



**Turgut v Nakuru Water & Sanitation Services Company Limited (Employment and Labour Relations Cause E062 of 2021) [2023] KEELRC 1097 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1097 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E062 OF 2021**

**HS WASILWA, J**

**MAY 4, 2023**

**BETWEEN**

**ANNE CHEPKORIR TURGUT ..... CLAIMANT**

**AND**

**NAKURU WATER & SANITATION SERVICES COMPANY  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this claim vide memorandum of claim dated November 3, 2021, claiming to have been unfairly terminated and seeking for the following reliefs;
  - a. A declaration that the claimant's dismissal of employment was unfair, wrongful, unprocedural and unjust.
  - b. A declaration that the purported surcharge of the Claimant of Kshs 3,219,256.00 is unlawful and is hereby reversed:
  - c. Compensation, Twelve (12) months' salary, Kshs 305,000.00 X 12 = Kshs 3,660,000.00
  - d. Unpaid dues comprising of:
    - i. Three months' salary in lieu of notice of Kshs 305,000 X3 = Kshs 915,000.00;
    - ii. Unpaid salary up to February 3, 2021;
    - iii. Pro-rated leave days, earned and not taken of 20 days;
    - iv. Pro-rata leave travelling allowance calculated at 6.5% of the Claimant's annual basic salary up to February 3, 2021;
    - v. Earned Allowances as listed in the dismissal letter of February 3, 2021;



- vi. Pro-rated Gratuity at 31% of the Claimant's monthly basic salary for every month successfully completed up to February 3, 2021.
- e. Punitive and aggravated damages for breach of the claimant's constitutional rights.
- f. Costs of the Suit.
- g. Interest on all the above prayers at court rates.
- h. Any other relief as the Court shall deem fit.

### **Claimant's case**

2. The summary of the claim is that the claimant was employed by the Respondent by a letter of appointment dated July 27, 2018 to serve as a Human Resource and Administration manager for a renewable term of Five (5) years commencing September 1, 2018 at a salary of Kshs 305,000 per month.
3. In the employment contract, the Claimant is to report to the Managing Director(MD). The contract also provided for three months' notice before termination or payment of three months' salary in lieu of notice, which can be done by either party.
4. The claimant stated that she worked with dedication for the Respondent until her termination on February 3, 2021.
5. The circumstances leading to the termination is that sometimes in September, 2020, the Respondent deployed an ERP Fleet Management Module. This module was supplied by a consultant and implemented with the help of ICT department, which was rolled out effected September 1, 2020.
6. Initially, the Respondent's drivers used to request for fuel manually using Fuel and oil requisition form that would then be signed by the Transport Assistant and checked by the Administration manager and finally approved by the claimant.
7. At the time the system was introduced, there were not enough computers to enable drivers make their requisition online and the transport assistant was facilitated with one computer.
8. It is stated that the claimant being the Human Resource manager, requested the Managing Director by her Memo of December 7, 2020 to test the system to identify any loopholes before the system was operationalized by all the other staff, but her request was met with contempt when the MD openly opposed her idea and choose to work directly with Human Resource officer, her junior officer, instead of going through her.
9. The claimant avers that sometimes on December 3, 2020, he requested the MD through an internal Memo to give guidance on signing completion certificate, because the Human Resource Officer, had communicated to Board of Management that the HR modules had been completed at 96% yet completion and implementation had not been achieved. Instead of giving the guidance sought, the MD directed the Human Resource officer to liaise with the Consultant and the ICT to finalize on the remaining 4% and directed the claimant to sign off, which the claimant refused because the system had not been tried and tested as required.
10. The claimant did not approve the operationalization of the system because it was still on initial implementation stages and unstable. Further that it had not been integrated to the other departments. Also that the claimant was unable to generate any reports to enable her monitor the use of fuel and lubricants.



