



**Kirimi v Onmobile Kenya Telecom Limited (Employment and Labour Relations Cause 498 of 2019) [2023] KEELRC 906 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 906 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 498 OF 2019**

**J RIKA, J**

**APRIL 20, 2023**

**BETWEEN**

**ALEX MUTUMA KIRIMI ..... CLAIMANT**

**AND**

**ONMOBILE KENYA TELECOM LIMITED ..... RESPONDENT**

**JUDGMENT**

Rika J

Court Assistant: Emmanuel Kiprono

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Nchogu Omwanza & Nyasimi Advocates for the Claimant

O & M Advocates for the Respondent

1. The Claimant filed his Statement of Claim on July 31, 2019.
2. He states, he was employed by the Respondent as a Content Executive Personnel, on April 1, 2012.
3. His duties included: dealing with music content in form of Airtel Hello Tunes, commonly called Skiza Tunes; acquire music content from partners who signed up independent artistes, design the content to specific formats and offer the same to communication companies; managing partners' relations; preparing and sharing revenue reports for the content partners; source and engage partners on music aspects; and operate channels for music acquisition.
4. He worked diligently and was promoted to Sales Consultant with enhanced monthly salary, in 2014. There was further promotion to Senior Sales Consultant with improved salary, on June 1, 2016.
5. The nature of his duty required him to work at least 3 days from 8.00 am to 11.00 pm Normal working hours were from 8.00 am to 5.00 pm



6. He was called by the Respondent's top Management on or about April 9, 2019 for a meeting to evaluate general performance of the Respondent and its Staff.
7. At the meeting, his laptop was confiscated and handed over to strangers, who apparently were external auditors. 45 minutes later, he was suspended. He was advised this was to pave way for investigations, of undisclosed activities. He was issued suspension letter on the same date, April 9, 2019.
8. He was recalled, [he states he was reinstated], through a letter dated April 29, 2019. On May 17, 2019 however, the Human Resource Manager issued the Claimant a letter to show cause why he should not be disciplined, for alleged financial fraud. He was invited to attend a meeting, chaired by Human Resource Representative Purity Wanjiru, and attended also by Director, Rohit Kaul. He was advised to have the company of a colleague at the meeting. He states that he was not given specific charges. He was not availed evidence to support the charges. Time to prepare was inadequate. Invitation was on a Friday, May 17, 2019. He was to attend hearing on Monday, May 20, 2019.
9. The letter of termination issued hardly 10 minutes after the hearing. His last salary was Kshs 265,973 monthly.
10. He prays for Judgment for: -
  - a. 1-month salary in lieu of notice at Kshs 265,973.
  - b. House allowance for the entire period of service at Kshs 3,510,676.
  - c. 12 months' salary in compensation for unfair termination at Kshs 3,191,676.
  - d. Overtime at Kshs 10,127,433.
  - e. Interest at court rate from the date of default.
  - f. Costs.
  - g. Certificate of Service.
  - h. Any other suitable remedy.
11. The Respondent filed its Statement of Response on August 30, 2019. It is conceded that the Claimant was employed by the Respondent, rising to the position of Senior Sales Executive by the time of termination. His promotion was not based on diligence, but was part of a routine human resource changes. His contract required that he could occasionally be required to work beyond the hours due to the nature of his work, without extra compensation.
12. The Respondent received whistleblower information on or about February 20, 2019, that the Claimant was involved in a stealthy, but elaborate scheme of fraud, financial impropriety and theft of funds meant for content providers. The Respondent engaged the services of PricewaterhouseCoopers [PWC] to audit its systems. Evidence was collected and laptops seized from suspects. The suspect Employees, were suspended to facilitate investigations. After the preliminary report was made by PWC, the Claimant was recalled pending the final report.
13. It was after receipt of the final report that the Respondent determined that the Claimant was implicated, and issued letter to show cause, heralding the disciplinary process. He was found to have deleted all his e-mails relating to the fraud, but the same e-mails were retrieved from his colleagues' laptops. He was informed of the allegations against him, prior to the disciplinary appearance. He was given the opportunity to attend the hearing in the company of a colleague of his choice, as disclosed in his Pleadings. The whistleblower identity could not be disclosed. The disciplinary committee,



