



**Gatoto v Muki Sacco Limited (Cause 45 of 2021)
[2023] KEELRC 66 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 66 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 45 OF 2021
HS WASILWA, J
JANUARY 24, 2023**

BETWEEN

JIMNAH KARABA GATOTO CLAIMANT

AND

MUKI SACCO LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 30th July, 2021, claiming to have been unfairly terminated and seeking to be compensated for the unfair termination. His reliefs were as follows; -
 - a. A declaration that the Claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal.
 - b. 12 months' salary compensation for unfair termination.
 - c. An Order compelling the Respondent to settle the outstanding benefits as enumerated above being unpaid salary in lieu of notice, service pay and unpaid salary for the duration the Claimant could have worked till retirement.
 - d. Costs of suit and interest in (b) and (c) above at Court Rates.
 - e. The Respondent to issue the Claimant with a letter unequivocally clearing the Claimant of all accusations mentioned in the show cause and the termination letter that have impugned his integrity and professionalism.
 - f. Any other relief that this Court may deem fit to grant.



Claimant's case.

2. The Claimant was employed by the Respondent on or about June, 2012 as a systems and Network Administration in IT department on permanent and pensionable terms earning a consolidated salary of Kshs 62,500. That he worked hard and diligently for 9 years earning several accolades, promotions and his salary was increased as a result.
3. Due to his performance, the Respondent promoted him to the position of Deputy Chief Executive officer earning a consolidated salary of Kshs 126,000, a position that he served till his termination.
4. It is averred while working for the Respondent, the Claimant on various occasions pinpointed the weaknesses of the Respondent's security system and even advised the Respondent to update its software as they had been overwritten overtime.
5. The Claimant avers that on the 14th November, 2021, there was attack launched at the Respondent's software resulting to loss of Kshs. 1,700,000. That instead of following after the hackers, the Respondent accused him of professional negligence causing the said loss and fired him.
6. The reason for termination was that the Claimant had conspired with the hackers to cause loss to the Respondent. As a result, he was served with notice to show cause why disciplinary action should not be taken against him on allegation that he shared the Respondent's administrator's password with third party that led to the hacking of the system.
7. He stated that he was subjected to disciplinary process however that he was questioned with regard to installation of software called Dwagent which was installed in the system without his consent, authority, knowledge or involvement. Nevertheless, that he was terminated by the Respondent.
8. He contends that the termination was unfair because; He was initially suspended for more than 60 days before being subjected to the sham disciplinary hearing; accused of being negligent when the software that was installed in the system was done without his consent or authorization; disregarding his advice when he pointed out security threats on the system; failing to consider that all security logs were intact during the attack and failing to demonstrate the alleged negligence on his part.
9. During hearing the Claimant testified as CW-1 and adopted his statement dated 2.8.2021 and produced the documents of 30.7.2021 marked as Exhibit 1-17 and further list of document dated 8th March, 2022 marked as Exhibit 18 and 19. He added that when the Respondent's system was attacked he is the one that raised the concern by calling Safaricom and reported the issue to the police then called the Chief Executive officer and informed him of the incident.
10. He testified that the malicious software that was installed in the system was installed on 4.5.2020 and 14.11.2020 in the presence of the vendor, Crowspesa / Surestep and his assistant. He stated that for software to work well the vendor had to be granted administrator pass. He stated that the illegal software was illegally installed by Surestep as such they are responsible for the loss.
11. With regard to the systems weaknesses noted, the Claimant testified that he had raised most of those concerns with his employer but the employer had not given direction on the same. He testified further that after investigation were completed, the culprits were arrested and charged in Court.
12. Upon cross examination, the Claimant testified that the malicious software was installed into the system without his consent and approval. He admitted getting enough time to prepare for disciplinary hearing. Also that he was heard by the Board who explained the areas he was found at fault and arrears he was exonerated. On termination he was paid leave arrear and one-month salary but that on suspension he was paid half salary not full as alleged by the Respondent.



