



**Mwangi v East African Breweries Limited (Cause 993 of 2014)
[2024] KEELRC 13462 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 993 OF 2014
NJ ABUODHA, J
DECEMBER 13, 2024**

BETWEEN

EMILY MWANGI CLAIMANT

AND

EAST AFRICAN BREWERIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant through her Memorandum of Claim dated 16th June, 2014 pleaded inter alia as follows: -
 - a. The Claimant signed an employment contract with the Respondent on or about the 14th May, 2007 as a customer relations representative at a guaranteed salary of Kshs 143,877.00/ = together with a variable sum of Kshs 47,959.02/= per month depending on the sales targets met including benefits like medical cover, retirement benefit and share scheme.
 - b. That as a customer relations representative the nature of her job was such that she was constantly in the field attending to the particular outlets she was assigned to promoting the Respondent's products. That she rendered her services diligently and to the satisfaction of the Respondent and she was even recognized for her outstanding performance. That at her employment period she never had any complaints regarding her work.
 - c. That on or about February 2014 the Respondent undertook to carry out restructuring and total overhaul of their organization where a number of employees were terminated while others opted to resign instead of termination. That the Claimant received a show cause letter on 19th February, 2014 from the Respondent requesting her to respond to allegations of deliberate absconding from work without good cause or prior authorization and give explanation regarding her whereabouts on a number of days in January, 2014.
 - d. The Claimant averred that she responded to the allegations in the show cause letter on her whereabouts on the stated dates. That the Respondent not being contented with her



explanations scheduled her disciplinary hearing on 25th February, 2014. That at the hearing she explained her whereabouts on the stated days and she was ambushed of allegations not earlier raised of inconsistencies regarding her work attendance in the month of December, 2013 as she was not prepared to answer the same against the laws of natural justice.

- e. The Claimant averred that on 25th March, 2014 she received a letter from the Respondent stating that her contract with the Respondent had been terminated with effect from 5th March, 2014. That the letter provided for one-month salary in lieu of notice which was never given to her.
 - f. The Claimant averred that in effecting the termination the Respondent stated that she was guilty of gross misconduct relating to falsification of callage reports none of which allegations the Respondent bothered to prove. That the vehicles were fitted with tracking device which could confirm her whereabouts through her movements. That her termination was based on tracking records that she was not at her place of work yet the same tracking records were never availed to her despite relying on the same.
 - g. The Claimant averred that she was not granted the right to be heard regarding the said termination as she was ambushed during the said hearing with information she had no prior knowledge of. That the Respondent had a policy on employee discipline which could apply to all employees. That the same required the employee to be given a first warning then a final warning then termination upon hearing. That the Respondent was in clear breach of their own policy.
 - h. The Claimant averred that after the Respondent started developing financial problems she became subjected to strenuous conditions, working long hours day and night as well as over the weekends which took a great toll on her health. That she suffered loss of employment resulting in mental anguish for herself and her family. That she was aged 32 years with 28 years remaining before her retirement.
2. The Claimant in the upshot prayed for this court to declare her termination to be unlawful and unprocedural, a violation of her rights under articles 50, 35, 41, 2(a) and (b), 27 and 47 of *the Constitution*, payment of 28 years remaining before retirement, compensation for unfair termination, severance pay, compensation for violation of her rights, certificate of service, salary increment of 2% denied and costs and interests.
 3. The Respondent filed its Response to the Memorandum of Claim dated 19th August, 2014 and averred inter alia as follows;
 - a. The Respondent admitted that it employed the Claimant on 14th May, 2007 but on contractual basis which contract was expiring on 28th February, 2009. That the said contract was subsequently extended for an additional period of three years with effect from 1st July, 2008.
 - b. The Respondent averred that by a letter of employment dated 27th November, 2009 it subsequently offered the Claimant employment as a customer Relations Representative within the sales department on permanent and pensionable basis with effect from 1st December, 2009. The terms of engagement were subsequently to apply from 1st January, 2010.
 - c. The Respondent averred that the Claimant's employment was governed by the terms set out in the employment contract above, Diageo of Business Conduct, Employee Alcohol policy the Respondent's T& E policy, the Respondent's policy on Employee Discipline and code of business conduct. That her salary was based on her performance and her participation in the



sales reward plan. That the sales reward plan was based on the Claimant's performance against sales specific targets.