- upon hearing the Claimant, concluded that there was enough evidence to warrant termination of the Claimant's contract, on the ground of his involvement in financial impropriety. The Claimant was a cog, within a wheel of an intricate web, that was involved in theft of funds meant for content providers.
14. He was summarily dismissed and not entitled to notice. His salary was consolidated. He was not unfairly dismissed to warrant compensation. Overtime is not payable. He was paid salary for 20 days worked in May 2019 at Kshs 174, 886 and pro rata leave at Kshs 307, 135. The Claim does not disclose reasonable cause of action. The Respondent prays that it is dismissed with costs.
  15. The Claimant gave evidence and closed his case, on June 11, 2021. The Respondent's Human Resource Representative in Kenya, Purity Wanjiru gave evidence on December 8, 2021 and on October 27, 2022 when hearing closed. The Claim was last mentioned on February 21, 2023 when the Parties confirmed the filing and exchange of their Submissions.
  16. The Claimant told the Court that the Respondent sold products to Telecommunication Companies. He was promoted twice based on good performance. He restated that he was issued a letter of compulsory leave, around April 2019. He was recalled after 20 days. He was lauded and told investigations were complete. He thought this meant that he had been cleared.
  17. Around May 17, 2019, he was issued a letter to show cause. He was told that the Respondent was considering termination of his contract, because of his involvement in financial fraud. It was a vague accusation. There were no documents issued to support the accusation. Hearing notice issued on a Friday. Hearing was on the following Monday. He was heard for 20 to 30 minutes. PWC Report did not assign any liability for fraud on the Claimant. Hearing was a formality. Termination decision was predetermined. He was not accompanied by any colleague. There were about 8 Employees at the time. 2 were faced with the same allegations as the Claimant. 1 was on maternity leave. Another was an intern, while the other was outside the country. The Claimant submits that he technically, was denied the chance to have the company of a colleague to the disciplinary hearing. He was not paid house allowance or provided housing by the Respondent. He worked over 8 hours a day without compensation. He was never reported to the Police for fraud. The alleged whistleblower did not give evidence. The Claimant adopted his Witness Statement and Documents on record, as his evidence-in-chief.
  18. Cross-examined, he told the Court that the nature of his work involved business and account management. He was promoted severally. Letters of promotion stated that all other terms remained the same. The contract fixed annual pay at Kshs 2 million. It did not mean that salary was fixed. He did not have documents supporting overtime claim at Kshs 10 million. He was aware that the Respondent had whistleblower policy. He was interviewed by PWC before the disciplinary hearing. His name was included in the whistleblower e-mail. There were no details of financial loss. He was not aware of why he was placed on compulsory leave. His name was not on the preliminary report. He was recalled. He was not aware that at the time he was reinstated, investigations were ongoing. He was advised to attend hearing in the company of a colleague. Most colleagues were not available. He did not have any relationship with a company called Napster. He did not share any money with a colleague, Esther. He knew nothing about Sheriff Limited. The disciplinary hearing was rushed.
  19. Redirected, the Claimant told the Court that his salary was not fixed from the beginning. It was subject to review. Overtime records were retained by the Respondent. The Respondent did not supply the Claimant requisite documents before the hearing. As pleaded by the Respondent, the Respondent employed an element of surprise. After recall, the Claimant was not advised about any pending investigations. He was not aware of any excel sheet. He did not receive any money fraudulently. He had normal conversations and interaction with Esther. No money was lost by the Respondent.