13. On re-examination, he testified that he was involved in purchase of VM software that the finance bought and he was the one that installed but was not aware of Dwagent software which was installed without his consultation.
14. Fredrick Wahomo, an IT expert, testified as CW-2. He testified that he is an expert in IT having worked in the sector for 11 years. He adopted his statement of 8th March, 2022 and in summary told this Court that Dwagent is a software which is usually used to access a system remotely and is not necessarily a malicious system though that the software can be compromised. He added that the Respondent's system was compromised from the provider (Cloudpesa) end, which is impossible to detect from the Respondent's end even with diligence.
15. On cross-examination, the witness testified that he has a certificate in certified hacking forensic investigations (CCE). He testified that before he made his conclusion, he reviewed the forensic review report and info system which has images of the system captured, but not the physical system.
16. In his reply to defence and counterclaim, the Claimant reiterated his claim and in addition stated that the claim for loss and loan are issues beyond the jurisdiction of this Court and should be pursued in the appropriate forums.

Respondent's case.

17. The Respondent entered appearance and filed a response to claim and Counterclaim on the 26th August, 2021 admitting to employing the Claimant on the terms disclosed in the claim but avers that the number of completed years worked are 8 years.
18. It is averred that the Claimant performed his duties negligently leading to loss of Kshs 1,753,030, which behavior led to his termination which was justified according on perusal of the circumstances therein.
19. It is stated that the Claimant failed to configure or procure a secondary storage for firewall and security logs thereby causing them to be overwritten due to inadequate storage. Further that on the 13th and 14th November, 2020 when the said money was lost, investigation revealed that the Claimant breached his duty and shared administrators' password with third party, in effect facilitated the fraud.
20. The Respondent avers that during disciplinary hearing, the Claimant was informed of his right to have a witness but elected not to have any. Further that the Claimant admitted during hearing having failed in his duty. On the extended suspension period, the Respondent avers that the same was extended on the Claimant's request who asked for more time to respond to the show cause letter. Also that the Claimant was paid full salary during the suspension period as opposed to half salary provided by the law therefore no prejudice was visited on him.
21. It was also stated that the Claimant left the Respondent server's door open for unauthorized installation of malicious software in and failed to report the said illegal installation. Also that he did not configure secondary storage facility where logs could be stored to avoid the attack and enable the Respondent trace the cyber criminals, in effect demonstrating an act of negligence in the performing of his duties.
22. It was averred that the Claimant was made aware of the decision to place him on disciplinary hearing while investigations were ongoing. Additionally, that the issue raised in his appeal were issues that had been dealt with during hearing, therefore the Appeal was not merited.



23. On allegation that he was denied audience with the auditor, the Respondent avers that the Claimant only requested to cross examine the auditor vide the letter of 14th January, 2021 which request was granted and the Auditor availed during hearing on the 1st February, 2021.
24. It is averred that the Claimant was blamed for the cyber-attack launched at the Respondent's systems because investigations by Director of Criminal Investigation of 8th January, 2021 revealed that the cybercrime was coordinated by Surestep systems and solution with assistance of insiders because; all the affected accounts were dormant an indication that the systems were carefully selected, remote access to servers were facilitated by persons with administrative capacity, the mobile banking activation pins that were generated and shared with the 17 registered sim-cards which were used in commission of the crime were send without authorization of the Respondent and the fact that all firewall logs and security logs were deleted.
25. It is indicated that the Respondent's decision to summarily dismiss the Claimant was arrived at after careful evaluation of evidence tabled before it and subjecting the Claimant to proper disciplinary hearing. Consequently, that the Claimant is not deserving of the reliefs sought especially compensation since he is in gainful employment.
26. Further that he was paid all his dues till the 12th February, 2021 being his last day at work, together with his terminal dues as evidence in the pay slip dated 13th February, 2021.
27. The Respondent stated also that the Claimant was a member of ICEA Lions pension plan, where 8% of the Claimant's salary was remitted every month, therefore not entitled to service pay.
28. In the counterclaim, the Respondent avers that it employed the Claimant on 13th June, 2012 and promoted him to the position of Deputy Chief Executive officer in charge of IT commencing 1st April, 2020 whose roles include; continuous assessment of health status of the ICT infrastructure, pint of correspondences with ICT systems vendors, supervise junior staff, advice the Board of Directors on ICT changes and happenings, ensure business continuity through backup, system user administration and maintenance and management of e-channels such as M-pesa, Mobile banking, Agency banking and portal.
29. On 29th March, 2019 an IT System Audit was conducted by Extant group limited which highlighted areas of improvement such as development of elaborate and formalize policy and procedure for conducting changes on ICT systems, development of IT policy and procedure manual on usage of ICT equipment, development of user access matrix which could assist in grouping of users and listing of the type of rights granted to those users to control access of privileged information, development of functional disaster recovery site, periodic user access monitoring, development of a disaster management policy document, periodic review of audit logs maintenance of register of persons that access server rooms and back up testing.
30. On 15th November, 2020, Geoffrey Munania, the Respondent accountant was called by a representative of Safaricom Limited raising an issue on detected suspicious transaction on the Respondent's mobile platform and the Claimant who was to be contracted was not picking his calls. That the Claimant assistant was informed of the issue to relay to the Claimant.
31. Soon thereafter, the Claimant called Safaricom and inquired on the abnormal depreciated bulk payment service number 745831. This issue was raised with the Respondent's Chief Executive officer Ms. Violet Wanjiru Ndungu who reported it at Engineer police station and the Claimant was summoned to record statement since he was the one in charge of ICT.