- d. The Respondent averred that it was a further term of the contract that the salary and sales reward plan was reviewable annually in the month of July based on individual performance. That at the time the Claimant left its employ she was earning a gross salary of Kshs 158,283.01/=. That it was a term of the contract that the contract could be terminated upon issuance of one month notice or payment of one month in lieu of notice by either party.
- e. The Respondent further averred that it was a further term of the contract that the Respondent could summarily terminate the Claimant's employment in the event it was established to the satisfaction of the Respondent that the Claimant had behaved dishonestly or recklessly in relation to the Respondent's assets, premises, staff or reputation.
- f. The Respondent averred that in the course of employment the Claimant was assigned a personal Digital Assistant (PDA) device together with a motor vehicle which was fitted with a tracking device for purposes of monitoring sales, distribution and performance in the area which comprised of her marketing jurisdiction.
- g. The Respondent further averred contrary to the Claimant's allegations her employment was beleaguered by performance issues, dishonesty, deliberate falsification of record, loss of Respondent's property and other acts which broke the mutual trust and confidence between the parties. That in January, 2012 the Claimant willfully and without justification failed to execute part of her duties as the customer Relations Representative for Chumvi Territory by failing to submit Monitoring & Evaluation Summaries for activities carried out in her territory within the period of 30 days which led to issuance of a warning letter.
- h. The Respondent further averred that on or about January,2013 the Claimant who was assigned motor vehicle registration KBN 811N to aid in discharge of her duties acted negligently in failing to maintain the car which had oil leakage causing the Respondent to spend Kshs 400,000/= to repair it after engine knock. That she was issued with show cause letter which she responded by way of memorandum dated 4th January,2014. That her performance for the third quarter of the year 2013 was below acceptable levels resulting in her failing to qualify for variable pay for the period in question.
- i. The Respondent averred that in its ordinary course of business it used to conduct routine sales calls back checks and audits through the PDA compared with the motor vehicle movement reports generated by motor vehicle tracking system. That on or about 19th February,2014, the Respondent while in the course of conducting such a review and audit exercise randomly picked the Claimant's PDA and compared it with Motor vehicle movement reports for the month of January, 2014. That the review revealed that the Claimant would make calls while in the market but the Motor vehicle was in different location. That the inconsistencies raised serious questions of integrity and absconding of duties on her part in breach of her conduct raising serious doubts on her integrity and suitability in her position she held.
- j. The Respondent further averred that the Claimant's conduct led to her being issued with a show cause letter on 19th February,2014 in accordance with Respondent's Policy on employee discipline. That she responded to the show cause letter by email of 21st February,2014 which was found unsatisfactory and she was invited for disciplinary hearing which took place on 25th February,2014. That she was terminated on 5th March, 2014 upon hearing and considering her representations.



- k. The Respondent further averred that the Claimant failed to lodge any appeal on its decision within 5 days thereby waiving her right of appeal as per the Respondent's Policy on Employee discipline. The Respondent denied the allegations by the Claimant that she was terminated due to the perceived restructuring due to financial difficulties leading to massive terminations. That it was not true that the Claimant was ambushed about the inconsistencies of her whereabouts. That she was duly notified of the charges facing her on 19th February, 2014 and had sufficient and reasonable time to prepare and respond on 25th February, 2014 during the disciplinary hearing.
- l. The Respondent averred that it satisfied the charges of falsified data in to her PDA contradicted the motor vehicle movement reports were well established hence the Respondent had valid and reasonable grounds. That the payment of one-month salary in lieu of notice was factored in the Claimants final dues payment who had loan obligations, tax liabilities which the Respondent was empowered to deduct making her get nil net pay.
- m. The Respondent further denied refusing to furnish the Claimant with motor vehicle movement records as claimed and that the Claimant was the author of her own misfortune she cannot blame the Respondent for her interference to earn a living. That she was a young person who could secure alternative employment with the experience acquired. That her termination was therefore fair, lawful and in accordance with the law and other regulations. That it did not breach any provisions of *the Constitution* as alleged by the Claimant. That the Claimant did not seek any information from the Respondent which was denied and she was not discriminated in any way hence no cause of action was established against it by the Claimant.

Evidence

4. The Claimant's case was first heard by Hon. Lady Justice Mbaru on 19th January, 2021 where the Claimant Emily Wanjiru Mwangi (CW1) herein testified that she was employed by the Respondent and was unfairly terminated and was still unemployed as she was unable to secure another job. She was 33 years of age left with 24 years before she could retire at 60 years. It was her evidence that at the time of termination she was on permanent and pensionable terms and that her last salary was Kshs. 145,000/= with benefits.
5. CW1 further testified that she was awarded for her performance on several occasions and that every end of year in July they used to do performance rating and she was rated excellent. That she had no complaint on her performance rating. On the issue of motor vehicles breakdown, she stated that it was not her fault as it was handed over to her and the next day there was breakdown. That the procedure to report motor vehicle breakdown was to inform the Line manager and write to the main manager.
6. CW1 testified that the Respondent alleged that PDA and GPRS were falsified which was not true. That in January she was on leave and reliever was to take over. That her line manager was aware and the three days leave was official. She admitted that she was issued with a notice to show cause and on 25th February, 2014 she called for disciplinary hearing. That her PDA and GPRS data were attached to the Notice to Show Cause and she did reply explaining what she was doing from 2nd January, 2014.
7. CW1 testified that during the disciplinary hearing she was asked about December 2013 and since she did not have the data she could not explain and she was terminated. It was her evidence that there were no reports on any investigations and that the respondent paid for the month worked but was not issued with certificate of service.



