



**Mwita v DHL World Wide Express Kenya Limited (DHL) (Cause E1005 of 2021) [2023] KEELRC 3101 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3101 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1005 OF 2021  
B ONGAYA, J  
NOVEMBER 27, 2023**

**BETWEEN**

**OLIVER MATIKO MWITA ..... CLAIMANT**

**AND**

**DHL WORLD WIDE EXPRESS KENYA LIMITED (DHL) ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim on 06.12.2021 through J A Guserwa & Co Advocates. The claimant prayed for judgment against the respondent for:
  - a. A declaration that the claimant's suspension from his position and subsequent dismissal as the chief finance officer was unfair, unjustified, illegal, null and void.
  - b. Reinstatement to his employment in the capacity of the chief financial officer of the respondent without any loss of benefits.
  - c. An injunction to issue against the board of directors of the respondent's restraining it from interfering with or sabotaging the claimant's terms of employment in force by recruiting his replacement.
  - d. Salary for the entire period the claimant has been out of employment.
  - e. Damages for wrongful and/or unlawful suspension and subsequent dismissal from employment.
  - f. Pecuniary damages for loss of opportunities.
  - g. Damages for discrimination and violation of the claimant's right to fair hearing.
  - h. Costs of this suit with interest thereon.



2. The claimant particularised his claims as follows:
  - a. One-months' salary in lieu of notice Kshs 828,889.58.
  - b. Salary for the 10-years 8-months to retirement Kshs 106,131,022.25.
  - c. 12-months' salary compensation Kshs 9,946,674.96.
  - d. Accrued 28-leave days Kshs 652,296.94.
  - e. Unpaid disbursements of Euro 300 @126.66618 =Kshs 37,998.54.
  - f. Pension 10% of basic pay Kshs 8,948,582.23.
  - g. Telephone allowance at Kshs10,000 for 10 years 8 months =Kshs 1,280,400.00.
  - h. Yearly Bonus for the 10 years Kshs 26,592,293.94.
  - i. Full medical cover Kshs 4,290,844.47.
  - j. Claim for director's fees for 8 years at Kshs 200,000 per month for two companies Kshs 38,400,000.00.
  - k. Total Kshs 187,162,327.95.
  - l. And he claimed damages.
3. The Respondent's Statement of Response and Counterclaim was dated 24.01.2022 and filed through Anjarwalla & Khanna LLP Advocates. The respondent prayed that the suit be dismissed with costs to the respondent and judgment be entered for the respondent on the counterclaim for:
  - a. An order directing the claimant to reimburse the respondent Kshs 126,663.34 as fuel expenses.
  - b. Interest on (a) above at court rates from the date of filing the suit.
  - c. Costs for suit and counterclaim.
  - d. Any other relief the court may deem fit.
4. The claimant's case was that he was employed as a Chief Financial Officer on 01.07.2013.
5. That he won the Finance Excellence Award for Sub-Saharan Africa for the year 2014. Additionally, he completed the coveted Finance Development (business excellence) and Professional Leadership Development (leadership excellence) Programmes in Kuala Lumpur, Malaysia, in 2015.
6. The claimant states that he was promoted from RCS grade J to RCS grade I in 2016 and was the recipient of the finalist 2017 DHL express global CEO awards under Investment of Choice category and that in the year 2020 finance employee opinion survey scores were at 98%. The claimant states that since 2014 he has always achieved Fully Meets or Exceeds/Role Model rating during appraisal.
7. On 24.12.2020 at 11:17 AM, Mr. Chad Thomas of the company IRS forensic investigations, South Africa was appointed to investigate an allegation of non-compliance. He set up a meeting on the same day at 2:23 pm for Monday 28.12.2020 between 11am and 12pm.
8. The claimant states that at 3:25pm on 24.12.2020 he requested that the meeting be rescheduled to Tuesday the 29.12.2020 and asked for particulars of the investigation for preparation purposes. Further, there was no response until 19.01.2021 at 10:45 am. Thereafter on 20.01.2021 at 11:44am he requested for more information.