32. The Respondent in taking corrective measure, instructed Safaricom to suspend all the suspicious accounts and inform the said move to Surestep systems and Solutions limited, a company that it had contracted to provide mobile banking and bulk sms services. Which company sub-contracted the services to Cloudpesa, which is still fully owned by Surestep.
33. Meanwhile, the Respondent contracted the services of Salaam Technology Limited to carry out system audit. The said company issued forensic review report of the system dated 4th January, 2021 and found that there was loss of Kshs 1,753,030 on the 14th and 15th November, 2020, that affected 17th customers. Additionally, that the cyber criminals accessed the system through the Respondent's administrator account.
34. It was also discovered that the criminal accessed the Respondent servers through the installed Dwagent software which were installed on two computers on 28th May, 2020 at 14.05.15 hours, a period when one Michael Kiganya of Surestep had been in their offices between 26th and 29th May, 2020. Further that another Dwagent software was install in SQL server on 4th November, 2020 when the said Surestep was offering support to the Respondent remotely.
35. It is the Respondent's case that after perusing the report and seeing all the loophole that were there in the system, the placed blame on the Claimant who was the person in charged and tasked to protecting the system.
36. That he was summoned to show cause why disciplinary action should not be taken against him because the system was attacked using an administrator account that the Claimant shared with Surestep. In response the Claimant vide the letter of 14th January, 2021 requested for extension of time and several document which were granted and given more time to respond to the notice to show cause.
37. That he was invited for disciplinary hearing on the 2nd February, 2021 but the Claimant requested to be heard on 1st February, 2021 which was granted. During hearing he was heard and the board resolved to terminate his services, however the chairman refused to sign the minutes of the meeting. Nevertheless, that the decision was made unanimously by the majority.
38. The Claimant's appeal against the decision was considered but was not successful. He was later paid all his terminal dues including days worked in February till 12th February, 2021.
39. In conclusion, the Respondent avers that the Claimant was to blame in the way he performed his duties and prayed for the following relief in the counterclaim;
 - a. That the Claimant's suit be dismissed with costs to the Respondent.
 - b. Judgement be entered for the Respondent against the Claimant for Kshs 1,753,030 being the amount of loss the Respondent suffered as a result of the Claimant's negligence and breach of duty.
 - c. Judgement be entered for the Respondent as against the Claimant for Kshs 980,199.97 being amount of outstanding loan.
 - d. Interest in (b) &(c) above.
 - e. Costs of the counterclaim.
 - f. Any other or further relief that the Honourable Court may deem fit to issue.