8. In cross examination which took place before this court on 9th July,2024, CW1 confirmed that she was using manual system before she was later allocated PDA and a vehicle KBN 811N for her movements. That she signed the contract of employment of 2010 which provided for termination at clause 8 upon one month's pay or notice. That termination could be on misconduct in the premises.
9. CW1 confirmed that she was aware of Employment Policy and discipline which provided for dismissal for gross misconduct while confirming she was aware of the grounds. That she had no prior disciplinary issues before termination.
10. CW1 confirmed receiving a warning letter in 2012 from the sales director and also the memo on the engine knock of the assigned vehicle above. That the same was a show cause letter which she responded to. That the vehicle did not have to be with her all the time and it was not necessary to notify her supervisor if she was not using the vehicle. That the vehicle and the PDA did not have to be together with her.
11. CW1 confirmed that she was aware the Respondent came across report from her PDA and BCP on random checks which revealed inconsistencies in the use of the vehicle. That through her emails she explained the variances.
12. CW1 confirmed that she could go to the market without notifying anyone but she notified her supervisor that she left her car at Kampala Road but had no evidence of notification to her supervisor. That she had no evidence to show there was no variance between the PDA and the vehicle. That she did not dispute the allegations of variance.
13. CW1 confirmed that when she was invited for disciplinary hearing she was informed to go with a witness but she did not call any. That her explanations were captured in the minutes of the disciplinary hearing. That after her termination she never appealed her termination and the reasons for termination were stated in the termination letter. That she did not ask for minutes of the hearing and she had evidence of massive terminations but the document related to Respondent's business at p24 of the CBD.
14. In re -examination CW1 clarified that PDA was a gadget used to assist her in her work as it reduced paper work as she could key in data about brands and sales at outlets. That BCP could be used where PDA was not working like when out of charge.
15. CW1 clarified that there were performance appraisals every year in July. That increments were based on the performance. That there was training upon introduction of PDA as well as continuous training. That the vehicle was assigned to her two days before the accident and she communicated the vehicle problem to the line manager and that she was not faulted for the vehicle engine knock and she did not pay for the same.
16. CW1 clarified that the Respondent did not verify the information on the PDA with outlets. That she had never been accused of theft of Respondent property but was accused of falsifying data in BCP or PDA. That she had no previous disciplinary records as the letter written by sales director was done while she was on maternity leave and was recalled.
17. CW1 clarified that there was no standard way of feeding information from BCP to PDA. That the same could be fed during the free time. That there were outlets the vehicle could not access hence the vehicle needed not be together with her.
18. CW1 clarified over the email from Kihoro in which she was to respond by 9.00 am and stated that he was not her line manager and she required at least five days to respond. That she was not given enough time to respond or given findings to prepare her appeal.



19. The Respondent's case on the other hand was heard on 9th July, 2024 where Pasculine Njoroge (RW1) the Respondent's Senior HR Business Partner testified. She stated that she had worked for the Respondent for 12 years with her role being to come up with HR policies. She relied on her statement and documents filed in court as her evidence in chief.
20. CW1 testified that the Claimant was a customer relations executive with her work entailing visiting bars and outlets to ensure Respondent's products were listed and stocked. The Claimant was issued with a motor vehicle KBN 811N to aid her movement and PDA to feed the information required at work. The vehicle was fitted with tracking system to align with outlets visited by the Claimant and fed in the PDA. That BCP would be used when PDA was offline. That any change where PDA failed CRR was to be filed for approval by line manager. RW1 never received such request submitted by the Claimant. The Claimant had subsequent warning and she went under another disciplinary hearing concerning the engine knock.
21. RW1 testified that the Claimant was terminated due to an audit which found discrepancy between her vehicle's movement and data fed in the PDA. That the Claimant responded to the email about the discrepancy and she did not dispute the variances and that she did not incorporate evidence from the outlets she allegedly visited.
22. RW1 testified that the Claimant's explanation was not satisfactory hence she was invited for disciplinary hearing and she never asked for more time. She never indicated her intention to call any witness. The disciplinary hearing outcome was a dismissal for filing in outlets she did not visit which was a falsification. The claimant was notified of the decision and she did not appeal. That she was issued with certificate of service.
23. In cross examination RW1 confirmed that she was not in charge of HR at the time of the incident. That she did not sit in the hearing. That at the time of termination the Claimant's salary was fixed at Kshs 158,283/= after being reviewed upwards.
24. RW1 confirmed that the Respondent reviewed a random audit and detected the discrepancy between the PDA and the vehicle Movement report. That the Claimant was subjected to disciplinary hearing and later terminated. That the PDA data and the vehicle movement report was attached to the Notice to show cause. That the Claimant was notified that BCP process was not followed.
25. RW1 confirmed that the document in isolation did not show falsification but it should be read together with the response to the show cause letter. She confirmed that the PDA was independent from vehicle and did not have to be where the vehicle was and that there was a policy on use of BCP.
26. RW1 confirmed that the Claimant did not dispute that the show cause letter had the above attachments and the line manager complied with the Respondent policy. That the Respondent had policy on timelines for response which was 5 days but the Claimant was given 3 days. That the show cause letter did not raise the issue about absconding duties. That the Claimant responded to the show cause letter.
27. RW1 confirmed that the Respondent had a policy on performance evaluation. That the Claimant never appealed the decision to terminate her. She did not have exact date minutes were supplied to the Claimant. RW1 confirmed that the warning letter issued to the Claimant about her conduct in 2012 had expired and could not be used against her.
28. RW1 confirmed that the Claimant was not issued with a final letter because it was a case of gross misconduct and she was provided with documents in support of the allegations. That the show cause letter was about the discrepancies. The BCP entries had timelines of 3 days with approval of