20. Purity relied on her Witness Statement and 10 Documents filed by the Respondent in her evidence-in-chief. She described the Respondent as a value-added service, dealing with music alerts, among other products.
21. The Respondent is a global business. The working hours are flexible. It does not operate in a single time zone. Remuneration is consolidated. Employees cater for their own housing.
22. The Respondent has a whistleblower policy. Employees sign this policy. They are aware about it. It is hosted by a 3<sup>rd</sup> Party to sustain anonymity.
23. On or about February 20, 2019, an e-mail was sent to the whistleblower e-mail / portal. The policy was to forward such to the Respondent's Director. Purity became aware of the whistleblower report on April 9, 2019. There were 2 different reports, all mentioning the Claimant, Esther and Janet. It was alleged that the 3 were involved in fraud.
24. Investigations were carried out by PWC on the instructions of the Respondent's global office. This involved interviews with the suspects, and computer scanning. Purity and the Directors also surrendered their computers. Those who were implicated were sent on compulsory leave. The Claimant was recalled after the preliminary report. He was advised that investigation was ongoing.
25. On May 17, 2019, the Respondent received the final report from PWC, which indicated a clear link between the Claimant of the one hand, and the 2 other Employees- Esther and Janet, of the other hand.
26. The Respondent issued letter to show cause to the Claimant, requiring him to respond in writing. He did not do so. He was invited to a disciplinary hearing, and advised of his right to be accompanied at the hearing. He did not go accompanied by a colleague of his choice. The PWC final report concluded that the 3 Employees- the Claimant, Esther and Janet- shared the proceeds of fraud at a ratio of 30%, 50% and 20% respectively. The Claimant alleged that the money related to Sacco contributions. It was the same amount in the whistleblower report. The Respondent did not in any event, expect the Employees to discuss Sacco affairs, through the Respondent's platform.
27. The Claimant and his conspirators, acted against the Respondent's Code of Conduct. They were required by the Code, to disclose this activity to their Supervisors. Esther owed a company called Mr Sheriff. Her husband was a Director in Mr Sheriff.
28. Purity underscored that the Claimant was engaged in gross misconduct. He was paid pending leave and salary for days worked. Salary was consolidated. There was no overtime due. Working hours were flexible. The Respondent's partners were located in different time-zones.
29. Cross-examined, Purity told the Court that she holds a Bachelor's and Master's Degree, from the UK. She holds a valid licence in human resource management, and is well-versed with the *Employment Act*. She joined the Respondent in 2018, a year before the Claimant's contract was terminated. The Claimant joined in 2013, holding different positions to the date of termination, as pleaded. He executed his duties diligently.
30. He cooperated with the Investigator. He was suspended and recalled. The recall letter is referenced 'reinstatement to work.' The Respondent thanked the Claimant on recall for his good work. Purity signed the letter. Suspension was based on preliminary investigation. It was not for PWC to say when to recall the Claimant. Decision was internal.
31. The Claimant did not respond to the letter to show cause. The letter issued on a Friday, May 17, 2019. He was to respond by Monday, May 20, 2019. He would deliver the written response by Monday, when



- he attended the disciplinary hearing. He was aware of the allegations against him, from the inception. He did not have the details of the allegations on suspension, but was aware about them, at the hearing.
32. The Claimant had the relevant e-mails by the time of the hearing. The Respondent lost Kshs 341,000 through the fraudulent activities of the Claimant. The Respondent deals in content management such as ringtones, football alerts and gaming. It was paying a hoax company Mr Sheriff, through the fraudulent activities of the Claimant and his 2 colleagues.
  33. The Claimant did on-boarding. This was not the responsibility of one person. Employees were required to carry out due diligence before on-boarding. There was breach of trust. The Claimant deleted his emails. The decision against the Claimant was collective, involving the global company. The Claimant earned a basic salary of Kshs 164,000 monthly and a gross of Kshs 265,000, the latter which included the housing element. House allowance was not itemized separately in the Claimant's pay slips. They pay slips show basic salary amount similar to gross pay. There were times the Claimant was expected to work beyond 45 hours a week. The hours were flexible. The 3 Employees divided the money as per spreadsheet, retrieved from Esther's computer. The invoice was paid. Redirected, Purity told the Court that, the Claimant was an Accounts Manager; there was a whistleblower policy; a whistleblower report was received by the Respondent; it was investigated; preliminary report was not clear about the Claimant's involvement; the final report made it clear that the Claimant was involved; and this opened the door for the disciplinary hearing, which was conducted fairly, resulting in dismissal of the Claimant.
  34. The issues are: whether the Claimant's contract was terminated for valid reason; whether he was taken through a fair procedure; and whether he merits the remedies pleaded. The relevant law is contained in Sections 41, 43, 45, 47 and 49 of the [Employment Act](#), read with Section 12 of the [Employment and Labour Relations Court Act](#).