40. The Respondent summoned its Human Resource manager and Administration manager, Jennifer Waibai Duncan, as RW-1 who adopted her witness statement of 25.8.2021 that basically reiterated the defence and counterclaim.
41. Upon cross-examination, the witness testified that there was an agreement between the Respondent and the Surestep company to provide services and in the agreement, the Respondent agreed to give Surestep its system password, therefore that the Claimant was within mandate to give out the passwords. She also admitted that the malicious software was installed by Surestep official called Michael Kimaru. She testified that she was not aware whether the Claimant had raised issues with the system and whether the same was acted upon by the Respondent.
42. Upon further cross examination, the witness testified that they are counterclaiming for the loss which they are also claiming from the third party and in addition a loan of Kshs 900,000 which the Claimant took with the Sacco.
43. On re-examination, she reiterated that the Claimant was the one in charge and also that the issue was reported by the CEO to the police.
44. The Respondent second witness was one, Elizabeth Wangui Kamau, the Respondent's internal auditor, who testified as RW-2. She adopted her witness statement dated 15.10.2021. In her testimony, she stated that the Claimant was found culpable for negligence because he failed to work on the gaps that had been identified by the auditors on 29th March, 2019.
45. Upon cross examination, she testified that she works as an auditor which is linked to the finance department. She contends that she was not aware of any recommendations made by the Claimant on system software update.
46. The third Respondent's witness is Raymond Bett, Chief Executive Officer of Salaam technologies and a certified information auditor by profession, who testified as RW-3. He testified that he was contracted by the Respondent to carry out ICT audit on the Respondent's ICT equipment and prepared the audit report dated 4.11.2021. He testified that a cyber-attack happened at the Respondent's in May, 2020 which occurred as a result of an illegal installation of Dwagent software on the Respondent's server that allowed unauthorized remote access of the servers. He blamed the Claimant for failing to protect the system from external attack. He stated that the software allowed external access of server through internet logs on the system. He testified that the insurance settled the loss but the Respondent's image was already damaged due to the Claimant's carelessness.
47. Upon cross examination, he testified that the audit was done after the attack. That the said logs were overwritten. He stated that the malicious software was installed by a third party but that the Claimant was the one that gave them his login details instead of creating a different account for them. He stated that the third party could only make any upgrades on the system on approval of the IT Officer.
48. On re-examination, he testified that the Claimant, under the IT officer was in charge of the server while the third party was in charge of software. He added that there were weaknesses in the system that allowed the attached.

Claimant's submissions.

49. The Claimant identified two issue for determination; Whether termination was unfair and unlawful and Whether the Honourable Court should award damages for unfair termination
50. On the first issue, it was submitted that the Claimant performed his job diligently and on countless occasions pinpointed weaknesses in the Respondents security system requesting for a software update



which was ignored by the Respondent. It was argued that the attached was organized by one of the Respondent's providers, Sure step Limited, which took advantage of the privileges given to it and installed a malicious software that it used to attack the Respondent system and steal the Respondent's funds. Therefore, that the theft cannot be shifted to the Claimant and blamed for negligence when all blame point to the third party. It was further submitted that from the evidence of the Respondent's witness, the case before Court is not a case of professional negligence but rather is a case of institutional failure to conduct its operations. The allegations that the Claimant failed to act on the audit report is an afterthought and a desperate attempt to sanitize the Respondent's unlawful actions of terminating the Claimant.

51. It was further argued that the decision to terminate the Claimant was predetermined as both witnesses RW1 and RW2 were unable to give reasons why only the Claimant that was put to task when there were personnel whose roles overlapped with that of the Claimant but were not questioned, investigated nor subjected through the same process as the Claimant. Notably that the minutes of the disciplinary hearing for 9th of February 2021 also reveal that some of the board members were in disagreement with the manner the disciplinary hearing was conducted, concluding that the termination was unfair. To Support its case for unfair termination, the Respondent relied on the Court of Appeal case of Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR as quoted with Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR that;

“The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in Ridge v Baldwin (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.”

52. It was also submitted that the Claimant was terminated for alleged negligence of duty when the real culprit was a third party who misused its privilege and installed malicious software on the system that caused the Respondent loss of money. It was argued further that the weakness in the system were identified by the Claimant and raised with the Respondent who dragged its feet in approving funds for the proofing of the system, therefore that the Claimant cannot be blamed for the mistakes that were caused by both the Respondent and third parties. It added that the actions of the Respondent in terminating the Claimant suddenly failed the reasonableness test as espoused in the case of CFC Stanbic Bank Limited v Danson Mwashako [2015] eKLR as cited with approval in the case of Wambua v Kenol Kobil Limited (Cause 2331 of 2017) the Court of Appeal adopted the following definition of ‘the range of reasonable responses test’ as captured in the Halsbury’s Laws of England, 4th Edition, Vol. 16(1B) para 642.

“...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. (Emphasis added) The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of



a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band it is unfair.”