line Manager and that the system audit checks were sufficient to take disciplinary action against the Claimant.

29. In re-examination RW1 clarified that PDA calls were linked to employees' performance. That it was a must for approval to be sought for non-use of PDA and that the Claimant did not dispute non-use of BCP process.

Claimants' Submissions

30. The Claimants' Advocates Rachier & Amollo LLP filed written submissions dated 5th August 2024. On the issue of whether the Respondent decision to terminate the Claimant's employment was substantially justified, counsel submitted that the conduct of the Respondent in terminating the Claimant did not meet the substantive fairness threshold test.
31. Counsel submitted that the Claimant was thus prejudiced in that she was not accorded adequate time to respond to the show cause letter which was not accompanied with any other documentary evidence which the Respondent relied on or gave them reasonable suspicion that the Claimant had falsified the collage reports and had also absconded duty. The Claimant only had two days within which she was required to respond.
32. Counsel relied on the case of *New Kenya Co-operative Creameries v Sigei (Appeal E002 of 2022)* (2024) KEELRC 27 (KLR) (25 January 2024) and submitted that suspicion alone does not suffice as genuine and reasonable grounds for disciplinary action, let alone termination. Counsel further submitted that show cause letter was also not particular on the specific days that the Claimant had allegedly absconded work and it was also not specific on the data that the Claimant had allegedly falsified neither was it particular on the alleged inconsistencies.
33. Counsel relied on the case of *Rita Gakii Gitobu v Telkom Kenya Limited* (2014) eKLR and submitted that failure by the Respondent to discount the explanations given by the Claimant on the specific charges against her only left the charges in the show cause letter as mere allegations. Counsel further submitted that at the hearing, the Claimant was ambushed with matters that had hitherto not been disclosed to her at all not even through the Respondent's show cause letter thus there no consistency.
34. Counsel submitted that the Claimant was not accorded a fair hearing in that she was not given an opportunity to present her case as evidenced by the casual minuting of the disciplinary hearing. The minutes were not verbatim but merely a report of what the Claimant allegedly said at the meeting.
35. Counsel relied on among others the case of *Howard Andrew Nyerere v Kenya Airways Limited* (2014) eKLR and submitted that the minutes of the disciplinary hearing were also not availed to the Claimant after the said hearing for her to go through and verify the correctness of what was recorded therein and were not signed by her. It was clear that from the Respondent's own evidence that they did not have any reason whatsoever to suspect the Claimant for having falsified the collage reports as alleged.
36. Counsel relied on the case of *Jane Wanja Muthara v EACC ELRC Cause No. 722 of 2015* and submitted that all termination of contracts of employment must meet the tests of substantive justification and procedural fairness. Further counsel relied on the case of *Agnes Ogandi versus KETRACO* (2016) eKLR and submitted that the Court can intervene and interfere with the prerogative of the employer to discipline its employees as appropriate where there is apparent lack of fairness and where to allow such would result in gross injustice against a party as is in the instant case.
37. Counsel submitted that the alleged vehicle movement report that the Respondent were relying upon were completely expunged from the court records and thus the Respondent did not provide any evidence speaking to the "alleged falsification". That the Claimant proffered an explanation as to the