**The Court Finds: -**

35. The Claimant was employed by the Respondent as Content Executive, on April 1, 2012. His initial Annual Fixed Compensation [AFC] was Kshs 2 million. It was subject to review.
36. By the time of termination, the Claimant was described as Senior Business Manager and Account Manager, Airtel Zambia.
37. His contract was terminated by the Respondent on May 20, 2019 on allegations of fraud. His payslips from 2012 to 2019, indicate he was paid basic monthly salary, similar to the gross monthly salary. The last such salary was in April 2019, stated at Kshs 265,973.
38. Before delving into whether termination was substantively and procedurally fair, the Court would beg to deal with some of the remedies sought.
39. Overtime: This is pleaded at a staggering sum of Kshs 10,127,433. The Claimant did not in his Pleadings and Evidence give a breakdown of the hours worked, and show the formula adopted, to come with an overtime claim of Kshs 10,127,433. The Claimant was in Management. He was not an Employee whose terms and conditions of employment, resulted from a Wage Order, designed through the involvement of a Wage Council. A Wage Order seeks to protect the remuneration and other conditions of employment, of any category of Employees, in any sector, which is not adequately regulated by collective agreements; and where it is expedient to set minimum wages and other conditions of employment, in respect of Employees in those sectors. Wage Orders are aimed at protection of vulnerable blue collar Employees, who do not have adequate bargaining strength, in negotiating and concluding contracts of employment with their Employers. It is a protection mechanism, particularly to lower cadre of Employees, who not only lack the bargaining strength



- individually, but also do not have the advantage of collective representation of a trade union and collective agreements.
40. Part VI of the *Labour Institutions Act* is clear that Wage Orders set down the minimum wage payable, or the wage floor, below which an Employer is not supposed to remunerate his or her Employee. They are aimed at setting the minimum standards of employment, and are not to be invoked by Managers, white collar Employees, who are deemed to have adequate bargaining strength, in entering into employment contracts with their Employers.
  41. The Claimant invokes the Regulation of Wages [General] Order, in pursuing overtime pay. He was however a Senior Business Manager and Account Manager, with adequate and equal bargaining strength, to engage his Employer. He did so, and freely executed a contract of employment on record, without the aid of a Wage Council.
  42. Clause 6 of his contract states: -