9. Mr. Paul Clegg, the VP Human Resources, Sub-Saharan Africa responded on 04.02.2021 at 10:04pm. However, according to the claimant, he did not provide all the information he had requested for.
10. The claimant responded on 10.02.2021 at 12:59 pm and reminded Paul Clegg that some information that he had requested for, was yet to be provided and agreed for a meeting with the IRS investigator on 12.02.2021.
11. Paul Clegg wrote at 7:31pm on 10.02.2021 and supplied some information, thereafter on 11.02.2021 at 7:52pm he wrote that the remaining information that the claimant had requested would not add value to the investigations.
12. Chad Thomas set up the meeting for 12.02.2021 at 11 am on the same day at 10:04 am.
13. The claimant states that there was no communication until the 01.09.2021 when he received an email from Hennie Heymans, CEO DHL Express Sub Sahara Africa regarding temporary suspension of his duties, wherein he proposed a meeting for 27.08.2021. The claimant pointed out to him that the date had passed, and said Hennie Heymans took note of the same and issued him a new letter scheduling the meeting for 03.09.2021.
14. On 03.09.2021 at 4pm, a meeting was held where the claimant states he informed Paul Clegg and Hennie Heymans that he had given all the information needed.
15. On 06.09.2021 the claimant received a skype message from Hennie Heymans at 9am asking him to call him. Upon calling him, the claimant was informed that the suspension letter suspending him until 24.09.2021 had been sent to him. On checking his email, the claimant found the letter had been sent to him at 8:56 am, he handed his laptop, keys and tag and left as directed.
16. He states that he acknowledged receipt of the suspension letter on 07.09.2021 at 9:04pm and Hennie Heymans responded on 10.09.2021 at 12:36pm.
17. On 23.09.2021 at 5:21 pm the claimant received a letter from Hennie Heymans allowing him to approve salaries. On the same day at 5:36 pm Hennie Heymans sent him another letter extending his suspension to 15.10.2021.
18. On 27.09.2021 at 12:36 pm the claimant received a letter requesting him to sign change of signatories, to which on 28.09.2021 at 7:46am he responded respectfully declining said request, on the basis that it would be un-procedural.
19. On 15.10.2021 at 4:01 pm the claimant received a letter from Hennie extending the suspension to the 31.10.2021.
20. On 21.10.2021 at 1:11pm the claimant received a letter authorizing him to approve October salaries.
21. On 26.10.2021 at 6:09 pm Paul Clegg sent the claimant a notice to attend disciplinary hearing on 03.11.2021 at 9:30 am.
22. The claimant states that he was accused of authorizing payment of the 13<sup>th</sup> salary for the year 2019 and the changing of the employee handbooks for the year 2018 and 2019 which accusations the claimant states were not true as these matters did not fall within his mandate.
23. Additionally, he was accused of non-cooperation with the investigative team and also not protecting the company's confidential information. The claimant maintains that he gave all information required by the investigators and within the timelines given and did not disclose the confidential information, which he states was not given to him.