- discrepancies brought about by the PDA machines. The Respondent without any evidence simply dismissed the explanations by the Claimant and proceeded to conclude that she had falsified the report and subsequently absconded work.
38. Counsel relied on among others the case of *Joseph Nzioka v Smart Coatings Limited* (2017) eKLR and submitted that dismissal on account of absconding duty must be preceded by evidence showing that reasonable attempt was made to contact the employee.
 39. On the issue of whether the Respondent's decision to terminate the Claimant's employment was procedurally fair counsel submitted that the Respondent was bound by its own Policy on Employee Discipline, HR policies and procedures manual and could not be allowed to say that they were at liberty to cherry-pick what to adhere to and what not to respect in their own disciplinary policy.
 40. Counsel submitted that the Claimant's line manager did not at any one time reach a conclusion that the allegations as had been levelled against the Claimant either related to conduct and/or capability. He further submitted that the Respondent breached clause 3.2 of the Policy on Employee Discipline and the Respondent's witness, Pasculine Njoroge, admitted under oath that the Respondent did not carry out any investigations in relation to the allegations that they had levelled against the Claimant. In this regard Counsel relied on the case of *Oyatsi v Judicial Service Commission (Petition E11 of 2021)* (2022) KEELRC 3 (KLR) (10 March 2022) and submitted that in terminating the Claimant the Respondent threw all caution to the wind and disregarded its own procedures that related to termination of employees.
 41. Counsel submitted that it is an uncontroverted fact that the Respondent did not carry out any investigations to prove the allegations that they had levelled against the Claimant. Instead the Respondent orchestrated a sham disciplinary process against the Claimant.
 42. Counsel further submitted that during the hearing, the Claimant gave evidence that she was denied the opportunity to file an appeal as she was not provided with the minutes and findings of the disciplinary proceedings.
 43. Counsel relied on the case of *Otieno v University of Nairobi & another, Kenya Union of Domestic, Hotels, Educational Institutions Hospitals and Allied Workers (KUDHEIHA) University of Nairobi Chapter (Interested Party) (Miscellaneous Application E130 of 2023)* (2024) KEELRC 970 (KLR) {8 April 2024} (Ruling), and submitted that procedural fairness in matters termination of employment, extends to post - termination events like an internally initiated appeal in assailment of the decision to terminate.
 44. Counsel submitted that during the hearing, the Claimant gave evidence that she was denied the opportunity to file an appeal as she was not provided with the minutes and findings of the disciplinary proceedings. The letter communicating the decision to terminate the Claimant's employment also did not inform the Claimant that she had the right to appeal against the decision within 5 days thereof.
 45. Counsel submitted that the Respondent did not follow the procedure clearly prescribed in its policy with respect to conduct of disciplinary proceedings. The time for responding to the notice to show cause was only a day yet the policy required that the Claimant be granted 5 days to respond.
 46. On the issue of whether the Claimant's Constitutional right under Article 41(1) was violated, Counsel submitted that article 41 of *the Constitution* of Kenya 2010 protects the right to fair labour practices, fair remuneration and reasonable working conditions.
 47. Counsel submitted that the rights of the Claimant to a fair hearing as envisaged under articles 41, 47 and 50 of *the Constitution* was mandatory and that the Claimant was subjected to a flawed disciplinary



process and as such she was entitled to compensation for unfair termination. Counsel relied on among others the case of John Torongei vs National Cereals & Produce Board, Industrial Cause Number 6 of 2013 and submitted that the Respondent deviated from the reasons that had been disclosed to the Claimant in the Show Cause Letter.

48. Counsel submitted that an award of 12 months' salary in compensation for unlawful and unfair termination was adequate.
49. Counsel submitted that on the fairness test, Sections 43, 45(2) and 47(5) of the *Employment Act*, 2007, places on the employer a legal and evidentiary burden of proof of reasons for termination where an employer alleges unfair termination and if the employer fails, the termination shall be deemed to be unfair.
50. Counsel relied on the case of Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR) and submitted that the burden was on the Respondent to show that the reasons given for the termination were valid, fair and justified.
51. On the issue of whether the Claimant is entitled to reliefs sought, Counsel submitted that the Claimant was entitled to damages under section 49 of the *Employment Act* which included salary in lieu of notice and compensation for unfair termination.
52. Counsel submitted that the Court takes into consideration the fact that despite her best efforts, the Claimant had been unable to secure any other employment largely on account of the Respondent's unfair and unlawful termination of her employment. The banking sector being a very sensitive sector, potential employers have shunned the Claimant on realizing that she was terminated by the Respondent on account of misconduct. Counsel relied on the case of Raphael Wellington Okonji vs Sunthesis Limited, Industrial Cause Number 1851 of 2011 and submitted that although the law does not give the criteria for assessing the quantum of damages for unfair termination, the court is of the view that the consequences of the dismissal, circumstances of the dismissal, the difficulty with which to secure another job and the embarrassment suffered by the victim of unfair dismissal are key factors for consideration.
53. Counsel submitted that the Claimant was further entitled to the prorated Gratuity to every year worked being Kshs. 358,781.00 which was equally not disproved by way of evidence by the Respondent. That the Claimant worked from 2007 to 2014 before her termination.

