which in my assessment render reinstatement inappropriate. There are also no exceptional circumstances that entitle the Claimant to the court's exercise of discretion to reinstate.
122. The prayer for reinstate thus fails and is dismissed.

#### **General Damages for unfair termination**

123. The Claimant seeks 12 months' salary as compensation for unfair termination. Having held that the Claimant was indeed unfairly terminated, and considering his length of service with the Respondent, and the opportunities available to him for securing comparable employment, I deem an award of Eight (5) months' salary sufficient compensation for the unfair termination, and its hereby awarded.



**Refund of Kshs. 930,000/= being school related expenses**

124. Under this head, the Claimant seeks refund of Kshs. 930,000/= for school related expenses which he utilized for his two children.
125. On a perusal of the Letter of offer dated 2<sup>nd</sup> September, 2021, the Claimant was entitled to \$4,000 USD annually per child for school related expenses, which he was entitled to up to the date of termination. I therefore hold that the Claimant is entitled to the refund of the sum of Kshs. 930,000/= being school related expenses.

**Refund of Kshs. 10,100/= being work related out of pocket expenses**

126. Under this head, I find that there is no legal basis and justification for the claim for refund of the out of pocket expenses incurred on behalf of the Respondent. I therefore decline to award the same.
127. In the final analysis, the claim succeeds in terms of the following orders: -
- a. A Declaration that the Claimant's termination was unfair
  - b. That the Respondent pays the Claimant Five (5) months' salary as compensation for the unfair termination at USD.12,400;
  - c. That the Respondent pays the Claimant a refund in the sum of Kshs. 930,000/= on account of school related expenses; and
  - d. Costs of the suit and interest until payment in full.

128. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Mwangi present for the Claimant

N/A for the Respondent

Ms. Esther – C/A