24. The claimant requested for access to his laptop on 29.10.2021 to which Paul Clegg responded asking him to liaise with Mr. Peter Kuya despite the conditions of his suspension not allowing him to do so.
25. On 29.10.2021 a letter was sent to the claimant extending his suspension to 12.11.2021. On 09.11.2021 the claimant was invited by Ms. Nolwazi Tshikala to a hearing continuation meeting scheduled for 11.11.2021 at 11:30 am to which the claimant responded raising concern and asked for the agenda of the meeting. On 10.11.2021 the claimant was told the purpose of the meeting was to inform him of the verdict, and a mitigation meeting to follow.
26. The claimant attended the meeting on 11.11.2021, and after the verdict, he states that he was coerced to mitigate but which he did not consider necessary, having been put under pressure and receiving threats from company representatives and their legal counsel.
27. The outcome of the disciplinary hearing was communicated to the claimant on the 12.11.2021 at 13:41pm and a summary dismissal letter was received from Hennie on 15.11.2021 backdated to 12.11.2021.
28. The claimant appealed the decision on 16.11.2021 at 18:42 pm. On 01.12.2021 he was informed that an appeal panel had been set up on 26.11.2021.
29. On the part of the respondents it is stated that the claimant did not diligently and dutifully execute his roles and responsibilities as the respondent's CFO and director before receiving the invitation to the suspension meeting. That the claimant breached several terms of the employment agreement and the respondent's policies and was found to have engaged in gross misconduct and had also breached several of his fiduciary and statutory director duties.
30. That the claimant's performance appraisals were all done prior to the allegation levelled against the claimant had been discovered. That the claimant was terminated on grounds of gross misconduct and wilful negligence of his duties as CFO and director of the respondent and not because of poor performance.
31. The respondent states that following suspicion that the claimant and other senior employees of the respondent had breached the terms of their respective employment agreements and the respondent's policies, the respondent hired a third party, IRS-Forensic Investigation to assist it with its investigations concerning the payment of 13<sup>th</sup> cheque to the respondent's employees which appeared to constitute a transgression of the respondent's policies and procedure on remuneration.
32. The respondent pleaded that it provided the claimant with all information he requested for to enable him prepare for the interview with the IRS. On or about 12.02.2021 the claimant was interviewed by the IRS Thomas concerning the respondent's operations. The respondent states that the interview was not a disciplinary process but was to allow the IRS to familiarise themselves with the respondent's operations and the claimant's role and involvement (if any) pertaining to the 13<sup>th</sup> month cheque issue.
33. That the claimant refused to cooperate in the preliminary investigation by being evasive and providing misleading information.
34. On 06.09.2021 the respondent after considering the representations made by the claimant, communicated its decision in writing to temporarily suspend the duties of the claimant to allow the respondent to conduct and finalise the investigation, and to this end the claimant was issued a letter of suspension on the same date.
35. The suspension letter and subsequent extension letters informed the claimant that during the suspension and suspension extension periods, the terms and conditions set out in the suspension letter



- and the suspension extension letters including the respondent's obligation to pay the claimant's salary and provide for other benefits and the fact that the suspension did not amount to a disciplinary hearing or imply that the claimant was guilty of any misconduct continued to apply.
36. On 26.10.2021 the respondent issued a notice to the claimant to attend a disciplinary enquiry scheduled for 03.11.2021 at 9:30 am. The notice contained a detailed description of the allegations as levelled against the claimant and the supporting documents relied on by the disciplinary panel but also informed the claimant that he could access the supporting evidence by clicking a link which would have directed the claimant to a virtual data room with the supporting documents in relation to each allegation.
  37. The respondent states that it chose as members of the disciplinary panel, individuals who had not significant prior interaction with the claimant precisely to ensure that they were not biased towards or against the claimant and could therefore assess the evidence with impartiality.
  38. The respondent states that the disciplinary panel after having heard from the respondent's witnesses and the claimant, the panel adjourned the hearing to review the evidence and the respondent's and claimant's arguments presented during the hearing and to deliberate whether the claimant was culpable of the allegations proffered against him.
  39. After reviewing the evidence on record and considering the representations made by the claimant during the disciplinary hearing, the disciplinary panel came to the conclusion that the claimant had committed and was guilty of the allegations.
  40. On 16.11.2021 the claimant being dissatisfied with the decision to summarily dismiss him and in line with the respondent's disciplinary code submitted a formal written appeal challenging the procedural and substantive fairness of the disciplinary hearing.
  41. On 26.11.2021 the respondent as per the disciplinary procedure filed its written response to the appeal which was then considered by the appeal panel. The appeal panel did not reconvene the hearing nor did it call any additional witnesses to present evidence at the appeal hearing. The appeal panel relied on the comprehensive submission by the claimant and respondent during the disciplinary hearing, the claimant's submissions dated 16.11.2021 during the appeal, and the supporting documents relied on by the parties at the disciplinary hearing.
  42. The appeal panel determination was made on 30.11.2021. The appeal unanimously found that the disciplinary hearing was carried out in a procedurally and substantively fair manner in line with the *Employment Act* and the respondent's disciplinary procedure.
  43. The respondent's case is that there was no unfair or vindictive targeting of the respondent's key management including the claimant. The respondent arrived at its decision to terminate the claimant's employment after conducting extensive investigations and holding fair and proper disciplinary proceedings.
  44. The respondent concluded the disciplinary proceedings against the claimant who was found to be involved in the commission of the various irregularities and was ultimately found to be guilty of gross misconduct. The decision to terminate the claimant was made on the basis of actual evidence and there was no pre-meditated motive to single out particular employees, as suggested by the claimant.
  45. The respondent pleads that the claimant's allegations that the accusations levelled against him were not in tandem with his job description are incorrect and states that the allegations are specifically related to the claimant's senior role as a respondent's chief finance officer Kenya and the responsibilities the claimant had in this position.