53. To put more emphasize on the argument above, the Claimant relied on the case of *Caroline Chemutai Rotich v Chase Bank (Kenya) Limited* [2015] eKLR, the Court rendered itself thus pertaining alleged employee performance:-
- ‘...Where the question regard to an employee performance, an employer must demonstrate that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews. It is not just enough to say that an employee is of poor performance. There must be a demonstration that the employer did more in this regard to bring such a non-performing employee to the status required by an employer...’
54. On the reliefs sought, the Claimant submitted that he had demonstrated the manner in which his termination was orchestrated by the Respondent, which in their view fell short of the requirement under section 41, 43 and 45 of the *Employment Act* as such the Claimant should be compensated for the said termination.
55. On the counterclaim, the Claimant submitted that the Claimant was not identified as perpetrator or in that sense a conspirator involved in the theft of funds. The findings of the Directorate of Criminal Investigations did not name the Claimant among the four perpetrators charged with fraud. Secondly, that the Forensic Report from Salaam technologies attributes negligence and blames the third party provider Sure step solutions, therefore that the claim of loss of the 1,753,030 is outrageous in the circumstances. Regarding the claim for outstanding loan balance of Kshs 980,199.97/=, it was submitted that the Respondent has made a claim for recovery of a debt in the inappropriate forum. Therefore, that the claim ought to be pursued in the appropriate forum for recovery of debt.

Respondent’s submissions.

56. The Respondent submitted on four issues; Whether the Claimant’s termination from Employment was fair and lawful, Whether the Claimant is entitled to the reliefs sought, Whether the Respondent is entitled to the reliefs sought and who bears the costs.
57. On the first issue, the Respondent cited the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and the case of *Janet Nyandiko versus Kenya Commercial Bank Limited* [2017] eKLR which was cited with approval by the Court of Appeal in the case of *National Bank of Kenya v Anthony Njue John* [2019] eKLR, thus: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the



employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.”

58. Accordingly, it was argued that the reason for termination was based on negligence of duty as he had failed to put in place cyber security measures such as review of logs, exposure of mobile and agency banking over the internet, which if properly done could have evaded the cyber-attack. It was argued further that the attack was successful because there was manipulation at the Respondent’s side, which occurred through manipulation of the database of dormant accounts and then reactivating them and re assigning mobile phone numbers which was under the Claimant’s control. Also that the Claimant failed in creating an administrative account for the vendor to avoid such attacks on the system. Therefore, the blame did not only fall on the third-party vendor but also the Claimant being the person with primary responsibility and administrator of the Respondent’s ICT infrastructure.
59. It is argued that the agreement between the Respondent and the vendor on sharing of passwords was not for the sharing of administrator password, because administrator password is the only one allowed to access all levels of the system. Additionally, that the Claimant being the IT professional was required to exercise a high degree of professional conduct in carrying out his duty. They relied on the case of *Ruth Waithera Muthama v AIC Kijabe Hospital* [2019] eKLR, where the Claimant who had worked for the Respondent for 12 years as a Deputy Accountant was dismissed from employment for negligence of duty. The Claimant had disclosed her password to her fellow colleagues and interns in her department which placed the Respondent in a vulnerable position where fraudulent activities were committed using the system access given by the Claimant and the Respondent lost KShs.236, 655.00. Justice Mbaru, in finding that the Claimant was dismissed for justified reason held that;-

“The Claimant had worked with the Respondent in the accounts department for over 12 years. As the Deputy Accountant a high degree of professional conduct in her duties was required. The nature of position held, and the functions of the job were not those of an ordinary employee as any work lapse would lead to serious loss and damage...Matters set out to the Claimant in the show cause were serious and related to negligence of duty. The responses given in defence do not reflect a seriousness with which the same ought to have been addressed”

60. They also relied on the case of *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR where the Court held that banks operate in a highly sensitive environment requiring the highest degree of prudence and probity to which their employees must adhere. The Court held that that similarly, an accountant or an officer working in the accounts department operates in a highly sensitive environment which requires the highest degree of prudence. The Court held that;-

“In this case, the Court finds the Respondent as the employer discharged its burden as imposed by Section 43 of the *Employment Act*, 2007 by establishing a valid reason that would move a reasonable employer to terminate the employment of an employee. On the notice to show cause, the Claimant failed to give a proper account as to why she was negligent in her duties and caused her systems password and credentials to be shared or cause to be identified and applied to access the system and where fraud was committed. Save for the show cause, the 17 Claimant was invited to a physical hearing and where she was given a fair chance to urge her defence but failed to discharge her duty by giving a satisfactory response. The Respondent terminated employment for a genuine and valid reason pursuant to the provisions of section 41 and 43 of the *Employment Act*, 2007.”