11. On December 8, 2020, the claimant was summoned by the MD who demanded for a refund of Kshs 14 Million that was allegedly lost through fraudulent purchase of fuel and lubricants. In the said memo, the MD blamed the claimant on the gaps in the system and demanded for answers of how the same will be cured.
12. In response, the claimant presented a report dated December 11, 2020 titled 'Fleet management Report' which claimant made the following findings; that the drivers lacked computers to enable them log into the system and they were all relying on the Transport Assistant's computer; indication of spike fuel consumption for some generators in the main office and sewage plants between September and December, 2020. The fuel report for generators for Mwarigi and Njoro sewage plants showed a wide variation with the ERP Reports.
13. In her report, she suggested payments be made directly from the Administration to finance, requisition to be initiated by individual driver and not the Transport assistant and the fact there was no collective responsibility by supervisors assigned to supervise the activities of the drivers.
14. Based on these gaps, she suggested the use of fuel cards to be adopted, installation of car tracking devices on all vehicles, transport assistant to supervise fuelling at the Fuelling station, fuelling of cutters and generators to be done under the supervision of the head of department, payments to be channelled through procurement, ICT to help identify the weaknesses of the system and for thorough investigation to be conducted on the loss.
15. Instead of acting on the report, the claimant was placed on compulsory leave by the letter of December 11, 2020. On January 13, 2021, she received a show cause letter titled 'Incompetence and Negligence of Duty' and the reasons given was on allegation that the claimant had fraudulently approved fuel orders during the period of September to November, 2020 resulting in the loss of Kshs 3,219,256 and failing to use the ERP Fleet Management Module to monitor consumption of fuel and lubricants for the Respondent's vehicles.
16. The claimant tendered her response to the show cause on the January 20, 2021, together with a report detailing her malicious treatment by the MD. She was invited to the disciplinary hearing scheduled for January 28, 2021 before the Respondent's Ad hoc Committee.
17. During disciplinary hearing, the claimant alleged that she was forced to sign a written statement which she refused and wrote a follow up letter on the February 3, 2021, which she also requested for the minutes of the meeting.
18. On the same day, the claimant received her termination letter, with reasons of termination given as indicated in the show cause letter. The claimant appealed the termination to the Chairperson of the Board by her letter of March 17, 2021 however the Appeal was dismissed on the May 27, 2021 and communicated to her on June 16, 2021
19. The claimant contends that she was discriminated against as all her colleagues that were implicated in the fraud were not subjected to the same treatment.
20. After termination, the claimant was reported to the Director of Criminal Investigation who summoned her and taken her written statement with regard to complaints raised by the Respondent.
21. The claimant testified as CW-1 and adopted her witness statement dated November 3, 2021 and produced the documents filed with the claim as her Exhibits 1-9 respectively. She testified that contrary to the allegation by the Respondents, the ERP fleet management module was introduced by the Respondents through an advert in February, 2019 made conjointly with Nakuru County, Rural water, water works and development partners. She testified that in the module, the drivers have to go through



- the Transport assistant, the administration officer and herself before fuel was approved. She told the Court that the Respondent first raised concern with the module vide the Memo dated December 8, 2020 asking why there was a spike in fuel consumption which she duly responded by the Report of December 11, 2020.
22. It was her testimony that the Respondent did not consider her response on the possible reasons for the spike and recommendation indicated in her report but instead the Respondent summoned her for a disciplinary meeting before an Ad Hoc Committee which eventually resolved to have her services terminated. That she appealed on that decision but the Board adopted the decision of the disciplinary committee. She maintained that she was not negligent in the way she handles her duties.
  23. She also told the Court that her relationship with the managing director had deteriorated so much that the Managing Director used to give her junior, Human Resource officer, her duties and directed her to report to him directly without passing through her as contemplated by the Respondent's policies. She also added that she was threatened by the Managing Director an issue that she reported to the DCIO and police.
  24. Upon cross examination, she testified that she only raised the issue of mistreatment by the Managing Director after she was terminated. She admitted preparing the report on the position of the ERP module following the complaint raised by the MD on December 8, 2020. She testified that she complained of discrimination in her claim because the colleagues that were equally implicated had not been terminated at the time of filling this suit, but confirmed that they were dismissed after. She also testified that as much as the HR manual provide for communication to be through internal memos and Letters, Covid 19 forced her to create a WhatsApp group to ease communication. She also admitted that the transport docket was one of her key responsibilities.
  25. On leave days she testified that the HR manual under Clause 7.3 prohibit employees from carrying forward more than 10 leave days. She admitted surcharge is provided for under the manual and even suspension but not Compulsory leave. She clarified that the fraud occurred on the desk of the Transport assistant as she was the one tasked with receiving external calls. She admitted that the system was 90% operationalized and in the Report to the MD she raised the gaps in the system and suggested solution, including disciplinary action for the people found culpable after external investigation is carried out. She reiterated that she proposed in the steering committee to work with the ICT and consultant in developing the system, and that she was not the author of that ERP system.
  26. On re-examination she testified that the transport management was done by the Transport assistant. She also confirmed sending a demand letter to the Respondents. She stated that she was sent on compulsory leave not suspension. She also stated that she was not invited for Appeal hearing.