46. As the group finance director, the claimant oversaw the financial operation, accounting records and accounting practise of the respondent. The claimant had a duty to safeguard the financial integrity of all payments in the jurisdictions within his remit and to ensure that appropriate systems were in place to minimise the risk of illicit payments and other financial misconduct.
47. The respondent states that the claimant should not be permitted to defer accountability to his subordinates. The approvals and lack of oversight by the claimant were contrary to the respondent's policies.
48. The respondent's case is that the claimant's allegation that preparation of the 2018 handbook is not part of his schedule of responsibilities and is not part of the responsibilities of the chief finance officer is misleading and incorrect. The respondent's further case is that it is not possible that a head of HR who in rank is junior to a CFO, could develop the policies concerned (i.e. long service, retrenchment, retirement plans which exceeded the legal requirements and car policies) with large costs associated with them and publish these to the business in an employee handbook, to the exclusion of the CFO and without the CFO having sight and approval that the business could rightfully afford such policies which is a generally recognised designation of a CFO.
49. The respondent states that it is entitled to receive the sum of Kshs126,663.34 from the claimant because the claimant, as the processor of payroll, made an unauthorised exception to the respondent's car policy standards for his fuel expenses allowing him to reimburse the amounts expensed on his fuel card by personal cheque instead of having them recovered directly from the payroll. That the claimant has without any legal basis failed and/or refused to reimburse the respondent the fuel expenses for the months of May, October, November and December 2021 totalling Kshs126,663.34.
50. The claimant filed the response to the respondent's statement of response and defence to the counterclaim dated 03.02.2022. the claimant repeated his claims and allegations in the statement of claim and denied that he owed the respondent the amount set out in the counterclaim or any part thereof. The claimant prayed that judgment be entered for him and the defence and counterclaim be dismissed with costs.
51. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
52. To answer the 1<sup>st</sup> issue, there is no dispute that parties were in a contract of service. The claimant worked for the respondent as chief finance officer at Kshs 828,889.58 per month. He worked from 01.07.2013 until 12.11.2021. A certificate of service was issued in that regard dated 12.11.2021.
53. To answer the 2<sup>nd</sup> issue, the Court returns that the contract of employment was terminated by the letter dated 12.11.2021. The stated reasons for the termination were enumerated as follows:
  - a. The claimant breached the Global Pay Policy Managers Handbook effective 01.01.2018, section 44(4) of the *Employment Act*, 2007, clause 6 of the Disciplinary, and, 1.2, and 7.1 of the DHL's Employee Handbook dated June 2018 (the 2018 Handbook) by being involved in the unauthorised changes made to the provisions of the 2018 Handbook relating to retirement scheme, long service award scheme and motor vehicle benefits.
  - b. The claimant breached clause 1.4.1 of the DHL Express Global Compensation Policy 2019 HR Handbook, section 44(4) (e) of the *Employment Act*, clause 6 of the Disciplinary Procedure, clause 2(b) of the employment contract and clause 2.4 and 7.1 of the 2019 Handbook by being involved in the approval and payment of the 13<sup>th</sup> month cheque to the



employees of DHL including the claimant contrary to DHL Group's policies and procedures and without obtaining the requisite approvals from the Regional level or Group level.