61. From the foregoing, the Respondent submitted that the Claimant was negligent because he did not discover the installation of the said malicious software on time, when he was the person in charge of the system. Further that upon the attack, the CEO is the one that reported the matter to the police instead of the Claimant who is in charge of the IT department.
62. On due procedure, the Respondent submitted that it followed due procedure by issuing the Claimant with a show cause letter and advising on his right to be accompanied by a witness and ultimately communicate the decision to terminate his services. It was argued further that the decision to terminate the Claimant's services was arrived at unanimously, thus the allegation that appeal should have succeeded on the basis that the chairperson refused to sign the minutes is without basis.
63. On the reliefs sought, the Respondent submitted that the claim for notice pay is not warranted as the termination was justified. On severance pay, the Respondent submitted that the Claimant is also not entitled to service pay because he was a member of the ICEA Lion's Personal Retirement Benefit Claim where the Respondent was paying an amount equivalent to 8% of the Claimant's monthly salary in favour of the Claimant.
64. On prayer for unpaid salary till retirement, the Respondent submitted that the said relief is alien to the Employment Act and argued that compensation for unfair termination are captured under section 49 of the Employment Act. In this they relied on the case of Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment, like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word „permanent employment.”
65. On the counterclaim, the Respondent submitted that the claim is made in accordance with section 12(3)(viii) that gives this Court wide discretion to decide on any other appropriate relief as the Court may deem fit to grant. To support this argument, they relied on the case of Abraham Nyambane Asiago v Barclays Bank of Kenya Limited [2013] eKLR the Court held that:

“By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different Courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators.”
66. On that basis, the Respondent argued that the loss incurred and the loan obtained was done during the subsistence of the Claimant employment and therefore should be addressed by this Court as part of the issued incidental to employment.
67. On costs, the Respondent urged this Court to dismiss this suit against the Respondent and award the Respondent the costs of this suit and the interest incurred in defending this suit.
68. I have examined all evidence and submissions of the parties herein. The issues this Court shall determine are as follows;



1. Whether there were valid reasons to warrant Claimant termination.
2. Whether due process was followed.
3. Whether the counter claim is established.
4. Whether the Claimant is entitled to the remedies sought.

No. 1. Reasons

69. The Claimant was summarily dismissed from his employment vide a letter dated 11/2/2021. The letter indicated that he was being dismissed for gross misconduct as provided for under Section 44 (4) (c) of the *Employment Act* and Clause 15.3 (c) of the Respondents HR Policy. The gross misconduct was attributed to the fact that he was negligence in the performance of his duties as an IT System and Network Administrator.
70. In respect of this contention, the Claimant testified that he never acted negligently. He indicated that there was an attack on the Respondent's software resulting in loss of 1,700,000/=. He was accused of compromising with the hackers an allegation that he shared the Respondents administrative password with a third party.
71. He however indicated that the software installed in the system was installed without his consent or authorization disregarding his advice when he pointed out the security threats in the system.
72. The Claimant produced an Email Exh. 5 15/10/2020 where he wrote to his boss suggesting a system upgrade with a quote for the same in order to avoid a danger to the system.
73. In another Email of September 2021, he wrote requesting for API Linking of the system to Safaricom.
74. The Claimant also called a witness, the CW2 who is a trained Computer Science & Forensic Cyber Security expert. He testified that the forensic report lacked acquisition, authentication and analysis.
75. He also indicated that the DW Agent is a legitimate agent which is for remote access to support a customer and that it can be compromised.
76. He indicated that the provider was a 3rd party managing the servers and so required an unlimited access to the Respondents and so could breach the right in such circumstances.
77. He intimated that he examined the documents and found that the breach originated from the provider of the service which is Cloud Pesa Ltd and in this case it was impossible for the Respondents to see what was happening at Cloud Pesa Ltd. He indicated that he also reviewed other documents and the systems documents and noted that the IT staff had raised their concern on the system.
78. The RW1 when cross examined, indicated that in the agreement between the Respondent and Surestep Company to provide services, the Respondent agreed to give Surestep its system password therefore the Claimant was within the mandate to give out the passwords.
79. She also admitted that the malicious software was installed by Surestep official called Michael Kimaru.
80. The RW2 also testified and indicated that the Claimant was found culpable for not working on gaps identified by auditors on 29th March, 2019.
81. She indicated she was not aware of any recommendation made by the Claimant on system software update.