### **Respondent's case.**

27. The Respondent entered appearance on the January 25, 2022 and filed defence to claim and counterclaim on the January 26, 2022. Admitting to employing the claimant as described in the claim but denied the manner in which the termination occurred.
28. The Respondent stated that it is infact the claimant who authored the system and proposed the installation of the system and claimed to have successfully worked in her previous work stations. It's on the strength of her words that the Respondent purchased the said system.
29. Contrary to the allegations by the claimant, the Respondent stated that its managing Director by the Memo of December 8, 2020 that first raised some grave concerns regarding the ERP Fleet Managing



- Module, which did not have control methods and giving conniving staff a field day in fleecing the company. Instead of the claimant giving solution in response to the Memo, she merely gave excuses.
30. Dissatisfied with the explanation given by the claimant in the reports tendered, the Respondent resolved to place the claimant on compulsory leave to allow for thorough investigation and audit of the system to enable them identify and close all loopholes. He added that the claimant was the one in charge of observing and managing the utilization of the Respondent's resources. thus the suspension was in line with Clause 7.3.11 of the HR Manual.
  31. Internal audit was done by the internal audit manager with regard to the spiked fuel consumption between September, and December, 2020. After thorough analysis of the system, the Respondent resolved to surcharge the claimant Kshs 3,219,256 for approving fuel requests in the fuel sub-module and authorizing fuel orders which resulted to loss. This recommendation was arrived at after the Respondent noted that the claimant, being the one in charge, approved fictitious requests and Orders and also for failing to utilize the ERP Fleet management module to monitor the consumption of fuel and lubricants, when she was the author of the system.
  32. A show cause letter dated January 13, 2021 was served on the claimant giving her ample time to respond which she did on January 21, 2021. It is averred that her explanation was not satisfactory leading to the invitation of disciplinary hearing that was scheduled for January 28, 2021 and advised to bring along a representative of her choice.
  33. On the day of disciplinary hearing, the claimant requested to be furnished with the investigation report, together with work tickets, fuel requisition forms, generated ERP reports and invoices for the period between September 1, 2020 and November 30, 2020, which were supplied to her and by consensus arrived at for her to be given a further 3 days to prepare and the next hearing was re-scheduled to February 1, 2021. The claimant attended the hearing together with her witness Willy Kibet and made submissions.
  34. After the hearing, the Respondent resolved to terminate the services of the claimant for incompetence, negligence that caused the Respondent loss of Kshs 3,219,256 and resolved to device ways to recover the loss from the claimant. This termination, together with terminal dues payable and her rights of appeal was communicated in the letter of termination of February 3, 2021. The Claimant then appealed the decision but the Appellate board declined the same and upheld the decision of the disciplinary committee.
  35. It is stated that contrary to the allegation that the clamant was discriminate against, her colleagues such as Gilbert Onderi Nyaata, Martin Muchai Kariuki and Benjamin Muibu were also taken through the disciplinary process and their services summarily terminated.
  36. In the counterclaim, the Respondent reiterated that among the roles the claimant was tasked with was to ensure activities are cost effective and contribute to the overall efficiency of the company and for her to provide effective guidance and supervision of staff and coordinate office administration services and transport.
  37. It is indicated that the claimant failed in this role, causing the Managing director to carry out audit and investigations because there was a spike of Fuel consumption, whereas their operations had been scaled down due to Covid-19 pandemic. In the report it was discovered that the claimant had negligently approved fuel requests in the fuel sub module and authorized fuel orders that led to loss of Kshs 3,219,256, which the Respondent found the claimant personally liable for.
  38. The Respondent also stated that the claimant committed fraud that costed the Respondent and gave the particulars to include; failing, refusing and or neglecting to account for fuel loss of Kshs