- c. The claimant negligently performed duties and failed to comply with the instructions conveyed in the former Head of Compensation and benefits SSA Paul Webster's covering emails sent on 19.06.2019 and 17.10.2019, the provision of clause 2(b) of the employment contract, paragraphs 2.4 of the 2019 Handbook and clause 6 of the Disciplinary Procedure, by being involved in the unauthorised amendment of the 2019 Handbook in July 2020 by introducing provisions on the 13<sup>th</sup> month cheque without following the process and obtaining the required approvals at the Regional level or Global level.
  - d. The claimant breached section 44(4) (e) of the *Employment Act* and clause 14 and 15 of the Disciplinary Procedure by refusing to co-operate in the investigations after being approached by the IRS Forensic Team for information or explanation pertaining to the unauthorised approval and payment of the 13<sup>th</sup> month cheque.
  - e. The claimant failed to comply with the provisions of clause 2.8, 6.9, 7.1, of the 2019 Handbook, clauses 14 and 15 of the Disciplinary Procedure and clause 2(c) of the employment contract by failing to protect DHL's confidential information and documents by forwarding emails outside of DHL domain to his personal email address.
  - f. The letter stated that the termination took effect on 12.1.2021 and the claimant would be paid salary up to termination Kshs 331, 555.83; and, unpaid 7.67 leave days Kshs 64,169.50; and. Making Kshs 395,725.33. The letter directed the claimant to resign from directorship of the respondent by handing in resignation letter and a statutory declaration to DHL by 15.11.2021. A certificate of service was enclosed. The claimant appealed against the summary dismissal by the letter dated 16.11.2021. The appeal was determined by the respondent's letter dated 01.12.2021 sustaining the summary dismissal.
54. The 3<sup>rd</sup> issue is whether the termination by summary dismissal was unfair. The parties have first submitted on whether there were valid and fair reasons for termination. The operative law is section 43 of the *Employment Act* which provides that the employer must establish that as at termination there was a valid or genuine reason, and, section 45 of the *Act* which states that a fair reason for termination must relate to the employee's conduct or compatibility and, the employer's operational requirements. It is submitted for the claimant that the evidence by testimonies and documents show that the claimant was dismissed upon mere allegations that were neither valid nor proven. The Court will consider the parties' respective submissions on each allegation that was levelled against the claimant by the respondent. The analysis is as follows:
- a. Allegation one was involvement in unauthorised amendments to the respondent's 2018 Employee Handbook to provide for additional benefits relating to the retirement scheme, long service award scheme and motor vehicle benefits. It is submitted for the claimant that his role and responsibility as CFO, as per his evidence, did not involve and require him to make or amend the respondent's handbook, policy or any other documents and which was the clear mandate of the HR Department., Further, the respondent's witnesses failed to place before the Court the documents that were allegedly amended by the claimant. The documents placed before the Court were neither signed nor dated. The documents did not reflect the amendments, the date they may have been made, and, the maker of the alleged amendments. For the respondent it was submitted that the notice of inquiry on page 89 of the claimant's bundle provides a clear breakdown of the modifications made to the 2018 handbook. In particular, the 2015 hand book is stated to have initially included the