‘ You will be expected to work no less than 48 hours a week. Your working hours will be the working hours of the office from which you operate. There may be occasions when you may have to work beyond office hours due to exigencies of the Company’s business and you will not be entitled to any additional compensation on that account.’
  43. The Claimant’s contract was express that the Claimant could be called upon to work excess hours, without additional compensation for the excess hours. His monthly salary at Kshs 265, 973, would be deemed to have factored in, that the Claimant would from time to time, be required to work excess hours. There would be no justification for overtime pay, outside the monthly salary. The Claimant cannot therefore submit that he merited overtime pay. His contract was clear on this. The prayer for overtime pay at Kshs 10, 127, 433 is rejected.
  44. House allowance. The contract dated April 1, 2012, states that the Claimant would be paid Annual Fixed Compensation at Kshs 2 million. Appendix 2 in the Claimant’s contract, comprised a breakdown of total compensation package. Annual Fixed Compensation was restated at Kshs 2 million. The monthly salary paid was Kshs 166,667 at the beginning. The pay slips, throughout, equated Annual Fixed Compensation, or gross pay, with basic salary. Annual Fixed Compensation, or gross salary, includes the basic salary and other applicable allowances. Basic salary cannot be the same as gross salary. The contract authored by the Respondent, executed by the Parties was inconsistent or uncertain in its language, with regard to basic salary, gross salary and by extension house allowance. The Claimant states that he was entitled to house and the amount paid did not include house allowance. He relies on pay slips issued to him, where gross salary was equated to basic salary.
  45. The Respondent was not able to point to a clause under the contract, which clearly consolidated the Claimant’s salary in accordance with Section 31 [2] of the *Employment Act*. Purity Wanjiru was not able to say how much was supposed to be the Claimant’s house allowance, out of the amount simultaneously described as gross salary, and basic salary. She admitted that house allowance was not itemized in the pay slips. About 80 pay slips were exhibited. All itemized basic salary and gross salary, without an indication on house allowance. Specifically, she told the Court without conviction, on cross-examination, that the Claimant earned a monthly basic salary of about Kshs 164, 000 and gross of Kshs 265, 973. The pay slips do not have this breakdown. If it was the correct breakdown, why was it not captured in any of the 80 pay slips?
  46. Section 20 of the *Employment Act* requires an Employer, before payment of a salary, to give to an Employee a written itemized pay statement, commonly known as a pay slip. The pay slip shall include the gross amount, variable items and statutory deductions. Gross salary as stated above, is not basic



- salary, and the pay slip should make it clear what is the gross pay, or total fixed compensation, as opposed to the basic salary which is exclusive of allowances and variable items.
47. Appendix 2 of the Claimant's contract quoted Annual Fixed Compensation and basic salary at Kshs 2 million. It also indicated that in addition to the Annual Fixed Compensation and basic salary, the Claimant would be entitled to a comprehensive package of benefits. He would thirdly, be entitled to another category of benefit, the healthcare cover, extending to his family.
  48. The Respondent was not clear about its remuneration to the Claimant. Remuneration is defined under Section 2 of the *Employment Act* as 'the total value of all payments in money or in kind, made or owing to an Employee, arising from the employment of that Employee.' Basic salary, gross salary, Annual Fixed Compensation, and Cost to the Company [CTC] were all lumped together at Kshs 2 million in Appendix 2. At the same time, the Claimant was advised that he was entitled to other benefits, not specified in the contract. Could these include house allowance? What was the Claimant's remuneration, what was his monthly basic salary, gross salary, and house allowance? What was the CTC? It cannot all have amounted to the same figure of Kshs 2 million annually.
  49. Ambiguity in a contract of employment, must be resolved in favour of the Employee, against the Employer who is the author of the contract of employment. The Court finds merit in the prayer for house allowance.
  50. Certificate of Service. An Employer shall issue to an Employee a Certificate of Service upon termination of his employment, unless the employment has continued for a period less than 4 consecutive weeks, in accordance with Section 51 of the *Employment Act*. The Respondent offered or forwarded this in the letter of termination, and there was no reason, for the Claimant to plead what was offered.
  51. Substantive fairness. The Claimant was designated as Senior Business Manager and Account Manager, Airtel Zambia, at the time he was implicated in fraud against the Respondent. He was said to have acted in concert with his colleagues, Esther Nyaga, Senior Content Manager and Janet Muriithi, Account Manager Airtel KE, TZ, MW and Vodacom Tanzania.
  52. The Respondent received 2 whistleblower allegations, that there was fraud being carried out against the Respondent by its Employees. Esther was alleged to have surreptitiously engaged the Respondent in a contract with her husband's company, Mr Sheriff Limited. The Respondent was to purchase content from Mr Sheriff.
  53. PWC was engaged by the Respondent to investigate the fraud, and report to the Respondent. It interviewed the Claimant, Esther and Janet. PWC also interviewed Sales Director Rohit Kaul and Accountant Njeri Ng'ang'a. The laptops of the 5 Officers were carted away by PWC for data extraction.
  54. The extraction yielded an excel spreadsheet from Esther's laptop, containing calculations from one of the invoices relating to Mr Sheriff Limited. The amount indicated on the invoice was to be shared amongst the 3 Employees- the Claimant, Esther and Janet, at 30%, 50% and 20% respectively.
  55. Data also confirmed that the 3 Employees communicated in furtherance of the fraud, and the Claimant's assertion that communication was innocent interaction concerning Sacco shares, was a poor attempt at hoodwinking the Court. The e-mail communication involving the Claimant, Esther and Janet, was not a normal conversation involving colleagues, as stated by the Claimant upon redirection. Far from it, these conversations were conspiratorial.
  56. Esther shared the weekly download report, with the Claimant, with a summary of the top 20 hits for the month. He asked Esther and Janet to see the highlights, which were confined to Napster songs. The list also showed majority of the downloads at 7,198, was towards 'unknown' songs. When the