- 3,219,256, misleading the board by submitting quarterly fuel consumption reports that were not factual, negligently approving dubious fuel orders and requests and colluding with unscrupulous colleagues to fleece the respondent.
39. Based on this, the Respondent prayed that the claim herein be dismissed and the judgement be entered in their favour in the counterclaim as follows;
- a. Kshs 3,219,256. Lost under her supervision.
  - b. Cost of the claim and counterclaim.
  - c. Interest in (a) &(b) above until payment in full.
  - d. Any other relief that the Court thinks fit and just to award.
40. During hearing Respondent called two witness, the first one was Joseph Githinji, the internal audit manager. He adopted his witness statement of 27.1.2022 and produced document 3, the audit report as his exhibits.
41. Upon cross examination he testified that he interviewed some of the employees such as Benjamin but did not have anything to show he interviewed the Claimant while carrying out investigations. He told this Court that the system is configured and the process of fuel approval is operated by three personnel and the Human Resource Manager has the final say to either approve it or reject the request. He admitted that the claimant was not happy with the system as at December, 2020, when the same had been rolled out in September, 2020. That she had recommended for the same to be tested out first before being rolled out but could not confirm if the Respondent acted on the recommendations by the claimant. He testified that the Respondent currently has a new system.
42. Upon further cross examination he testified that the Board conducted the Disciplinary committee and sat on the Appeal. He also told the Court that the claimant was not the author of the system but that the system was procured and installed by a consultant who configured it to fit the Respondent needs. He confirmed that the claimant did not directly receive any money with regard to the fraud as per the investigation report.
43. The Respondent's second witness was Kadita Wanjohi Muchoki, the current Human Resource manager. She adopted her witness statement of January 27, 2022 and upon cross examination, she testified that clause 7:3.11 of the HR Policies provide for compulsory leave which is approved by the Board but could not tell whether the same was approved by the Board. She testified that the disciplinary meeting was presiding over by Board members who also sat on Appeal. She also admitted that Benjamin was interviewed by internal auditor but the claimant was not interviewed as per the record. She also stated that the claimant is tasked with approval of Fuel but does not make any fuel requests. She also testified that some of the recommendation made by the claimant were implemented.
44. On re-examination she testified that the claimant is the one that undertook to spearhead the development of the ERP management system module. She also told this Court that disciplinary committee is formed depending on the cadre of the employee and the same applies to the Board that hears Appeals.

#### **Claimant's Submissions.**

45. The claimant identified two issue for determination; whether the Respondent had a valid reason to terminate his employment services and whether the termination was effected in terms of fair and justifiable procedure.