provisions 26.1 on medical insurance cover; 26.2 on group life cover; 26.3 on pension scheme; and 26.4 on group personal accident cover. The inquiry notice further stated that clause 4.1 of the 2018 Handbook provided for the four employee benefits and through alleged unauthorised amendments introduced additional benefits thus 27.1 the retirement scheme; 27.2 long service award scheme; and motor vehicle benefits. The effect was to provide in the 2018 Handbook a cumulative of the 7 benefits at clause 28.1 to 28.7. It is submitted that the respondent at pages 1, 2, and 3 of the respondent's supplementary list of documents presented the meta data confirming the authenticity of the copies of the 2015, 2018 and 2019 handbooks that were exhibited in Court. Further, the meta data included information about when the documents were created and how they were amended over time and it was that the 2015 Handbook was amended and renamed 2018 Handbook which was amended again and renamed 2019 handbook. As the metadata and Handbooks were not opposed by evidence or otherwise, they were credible and the history of their renaming was established. The respondent submitted that throughout disciplinary hearing the claimant had not opposed that the amendments took place. Further, it was submitted that even in the appeal, the claimant never denied that the amendments had taken place. Further, the claimant did not deny in his testimony in Court to the changes in 2015 Handbook and RW1 in the testimony took the Court through the amendments in issue. It was further RW1's testimony that the claimant did not contest at the disciplinary hearing the fact that the changes were made to the 2018 and 2019 Handbooks. Further, it is submitted for the respondent thus, "Instead, the Claimant consistently asserted that these changes fell within the purview of HR and were not within his sphere of responsibility." It is submitted for the respondent that the claimant's line of exculpation all through was not lack of awareness of the amendments to the Handbooks but that they were solely the function of the HR Department and that he was not involved in the process. It was submitted for the respondent thus, "In conclusion, the Claimant's consistent conduct, or lack thereof, during the disciplinary process and subsequent appeal strongly suggests that he implicitly acknowledged the existence of the Handbook modifications, especially in this case where there is no evidence to the contrary." The Court has considered the parties respective submissions. The respondent has failed to show that the function of amending the respondent's Handbooks in issue fell within the claimant's job description and the assigned duties. The respondent has failed to show the procedure that had been instituted to amend the manuals and how the claimant became involved as was alleged and levelled against him. While the amendments were undisputedly indicated in the purported Handbooks, the respondent failed to address the organizational authority for undertaking such amendments, who actually effected them and didn't offer any material evidence to defeat the claimant's case that the amendment function was solely that of the HR department. The Court returns that it cannot be that because the amendments were in place and the claimant had not denied awareness or knowledge thereof, then he had to be presumed to have been involved in bringing them about or to being. Not so! The Court returns that per section 45 of the Act, the respondent had to establish the claimant's conduct in making the amendments and the concerned respondent's operational requirement in making the amendments. That was not done and the alleged involvement collapses as either a valid reason as at termination of the contract per section 43 of the Act or a fair reason per section 45 of the Act. In particular, it appears to the Court that the respondent did not by contract vest in the claimant the function to amend or play a role in amendment of the Handbook and for that deficiency in its operational system, adverse consequences cannot be visited upon the claimant as was purportedly done in that regard.



- b. Allegation 2 was on alleged breaches of cited provisions by approving the 13<sup>th</sup> month cheque. It was submitted for the claimant that he was not given the cited documents by the respondent prior to the alleged breach. It was submitted that the claimant has exhibited the instructions he received from the HR Manager one Kennedy Kaunda on 06.12.2019 per page 1-3 of the claimant's further list of documents that he was directed as was the procedure, to effect the payment of the 13<sup>th</sup> cheque and he complied with the instructions. It was submitted for the claimant that per that evidence he was not the originator of the instructions and in any event he had demonstrated to the Court that payment of 13<sup>th</sup> cheque had been effected in the years 2019,2020 and 2021 and he was performing his work as directed. Thus, it was submitted that the allegation had been levelled maliciously and was unfounded. For the respondent it was submitted that the claimant admitted in the cross-examination that he approved payroll on monthly basis. Further, the 13<sup>th</sup> salary was recurrent issue in the several Senior Management Team (SMT) meetings also attended by the claimant. At the SMT meeting of 27.08.2019, the claimant as CFO would present final numbers for August and keep a close watch on the subsequent month's trend. It was submitted that in his responses dated 03.11.2021 and 08.11.2021, or, in the appeal letter, the claimant never denied attending the SMT meetings. The meetings took place after the email from Paul Webster which unambiguously detailed the mandatory approvals for introduction of new benefits. Thus, it was submitted that the claimant was aware of the ongoing discussions and decisions related to the 13<sup>th</sup> month cheque. It was submitted that he had actively participated in the deliberations, confirmed his involvement in key correspondences, and directly approved the very payroll that included the contentious 13<sup>th</sup> pay cheque. The reason for termination was that the claimant was involved in the approval and payment of the 13<sup>th</sup> month cheque contrary to respondent's procedures and policies and without obtaining the requisite approvals from the regional or global levels. The Court has considered the record of the disciplinary enquiry. The first point under the allegation 2 is thus, "As such, HR approved and Finance released the payment." By that finding, the Court returns that the approval of the 13<sup>th</sup> salary was by the HR and not the claimant. The role and responsibility of the claimant was to pay per the approval. It is true that Paul Webster in his emails of 12.06.2019 and 17.10.2019 had instructed thus, "... Therefore, please ensure that the policy is adhered to at all times. To summarise, any & all changes to salaries, payments, allowances and/or benefits must go through the regional office for approval." With respect to the 13<sup>th</sup> month cheque, it is the HR which approved and the claimant as CFO paid per payroll instructions given by the HR in Kenya. The evidence was that the minutes of the various meetings held in 2019 on the 13<sup>th</sup> month cheque was forwarded to the regional office. It is not clear whether the regional office rendered approval to the HR department in Kenya which by evidence had approved the payment. The Court considers that the claimant had made payment of all salaries in all payrolls and inclusion of the 13<sup>th</sup> month cheque in 2019 did not amount to a conflict of interest at all as there was no need for declaration of interest for such inclusion that was routine and obvious. It is that the claimant paid the 13<sup>th</sup> month cheque without seeking to verify approval by the regional or global office, however, he is vindicated by the undisputed fact that the HR department in exercise of its proper role had approved the 13<sup>th</sup> month cheque. His failure might be a contributory factor in his adversity in assessing compensation to be awarded but invariably, the claimant has not been shown to have participated in approving the 13<sup>th</sup> month cheque of December 2019. No culpability has as well been established for effecting the payment because, once the HR approved, the proper role of the claimant as the CFO was to pay. The Court has considered the email correspondence on record. In particular on 12.09.2021 Paul Clegg the VP Human Resources -Sub-Saharan Africa wrote to officials at