82. The 3rd witness RW3 indicated that the cyber attack happened in May 2020 due to an illegal installation by Dwagent Software on the Respondent's server. He also testified that the insurance settled the loss though the Respondents image was already damaged.
83. My analysis of the evidence and the audit report put together shows that the Claimant though being accused of illegally giving the password to a 3rd party, this is not true as the agreement allowed the password to be given to the provider.
84. The Claimant as testified by RW1 was within his mandate to give out the password.
85. And in relation to the contention that the Claimant was negligent in his duties, CW2 testified that he was not in a position to detect what was happening within the 3rd party provider.
86. The Claimant had also pointed out the weaknesses in the system to his superiors but nothing was done.
87. It is therefore my finding that the alleged negligence of duty on Claimant's part was not established.
88. Section 43 of the Employment Act 2007 envisages that before a dismissal or termination, the Respondent must establish the existence of valid reasons leading to termination. The valid reasons must exist at the time to warrant this termination or dismissal.
89. As per the evidence set out by the Claimant, his witness and RW1, the Claimant exonerates himself from blame and I therefore find that there never existed valid reasons to warrant summarily dismissal of the Claimant.

No. 2 Due Process

90. On issue of due process, the Claimant admitted that he was given a chance to be heard. He indicated that he was given enough time to prepare for his disciplinary hearing and that he was heard by the board who explained to him the areas he was found at fault and areas he was exonerated.
91. In terms of due process and provision of Section 41 of the Employment Act 2007, this Court finds that indeed the Claimant was accorded a fair opportunity to be heard.

No. 3 Counter Claim

92. The Respondent's counter claimed for kshs.1,700,000/= being the amount that was taken out of their account by the fraudsters.
93. In terms of the evidence before Court, this Court found that the Claimant was not wholly responsible for the loss and the fraudsters were also arrested and charged in Court.
94. The RW also admitted that the lost cash was refunded by the Insurance Company.
95. It is my finding therefore that the loss of 1.7m is not attributable to the Claimant and therefore the counter claim is not payable and is not awarded.
96. The Respondents further claimed against the Claimant an outstanding loan of 980,199.97/= which the Claimant has not been paying since the summarily dismissal.
97. In his defence the Claimant denies he owed the Respondent kshs.980,199.97/= claimed. In their evidence in chief, no evidence was led by the Respondent about the purported outstanding loan.
98. However Exb. 24 the Claimants pay slip produced by the Respondent shows that he had an outstanding loan of 975,610.98/= as at March 2021.



99. Despite the Claimant alleging that he is a stranger to the loan claim, the evidence before me indicates otherwise.
100. I therefore find for the Respondent in terms of the counter claim being kshs.975,610.98/= for the outstanding loan.

No. 4. Prayers

101. Having found as above, I refer to Section 45 (2) of the Employment Act 2007 which states as follows;

“ 45.

- (1)
- (2) A termination of employment 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”.

102. I have already found that the Claimant was dismissed without valid reasons. In terms of Section 45 (2) of the Employment Act 2007, therefore, it is my finding that the Claimant was dismissed unfairly and unjustifiably due to lack of valid reason.

103. The Claimant sought to be awarded various prayers. He has admitted he was paid 1 month’s pay at time of termination and arrears of leave. His claim for notice pay is therefore not payable.

1. The Claimant also indicated that during his suspension he was paid ½ salary and it is therefore my finding that he is entitled to the withheld ½ salary during suspension = $\frac{1}{2} \times 162,200 \times 3$ (from 28th November, 2020 to 11th February, 2021) = 243,200/-

2. I also award him compensation equivalent to 8 months salary in view of the unfairness meted against him having been dismissed for no valid reasons

= $8 \times 162,200/=$

= 1,297,600/=

TOTAL = 1,540,800/=

Less counter claim = 565,189.02/=

Less statutory deductions

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF JANUARY, 2023.



HON. LADY JUSTICE HELLEN WASILWA
JUDGE

In the presence of:

Daye for Claimant – present

Chama for Respondent – present

Court Assistant – Fred