46. On the first issue it was submitted that Section 47(5) of the *Employment Act* provides that the burden of proving unfair termination rests with the employee while the burden of justifying the grounds of termination lies with the employer.
47. It was submitted that the reasons given for termination of the claimant's services was two pronged; fraudulently authorizing fuel requests and further approved fuel orders during the period between September and November, 2020 resulting to loss of Kshs 3,219,259 to the Respondent and for failing to utilize the ERP Fleet management module monitor the consumption of fuel and lubricants for the vehicles whereas she was the author of the system. These reasons according to the claimant are not justified because the fuel request involved three personnel, the drivers initiating the fuel request, the Administration officer validating the request then the claimant approving the request at the tail end as such the claimant was unable to ascertain a fictitious request especially when the administration officer has validated it. In any case that there was no benefit that was earned by the claimant in the said fraud to find her liable.
48. On the second reason for termination, the claimant submitted that it did not author the installation of the machine as alleged but that it was installed by a consultant. That the claimant raised concerns on the system vide the Memos of December 3, 2020 and December 7, 2022 and even did a comprehensive report on December 11, 2020, indicating that she was vigilant and competent on her work. On that basis, the claimant submitted that the reasons for termination of her employment was not justified and therefore was unfair. To support this argument, she relied on the case of *H Young (EA) Limited V Samuel Gikunda Mbiuki [2020] eKLR* where the Court held that;
- ' Termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reason(s) and upon following a fair procedure.'
49. Similarly, that in this case, the Respondent failed to produced concrete evidence to connect the claimant to the loss and therefore the reasons given is not justified.
50. On procedural fairness, the claimant relied on the case of *Kenya Plantation and Agricultural Workers Union V Finlay's Horticultural Kenya Ltd [2015] eKLR* where the Court held that ;
- ' Natural justice has now become entrenched in the employment relationship where an employer is contemplating terminating the services of an employee. That is one of the essentials of the right to fair labour practices which has been given statutory underpinning in section 41 of the *Employment Act*, 2007. Where there is contractually agreed disciplinary procedure, an employer is bound to comply with those procedures. A failure by an employer to observe its own disciplinary procedures may amount to repudiation of contract (The Post Office v Strange (1981) IRLR 515). Where an employer is contemplating taking a decision to terminate the services of an employee, the statute has provided procedural safeguards. An employee is thus protected from procedurally unfair termination of service. This means that generally the employee will suffer the legal injury or actionable wrong after the employer has made the decision to terminate the employment in disregard of the prerequisite procedures or without valid and fair reasons.'
51. Based on the foregoing, the claimant submitted that the she was send on compulsory leave by the managing Director without seeking approval of the Board as provided for under Clause 7.3.11 of the HR Manual. Without any authority, the Managing director was acting in excess of his powers



which nullifies the entire procedure. In this she relied on the case of *Joseph Kiprono Koech V County Government of Turkana and another [2014] eKLR* where Byram Ongaya J held that;

' The court has already found that the 2<sup>nd</sup> claimant has not established any basis of the authority he pretended to exercise in suspending the claimant. The court finds that there was no inherent power vested in the 2<sup>nd</sup> respondent to suspend the claimant in the manner the 2<sup>nd</sup> respondent acted in the case. The court finds that the suspension was a nullity ab initio.'

52. It was further submitted that the Audit report was ordered by the managing director as opposed to the Board as contemplated under Clause 7.3.11.

53. The claimant also took issue with the way the disciplinary committee was instituted and submitted that according to clause 8.0 of the HR Manual the claimant was to be subjected to a disciplinary committee that was to be set up by the Respondent and the Appeal to be handled by the Board, However, in this case, the claimant was subjected to Board Ad Hoc Committee at the preliminary stage and the same board sat on Appeal, denying the claimant the right of Appeal. To support this argument, the claimant relied on the case of *Dinah Jemelly Kirwa V National Hospital Insurance Fund Board of management [2020] eKLR* where the Court held that.

' Consequently, I am of the considered view that when the Ad-hoc committee conducted the hearing, its verdict was final contrary to the express provision of the Human Resource Manual that provides for the right of appeal. Denying the Claimant, the crucial process of appeal, sabotaged the disciplinary process and nullified the entire process. In the circumstances, the Respondent breached the Claimant's right to appeal and as such the alleged disciplinary hearing was unfair.'

54. On remedies sought, it was submitted that since the disciplinary procedure was not followed and the reason given for the termination were not justified, the claimant's termination was unfair and urged this Court to find in her favour and awards the reliefs as prayed in the claim.