the Kenya office (excluding the claimant) on the 13<sup>th</sup> cheque in Kenya attaching the approval for the Kenya 13<sup>th</sup> cheque payment for 2021 with an understanding that the benefit may not be extended into future years given that it was instituted two years ago without following the appropriate global approval requirements and the email concluded, “I am still waiting for the communication that I have asked our attorney to draft in this regard and will let you have it as soon as I receive it. This approval is for all staff on the Kenya payroll.” Earlier for the 2020 payment, Paul Clegg wrote the email of 10.12.2020 addressed to Paul Webster DHL Express SSARO) and Kenneth Kaunda (DHL KE) and copied to Andrew Mutuma (again excluding the claimant) conveying that the 13<sup>th</sup> payment was reluctantly approved upon legal advice given and envisaging that once the investigations were over, if found irregularly introduced, the same benefit would be removed. The email correspondences are crucial as follows. That in 2020 and 2021 the regional or global office did not address or copy the emails to the claimant confirm the claimant’s assertion that the approval was by the HR department in Kenya, especially for 2019 13<sup>th</sup> month cheque that the claimant paid. The emails confirm that the approval from the regional or the global office on the 13<sup>th</sup> month cheque were obtainable by and addressed to the head of HR Department in Kenya, and in 2019, it was Kenneth Kaunda, who had instructed the claimant to pay. The emails also confirm that the officials at the global or regional offices knew that the claimant as CFO had nothing to do in obtaining the approval for the 13<sup>th</sup> month cheque – as it was purely an HR Department role and responsibility to whom the emails of 2020 and 2021 were addressed. Indeed, for the 2019 13<sup>th</sup> month cheque, the emails confirm that if the HR Department in Kenya through Kenneth Kaunda had obtained or not obtained the regional or global approval the claimant would not know and had no reason to know or make such enquiry once Kenneth Kaunda approved the 13<sup>th</sup> month cheque per the December 2019 payroll. The Court returns that the respondent has in the circumstances failed to show that the claimant was culpable per allegation No.2.