- question was raised about who the unknown was, the Claimant wrote to his colleagues, ‘hahaaha, find out we can welcome him/ her to our family if he/ she is orphaned.’ The 3 Employees were enjoying their scheme against the Respondent, and ready to spread their tentacles.
57. The conspiracy was further exposed through an e-mail wherein the Claimant shared a list of 6 songs from Napster, advising that the songs were top 6, in Zambia. Esther asked her 2 colleagues for their full names and identity card numbers. The Claimant replied excitedly, ‘Weee! Hiyo ukali umeitisha nayo!!! [ you! the kind of force you are using in making the request!!!].’ Esther replies in a conspiratorial tone, ‘hahaha hivyo ndivyo pesa itacome’ [ hahaha, that is how money will come].’
  58. PWC placed Esther and her husband, and their company Mr Sheriff, in the middle of the rip-off. Invoices from Mr Sheriff were found in Esther’s laptop. Sheriff Limited billed the Respondent, and upon payment, the money was split amongst the 3 Employees. Esther initiated the scam, on January 16, 2018, when she requested transfer of the CP agreement from existing CP Napster Technology, to her husband’s Mr Sheriff Limited. She abused her role as the Content Manager. It was her responsibility to manage CP contracts. She did not disclose to the Respondent that her husband Gitonga, was the man behind Mr Sheriff. Esther then went on a spree of transfer on tunes owned by the Respondent to Mr Sheriff. Mr Sheriff was not even registered as a music content provider.
  59. The other 2 Employees including the Claimant, participated in the scheme. They shared the proceeds. The Claimant shared songs that were doing well under the Napster label, with Esther. They would transfer the songs to Mr Sheriff. The Claimant and Janet mainly played the role of identifying top songs, and promoted transfer of the songs, to enhance the earnings of Mr Sheriff, which they in the end shared. The scheme was well captured in the whistleblower reports. When CPs requested for songs to be expired, the Claimant and his team expired the songs on the particular CP, and re-uploaded the same content to Mr Sheriff, giving the impression that they were the new owners of the content. They stole potentially high value content, and uploaded it as their own. They would steal from dormant or idle CPs. Once the money was paid to Mr Sheriff, the 3 Employees would share.
  60. The Claimant and his 2 colleagues violated the Respondent’s Code of Business Conduct and Ethics, on conflict of interest. They took part in activities that prejudiced their Employer’s business. They engaged in an investment which compromised their responsibilities to the Respondent. They did not protect, safeguard and put to proper use, the Respondent’s assets. They were engaged in theft of their Employer’s content, a clear act of gross misconduct, under Section 44 [4] [g] of the *Employment Act*.
  61. The Claimant breached clause 9.1 of his contract of employment, which provided for non-competition. He was not to be associated with, or involved directly or indirectly with any person, firm, corporation, or entity engaged in any business which provided services substantially similar to the services provided by the Respondent or its affiliates. He was not to engage 3<sup>rd</sup> Parties for any business purpose, other than for the benefit of the Respondent. PWC Report confirmed the Claimant’s involvement with Mr Sheriff Limited.
  62. Section 43 of the *Employment Act* does not require that an employment offence is reported or even investigated by the Police, to constitute valid termination reason. It was in the discretion of the Respondent to report to the Police. From the Report of PWC and the Claimant’s evidence at the disciplinary hearing, it cannot be doubted that the Respondent genuinely believed there was fraud committed against its business, by its 3 Senior Staff, and that the Claimant played a significant role in the fraud. The Respondent satisfied the substantive test, under Section 43 of the *Employment Act*.
  63. Procedural Fairness. The Respondent received whistleblower reports, and on April 9, 2019, suspended the Claimant to allow for investigations. He was asked to surrender his laptop and office keys, to facilitate investigations.