Respondent's Submissions

54. The Respondent's Advocates Iseme, Kamau & Maema Advocates filed written submissions dated 30th October, 2024. On the issue of whether the termination of the Claimant's employment was for lawful, fair and for valid reasons counsel submitted that the reason for termination of the Claimant, being on account of gross misconduct relating to falsification of collage reports on her PDA device which contradicted her vehicular movement report, was lawful, fair and valid. That the Policy on Employee Discipline for EABL provides that dismissal for a first offence will only occur in cases of gross misconduct.
55. Counsel submitted that both the Claimant during cross-examination and Pascaline Njoroge, RW-1, testified that the Claimant was given a PDA device as well as motor vehicle registration number KBN 811N. The PDA device was to be keyed in by the Claimant only when at the client's premise to log in orders and other key data relating to the customer's premise. The motor vehicle given to the Claimant was also required to be at the location where the Claimant was at all times. Consequently, the PDA device and the motor vehicle were always to be at the same location.



56. Counsel submitted that according to the Notice to Show Cause, inconsistencies had been noted between the reports generated by the Claimant's motor vehicle tracking report aforesaid, and the report generated by her PDA device for the month of January 2014 where calls were made in markets while the car was in a different location.
57. Counsel submitted that in the hearing held on 25th February 2014, the minutes reflected that the Claimant indicated that she went for truck accompaniment, left her car on Kampala Road the whole day, and that she forgot her PDA for that day. Counsel submitted that the explanation that she had not used her PDA because she had not charged it, and that she went for truck accompaniment was debunked during the hearing, during cross-examination and by Pascaline Njoroge that in the event her PDA device was not working, she could seek for her supervisor's permission to approve her to use the Business Continuity Plan (BCP), entailing use of a physical form to make calls.
58. Counsel submitted that from the disciplinary hearing, the Claimant did not follow the BCP process, the inconsistency noted between the report from her PDA device and motor vehicle movement report for 2nd January 2014 was not sufficiently explained.
59. Counsel submitted that Section 43(2) of the *Employment Act* provides that the reason for termination could include such reasons that the employer genuinely believed to exist at the time of termination. The Claimant did not adduce any evidence where she called for evidence which she did not have to enable her to respond to the notice to show cause or to enable her to prepare for hearing. That the allegation that the notice to show cause was not specific on the challenged dates therefore failed.
60. Counsel submitted that in her response and at the hearing, she responded on the inconsistencies on 2nd January 2014, 3rd January 2014 and 6th January 2014. She was aware of the relevant dates and no evidence was adduced to show that she was not aware of the dates which she was to respond in respect of.
61. Counsel submitted that as regards to the allegation that the notice to show cause was written by John Kihoro, who was not the Claimant's line manager, and not Jairus Shijenje, the notice to show cause showed that it was copied to the said Jairus Shijenje. Further, no prejudice was demonstrated by the Claimant by John Kihoro initiating the notice to show cause.
62. Counsel submitted that as regards to the allegation that the Claimant was ambushed with matters undisclosed at the hearing, this was not supported by evidence. No new matters were raised, as alleged or at all.
63. Counsel submitted that as regards to the allegation that she was not given minutes of the meeting; the disciplinary policy did not provide that she was entitled to them. Only the disciplinary panel was entitled to sign the same. Nonetheless, had the Claimant written and requested, she would have been given a copy.
64. Counsel submitted that the allegation that the Respondent failed to conduct investigations to verify the correctness of the allegations lacked merit. It is the Respondent's investigations which resulted in the inconsistencies being noted.
65. Counsel relied on among others the case of *Johnson Ngugi v East Africa Breweries (Cause 991 of 2014) [2019] KEELRC 1238 (KLR) (Employment and Labour) (28 June 2019) (Judgment)* and submitted that absence from duty without lawful cause is a ground for summary dismissal.