#### **Respondent's Submissions.**

55. The Respondent submitted from the onset that he who alleges must prove as provided for under section 107 to 109 of the *Evidence Act*. It submitted that Article 47 and 50 must be adhered to before any termination is effected in this they relied on the case of *Joseph Mbalu Mutava V Attorney Genral and another [2014] eKLR* where the Court cited the case of *Central Organisation Of Trade Unions Vs Benjamin K Nzioka & Others Civil Appeal No 166 of 1993* where the Court of Appeal expressed itself as follows:

' As a concept, it is derived from the Latim maxim 'audi alteram partem' which in English means 'hear the other party'. This rule obliges a judges or an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides. He should not base his decision only on hearing one side. In the case of a judge he should give equal opportunity to both parties to present their cases or divergent viewpoints. And in doing so, should hold the scales fairly and evenly between them'.

56. Similarly, that in this matter the claimant was accorded various opportunities to defend herself and she even suggested for disciplinary action to be taken against anyone that was found culpable. It was submitted that the procedures and the law under Sections 41, 43, 44, 45 and 47 of the *Employment Act*



was adhered to and the termination was justified in this circumstance. In this they relied on the case of [Galgalo Jarso Jillo V Agricultural Finance Corporation \[2021\] eKLR](#) where the Court held that;

' In terms of section 43 of the [Employment Act](#), an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.'

57. It was submitted further that the claimant was in charge of coordinating office administration services and transport and during her tenure the Respondent lost fuel and lubricants worth Kshs 3,219,256 which the Respondent reasonably believed the claimant to be responsible over because the loss occurred as a result of her negligence in approving the fuel in the fuel sub-module that was engineered by the claimant. The respondent maintained that what the employer needs to prove is the reasonableness of the action and not give a white tight evidence as was held in [Thomas Sila Nzivo V Bamburi Cement Limited \[2014\] eKLR](#)

' The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the [Employment Act](#) 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no Oil was available even as the Claimant protested he received such Oil, the Claimant's role in receiving the Oil and releasing the delivering Truck, all gave the Respondent reasonable and sufficient grounds to act against the Claimant.'

58. On that basis, it was submitted that the Respondent believed that that claimant is liable because she sanctioned the misapplication of the funds, negligently permitted the loss by failing to discharge her supervisory mandate as the HR manager and flag out this malpractice. It was argued further that as per the defence of the claimant, she attempts to distance herself from the entire saga and to do so would be abdicating her core role as stated in her employment contract.

59. On the reliefs sought, it was submitted that the termination of the claimant was summarily done in accordance with the [Employment Act](#) with reasons given and the claimant being subjected to disciplinary hearing as such, she is not entitled to the reliefs sought. The Respondent prayed for the claim to be dismissed with costs.

60. I have examined all evidence and submissions of the parties herein.

61. The issues for this court's determination are as follows;

1. Whether there were valid reasons to warrant termination of the claimant's services.
2. Whether the claimant was accorded due process before her termination.
3. Whether the counter claim is proved.



4. Whether the claimant is entitled to the remedies sought.

### **ISSUE NO 1: Validity of Reasons For Termination.**

62. The claimant was terminated vide a termination letter dated February 1, 2021 which set out the reasons for her termination as follows;-

' it was established that you were negligent and incompetent in your role as the Human Resource & Administration Manager being responsible for managing Transport Services. You approved fuel requests and fuel orders without due diligence during the aforesaid period resulting to a loss of Kshs 3,219,256.00 by the Company contrary to the *Employment Act, 2007* and *Public Finance Management Act, 2015*.

It was further established that you failed to utilize ERP Fleet Management Module to monitor the consumption of Fuel & Lubricants for the Company's Vehicles/Equipment whereas you were the author of the system which culminated into heavy loss contrary to the Company's expectation and the *Employment Act, 2007*'.