64. PWC commenced investigations and prepared a preliminary report. On April 29, 2019, the Claimant was recalled and thanked by the Respondent for his continued good work. He took this to mean that he had been absolved, but as explained by the Respondent, investigations had not been completed. PWC was still conducting investigations, which included extraction of data from the laptops taken from the Staff.
65. As indicated in reviewing substantive fairness, PWC came up with a final report which was damning on the role of the Claimant in the fraudulent scheme. The Claimant had no reason to assume that recalling him from suspension, meant he had been absolved. It only meant that investigations were now complete, evidence collected, warranting the Claimant to be placed on his defence. It is not uncommon to recall an Employee who is on suspension, at the end of investigations, for purposes of conducting the disciplinary process. Suspension was found necessary to keep the Claimant away from the scene of his employment offence, so as not to interfere with relevant evidence. The Respondent states that by the time PWC reached the Claimant, he had deleted most of the damning e-mails. Once evidence was collected, his capacity to contaminate evidence, was limited, and disciplinary process could take place unhindered.
66. The compliment by Purity, thanking the Claimant for his good work to-date and looking forward to his continued dedication and support, was not a message of absolution for the Claimant, for the employment offence which was yet to be tried at the disciplinary forum. Nothing much can be read from the polite language employed by Purity, in recalling the Claimant from suspension. The culpability of the Claimant was still not fully known. He was yet to be heard, and the full report of PWC, was yet to be generated.
67. He was, upon generation of the full report, asked to show cause why his contract should not be terminated, through a letter dated May 17, 2019. The letter to show cause, served as a notice of disciplinary hearing. Hearing was scheduled for the following Monday, May 20, 2019.
68. This was a procedural deformity. A letter to show cause is a precursor to the disciplinary hearing. It is not the disciplinary hearing. It is not an invitation letter to a disciplinary hearing. It signals an intent by the Employer, to have a disciplinary hearing. The Employee is given an opportunity to respond. The response guides the Employer, in determining whether there is going to be a hearing. The letter to show cause is preliminary or preparatory to the disciplinary hearing.
69. Purity was hard-pressed to say, how the Respondent would receive the Claimant's response to the letter to show cause, read, and determine whether to escalate the process to disciplinary hearing, on the same date the Claimant had been advised hearing would take place.
70. The Respondent submitted that the Claimant did not respond to the letter to show cause, in writing, within 48 hours of receipt. How was the Claimant to comply, while preparing for the hearing within the short period?
71. It is unfortunate that the Respondent merged 2 different aspects of the disciplinary process, and made it unclear to the Claimant, what was supposed to take place on May 20, 2019. Was he supposed to have replied to the letter to show cause, and as expected, await a response from the Respondent, before the anticipated disciplinary invitation and hearing?
72. Even barring the mix-up on show cause and disciplinary hearing, a notice of 48 hours issued to the Claimant to prepare for disciplinary hearing was inadequate. It was a weekend, when ordinarily, Employees enjoy their rest days. Work activities, including disciplinary preparations and hearings, should be conducted during working days. 48 hours were insufficient, particularly because the