66. On the issue of whether a fair procedure was followed by the Respondent in arriving at the decision to terminate the Claimant's employment, counsel submitted that the Respondent contended that it followed a fair procedure in arriving at the decision to terminate the Claimant's employment.
67. Counsel submitted that the Claimant was issued with a notice to show cause on 19th February 2014. The Claimant was asked to respond by 9.00 a.m. on 21st February 2014 which she did by her email of 20th February 2014 at 9.10 a.m. and on 21st February 2014 at 2.46 a.m. The time given was clearly sufficient to the Claimant as she responded way before the indicated time. Further, she did not ask for additional time, if she thought the time given to her was insufficient.
68. Counsel submitted that the Respondent invited the Claimant to attend the disciplinary hearing by the invitation sent to the Claimant on 21st February 2014 at 1633 hours. She was asked to attend on 25th February 2014 and attend with a witness, if she wished to call a witness.
69. Counsel submitted that in the event the Claimant wanted a longer period to prepare for the hearing, nothing was easier than to ask for adjournment of the hearing and for extension of time. The Claimant was thus not prejudiced by the notice given to her and despite being given an opportunity to appeal as confirmed in the Disciplinary policy in the Claimant's possession, she did not lodge an appeal.
70. Counsel relied on the case of [*Energy Regulatory Commission v John Sigura Otido \(Civil Appeal 417 of 2019\)*](#) [2021] KECA 1060 (KLR) (Civ) (29 January 2021) (Judgment) and submitted that it was not the role of the Court to supervise the internal grievance handling processes between employers and employees.
71. Counsel submitted that in specific response to the Claimant's allegations that the Claimant was not given a warning, the Respondent submitted that dismissal for a first offence could occur in cases of gross misconduct as that the Claimant committed and further that the allegation that the Claimant was not supplied with documents which the Respondent intended to rely on at the hearing was not true as the notice to show cause showed that it had attached the reports.
72. On the issue of whether the Claimant was entitled to the reliefs sought, Counsel submitted that the prayers sought by the Claimant were not warranted. That the claim for compensation for the remainder of 28 years was speculative and in violation of sections 49(1)(c) as read together with 50 of the [*Employment Act*](#).
73. Counsel relied on the case of *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd (Civil Appeal 25A of 2013)* [2014] KECA 765 (KLR) (5 February 2014) (Judgment) and submitted that there was no provision for payment of damages to the date of retirement.
74. Counsel submitted that the claim for general damages for unfair termination was not tenable and relied on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR.
75. Counsel submitted as regards to the prayer for compensation amounting to 12 months' salary that in view of the foregoing submissions, the Claimant had not demonstrated any basis for any compensation.
76. Counsel relied on the case of *Walter Ogal Anuro v Teachers Service Commission (Cause 955 of 2011)* [2013] KEELRC 386 (KLR) (2 May 2013) and submitted that the claim for severance pay had no basis as it was only applicable in cases of redundancy. That the prayer for compensation of violation of article 41 of [*the Constitution*](#) lacked basis.
77. Counsel submitted as regards to the prayer for salary review that the Claimant had failed to meet the qualifications to even get Quarter 3, Year 2013 salary variable. No proof was adduced that she met the



qualifications for salary review. In any event, the Claimant did not establish the basis of her claim for salary review.

Determination

78. The court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by Counsels and has come up with three main issues;
- i. Aa. aa. Whether the Claimant's termination of employment was unfair and unlawful
 - ii. Whether the Respondent breached the Claimant's statutory and Constitutional rights
 - iii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination of employment was unfair and unlawful have WhethrWWhwr

79. In this instant case, the Respondent alleged that they terminated the Claimant on grounds of gross misconduct relating to falsification of collage reports on the PDA device and the vehicle movement report which had inconsistencies as PDA and the vehicle were in different locations when they were supposed to be in the same location at the client's premises. That this led to the conclusion that the Claimant absconded her duties assigned by the Respondent and raised integrity issues. The Claimant on the other hand alleged that the PDA device and the Vehicle movement report did not have to be at the same location.
80. It is now an established principle that for termination to pass fairness test there should be both substantive and procedural fairness. This was emphasized in among other cases, the cases of Janet Nyandiko vs Kenya Commercial Bank Limited (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
81. The requirement for employers to terminate employee's employment contracts on fair and valid reasons is governed by section 43 of the *Employment Act* and the termination become unfair if there are no valid reasons for termination under section 45 of the Act. Further the employer (respondent) has a burden of proof to justify the grounds of termination under section 47(5) of the *Employment Act* while the Claimant has a duty to prove that the termination indeed took place and was unfair. In this case it was not in dispute that the Claimant was terminated on 5th March, 2014 through the termination letter of the even date.
82. The court notes that the main issue was the inconsistency between the PDA report and the vehicle movement report which the Claimant never denied. She acknowledged that they were at different locations and stated that she went on truck accompaniment and that she did not charge her PDA and further that she made calls through BCP without following the procedure. That is without prior approval from her line manager.
83. Whereas the Claimant confirmed during hearing that she notified her supervisor that she left her car at Kampala road she did not have evidence of the said notification. She did not have any evidence to illustrate that there was no variance between the two reports and she did not dispute the allegations of the variance.
84. The court notes that an employer under section 43 of the *Employment Act* can terminate the services of an employee for reasons it genuinely believed to exist at the time of termination. In this case the issue of the variance was not disputed by the Claimant and she did not seek approval to use BCP as required.