63. Prior to the termination, the claimant had been sent on compulsory leave by the Managing Director vide a letter dated December 15, 2020.
64. She had also been served with a show cause letter which required her to explain why disciplinary action should not be taken against her vide a letter of January 13, 2021.
65. The claimant had responded to the show cause letter and denied allegation in the show cause letter that she was incompetent and negligent in her duties.
66. In response to the issues of negligent of duty, the claimant indicated that fuel requests were handled by three persons where drivers initiated the requests then Administrative Officers validated it. The claimant did the final approval.
67. The claimant submitted that her work was just to approve the requests.
68. The RW1 one Githinji testified before court and indicated that the matter of the fuel consumption was investigated by the respondent and indicated that the system used in fuel consumption had issues to be addressed.
69. He indicated that the claimant had not been happy with the system as at December 2020 whereas the system had been rolled out in September 2020.
70. He indicated that the claimant had wanted the system tested out first before being rolled out but couldn't confirm if the respondent acted on the recommendations by the claimant.
71. He also indicated that the respondent currently had a new system.
72. The 2<sup>nd</sup> witness also indicated that claimant does not make any fuel requests.
73. Given that the claimant had issues with a system operating the fuel consumption and also having made recommendations on its improvement which recommendation was not acted upon by the respondent, the issue of her being negligent or incompetent does not arise.
74. The totality of whether there were valid reasons to warrant her dismissal therefore remain in limbo and it is my finding that the claimant was dismissed without valid reasons.



## ISSUE NO 2: Due Process

75. On issue of due process, the RW1 also indicated that the claimant was indeed subjected to a disciplinary process but also indicated that the board conducted the disciplinary process as a committee and also at an appellate level.
76. RW2 also confirmed that the disciplinary meeting was presided over by the board members who also sat on the appeal.
77. She also admitted that other suspects on the fuel problem were interviewed by the internal auditor but the claimant was not interviewed as per the record.
78. The process of disciplinary action envisaged under the law is as per Section 41 of the *Employment Act* 2007 which states as follows;

'41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make'.
79. And Section 7 (2) (a) & (c) of the *Fair Administrative Action Act* 2015 which states as follows;-

7. Institution of proceedings

- (1) .
- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if—
  - (a) The person who made the decision—
    - (i) Was not authorized to do so by the empowering provision;
    - (ii) Acted in excess of jurisdiction or power conferred under any written law;
    - (iii) Acted pursuant to delegated power in contravention of any law prohibiting such delegation;
    - (iv) Was biased or may reasonably be suspected of bias; or



(v) Denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) .

(c) The action or decision was procedurally unfair;

80. It is apparent from the evidence in court that the law was flouted as the claimant was disciplined by the same panel at committee and appellate stage

81. In view of this, it is my finding that the claimant was subjected to a disciplinary action that was unfair and unjustified.

### **Issue No. 3: Counter Claim**

82. The respondent raised a counter claim to the effect that the claimant occasioned loss to the respondent to the tune of Kshs 3,219,256/=.

83. I have already indicated that the claimant was not directly responsible for the loss of the 3,219,256/=.

84. The problem seems to have stemmed from the system in place of which the claimant had raised a complaint about and which respondent later on changed as alluded by RW1 & RW1.

85. The witnesses also agreed that the claimant never directly benefited from the 3,219,250/=.

86. In the circumstances of the case then, the counter claim cannot stand and is therefore dismissed with costs.

### **Issue No. 4: Remedies**

87. Having found as above, I find that the claimant is entitled to some remedies prayed and I award her as follows:

1. Given the unfairness of her dismissal I award her compensation equivalent to 10 months salary  $305,000/= \times 10 = 3,050,000/=$
2. 3 months salary in lieu of notice =  $305,000 \times 3 = 915,000/=$
3. Unpaid salary up to February 3, 2021 =  $3/30 \times 305,000 = 30,500/=$
4. Prorate leave earned for 20 days =  $20/30 \times 305,000 = 203,333/=$
5. Earned allowances as listed in dismissal letter of February 3, 2021.
6. Prorate leave travelling allowance calculated at 6.5% of her annual basic pay up to February 3, 2021.
7. Prorate gratuity at 31% of basic salary up to February, 2021.
8. 5, 6 & 7 to be calculated or agreed upon the parties TOTAL = 4,198,833/= plus agreed upon amount under 5, 6 & 7 above.  
Less statutory deductions.



9. The respondent to pay costs of this suit plus interest at court rates with effect from the date of this Judgement.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 4<sup>TH</sup> DAY OF MAY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Omondi for the Claimant – present

Odede holding brief for Okiro for Respondent – present

Court Assistant – Fred