- Respondent had not supplied the Claimant with all requisite documents, including the full PWC report. Supply of documents at the hearing, would not be fair to the Claimant.
73. The letter dated May 17, 2019 was referenced 'Notice to Show Cause,' rather than 'Notice of Disciplinary Hearing.' It informed the Claimant to attend a meeting, to discuss the matter. It was not expressed to be a disciplinary hearing. The Respondent merged different stages of a disciplinary hearing, which ended up depriving the Claimant of procedural fairness.
  74. His complaint about not being able to have a colleague at the meeting, had this been a legitimate disciplinary hearing, did not carry weight. He was not able to request a colleague to accompany him, for different reasons. There was nothing which prevented him from being accompanied by Esther or Janet who were quite familiar with the Claimant. They were still his colleagues, even though faced with their own disciplinary matters. Barring the availability of colleagues, it was open to the Claimant to request the Respondent to allow him to be accompanied by his Lawyer. Unavailability of colleagues would not result in a technical procedural defect as submitted by the Claimant.
  75. The whistleblower need not have been called as a witness, to satisfy procedural fairness in the process leading to the termination of the Claimant's contract. A whistleblower is typically someone who anonymously reports fraud and other improprieties, taking place within the organizations they serve. It can be an outsider. In this dispute they were probably colleagues of the Claimant, with insider information. Whistleblowers are entitled to anonymity, in order to afford them protection against retaliation from the wrongdoers. They are integral to the good health of their Organizations. They report, but it is the responsibility of their Organizations to investigate and take remedial action. In this matter the Respondent did not act merely on the strength of the information supplied by the whistleblower; it engaged PWC, who carried out thorough, forensic investigations, establishing fraud. It was not necessary therefore, to blow the lid off the face of the whistleblower, by requiring him or her to appear before the disciplinary hearing.
  76. There are grounds to warrant the finding that termination was not procedurally sound. Procedure did not meet the requirements of Sections 41 and 45 of the [Employment Act](#) and was therefore, unfair.
  77. Final remedies. The Court has acceded to the prayer for house allowance. The Claimant worked from April 1, 2012, to May 20, 2019, a period of 84 months, not 88 as pleaded by the Claimant. The Court allows the prayer for house allowance in arrears of 84 months, at 15% of the monthly salary, amounting to Kshs. 3,351,259.
  78. The Claimant was paid salary for 20 days worked in May 2019 and pending annual leave days at Kshs 174,886 and Kshs. 307,135 respectively.
  79. He was involved in an act of gross misconduct, warranting summary dismissal under Section 44[4] of the [Employment Act](#), and notice pay is not merited.
  80. The Claimant worked for about 7 years. Purity told the Court that he was a diligent Employee. In recalling him from suspension on April 29, 2019, she restated that he was a dedicated Employee. Clause 15 of his contract entitled him to work until the age of 58 years. He was mainly to blame, for the circumstances which resulted in termination of his contract. He engaged in fraud against the Respondent. Termination was based on valid reason, but procedure was flawed. He is granted equivalent of 2 months' salary in compensation for unfair termination, at Kshs 531,946.
  81. No order on the costs.
  82. Interest allowed at court rate from the date of Judgment, till payment is made in full.



**In Sum, It Is Odered: -**

- a. Termination was procedurally flawed and therefore unfair.
- b. The Respondent shall pay to the Claimant arrears of house allowance at Kshs 3,351,259; and equivalent of 2 months' salary in compensation for unfair termination at Kshs 531,946 – total Kshs 3,883, 205.
- c. No order on the costs
- d. Interest granted at court rate, from the date of Judgement till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**JAMES RIKA**

**JUDGE**