85. Employment policies and procedures are at the prerogative of an employer and whatever premium an employer attaches to them requiring employees to strictly observe them lest they be disciplined is a matter which the court cannot interfere. The Court's intervention may only be invoked where such policies and procedures are patently in violation of statute and *the Constitution*. It is not for the Court as a matter of course, to weight the violation and determine if it merited the disciplinary action taken by the employer. It is however conceded that the Court does have jurisdiction to undertake a merit review of the reason for termination in terms of validity and proportionality but such jurisdiction must be exercised with circumspection.
86. In the case of Kenya Revenue Authority Vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009 as cited in Republic Vs National Police Service Commission Exparte Daniel Chacha Chacha JR 36 of 2016 (2016) eKLR- Justice (Prof) Ojwang' as he then was stated:
- “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.”
87. Lord Denning further in the case of British Leyland UK Ltd v. Swift [1981]IRLR 91 stated:
- “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”
88. On the question of the proportionality of the disciplinary action meted out this Court in the case of Leon Yang Wang vs. Equity Bank [2023] eKLR stated:
- “...the reason for termination of employment need not be strictly proved but must however be reasonable and proportional in the circumstances.
- Further, the question and parameters of proportionality were elaborately considered in the case of R v Home Secretary; ex parte Daly [2001] 2 AC 532 where it was stated as follows concerning proportionality:
- “it leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations...”
89. Whereas the Respondent's employee manual required two warnings before termination this court notes that the act of falsification of records was a case of gross misconduct which could lead to summary



dismissal. The Respondent however gave the Claimant a chance to be heard by giving her a show cause letter which she responded to and later a disciplinary hearing and the end of which the respondent issued her with termination as opposed to summary dismissal letter. To this end this court is persuaded that the Respondent had reasonable and valid grounds to terminate the Claimant's employment.

90. Regarding procedural fairness section 41 of the *Employment Act* is the guiding law on the notification and hearing. This position was amplified by the Court of Appeal in the case of Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR as follows;

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

91. In this instant case the Claimant was issued with a show cause letter on 19th February, 2014 which required her to respond by 21st February, 2014 which was around 3 days while the manual required the Claimant to respond in 5 days. However, this court finds that no prejudice was occasioned to the Claimant since she did not request for more time to respond and in fact responded earlier on 20th February, 2014 to show that she was not prejudiced.
92. On the issue of the show cause letter not having attachments the court notes that during hearing the Claimant admitted that the show cause letter had the attachments and she responded accordingly. The Claimant admitted that she was invited for disciplinary hearing and advised to attend with a witness of her choice. She did not come with one and never expressed the desire to be given time to call one.
93. Whereas the Claimant alleged that the allegations in the show cause letter were different from the hearing, the court notes that the grounds in the show cause letter, the hearing and the termination letter did not change and revolved around the inconsistencies on the PDA report and the vehicle movement report. In addition, on the allegation that the show cause letter was not issued by the Claimant's immediate line manager, the court finds no merit in this complaint as the letter was copied to her line manager hence no prejudice was suffered by the Claimant.
94. Whereas the Claimant alleged that she was not given minutes of the disciplinary hearing to enable her appeal her termination, the claimant never adduced evidence of such request during the hearing. She in fact confirmed that she did not request for the minutes. On the issue of investigation report, the court notes that the Respondent used the PDA report and motor Vehicle movement Report to find the Claimant culpable which she did not dispute hence no independent report was necessary.
2. In conclusion this court finds that the Claimant was both substantively and procedurally terminated by the Respondent. Hence the termination is considered fair both in terms of reasons and procedure followed.

Whether the Respondent breached the Claimant's statutory and Constitutional rights

95. The Claimant claimed violation of her constitutional rights under article 27, 35, 41, 47 and 50 of *the Constitution* on fair administrative processes. The court however observes that the said violations need not just be pleaded. The Claimant ought to further prove the manner of the violation with precision.



In this regard the court is guided by the decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR where the Court held as follows: -

It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*, 2011. Accordingly, the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case (supra)

96. This court finds that the Claimant has not illustrated with precision how her rights were violated by the Respondent. In any event this was a termination of employment issue which was adequately covered by the *Employment Act* and nothing was demonstrated that the respondent carried the termination in a manner that could not be adequately accommodated by the remedies provided for in the *Employment Act*.
97. From the foregoing and in conclusion the Claimant's claim is found without merit and the same is hereby dismissed with costs.
98. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF DECEMBER, 2024

DELIVERED VIRTUALLY THIS 13TH DAY OF DECEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