- c. Allegation No.3 was that the claimant was involved in the unauthorised amendment of the 2019 handbook in July 2020 by introducing provisions in the payment of 13<sup>th</sup> month cheque. The Court has found that the amendments, if any, were outside the claimant’s roles as CFO and as confirmed by the emails on record in 2020 and 2021 approving the 13<sup>th</sup> month cheque, the amendments and obtaining of the approvals were the preserve of the roles and responsibilities of the HR Kenya office. The allegation will collapse as tested against the validity of reason in section 43 of the Act and fairness of the reason is section 45 of the Act.
- d. Allegation No.5 was about the claimant sending DHL confidential information and documents from the respondent’s domain address to the claimant’s personal address. As submitted for the claimant, the Court returns that the claimant did not thereby breach the confidentiality rules or standard as he did not forward the emails to third parties. It was submitted for the respondent that by sending the information to his email address outside the respondent’s domain, the claimant acted in contravention of clause 2.8 of the 2019 Employee Handbook and his Employment Agreement. The said clause 2.8 states that employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action up to and including termination of employment and legal action even if they do not actually benefit from the disclosed information. The Court finds that there being no sharing of the emails with third parties, the respondent has failed to establish that the allegation as was levelled against the claimant and as a reason for the termination of the contract of service existed as valid or was a fair reason.



- e. The final allegation was on failure to cooperate with the investigators. The evidence was, and as submitted for the respondent, Chad Thomas the IRS CEO thanked the claimant for availing himself during the investigations. The Court considers that by that express written communication, it is not open for the respondent to treat it as a mere business courtesy because the investigator had thereby confirmed that the claimant had been available during the investigations. It is submitted that the enquiry panel confirmed the claimant's dismissiveness at the disciplinary or enquiry hearing. However, the Court finds that the matter under consideration were about the substantive allegations as had been levelled and behaviour at the disciplinary hearing was not one of them. It therefore appears that the respondent misdirected itself in unilaterally accusing the claimant about the behaviour during the disciplinary hearing and without an opportunity for the claimant to exculpate himself in that regard, the respondent crystallised the same as one of the reasons for termination. The procedure adopted with respect to that finding was unfair as offending section 41 of the *Employment Act* as the claimant had not been given a notice and then a hearing with respect to his conduct or behaviour during the disciplinary enquiry or hearing. That ground or reason for the termination will collapse. As submitted for the claimant the investigator was not called to testify about the claimant's conduct during the investigations and, the allegation is not proved at all as it has not been shown to have been valid.
55. The Court has considered the respondent's list of supplementary documents. The Court has specifically looked at the document properties exhibited by the respondent for respondent's Handbooks for 2015, 2018 and 2019. All of them show the author was Kaunda meaning the then respondent's HR Department head in Kenya one Kenneth Kaunda. It should therefore be clear to the Court that the maker of the amendments in the Handbooks was the said author and the respondent is found to have misguided itself in making allegations against the claimant as was levelled about the introduction of the amendments and including approval of the 13<sup>th</sup> month cheque and other impugned benefits. The roles and responsibility in the levelled allegations were squarely in the HR Department and not the claimant. The Court finds that even if the head of the HR Department in Kenya might have been a rank lower than the claimant, the issues in the allegations were vested in the HR Department and the claimant had no reason to doubt that the HR Department had acted and discharged the relevant roles and responsibilities professionally and properly as had been vested. The court upholds its opinion in *Edward Juma Masakha v National Environment Management Authority* [2014] eKLR thus, "While making the finding, the court further holds that it would be unfair labour practice for an employer to terminate a manager or other senior officer on account of obvious breach of trust by an officer working under the manager because managers are entitled to trust those who work under them and an employer's service delivery would be impossible if such trust relationship is not protected and respected."
56. In the submissions on the main claim, there were elaborate submissions on the breach of due procedure. The steps in the disciplinary process as it took place and as per account on record and submissions was as follows. On 24.12.2020 the claimant received email asking him to avail himself to a private investigator based in South Africa for a possible infringement. He complied. On 06.09.2021 he was suspended from duty. He was to keep away from the respondent's premises. By letter dated 26.10.2021 the respondent invited the claimant to a disciplinary hearing scheduled for 03.11.2021 to discuss matters set out in the invitation letter. The claimant scheduled to attend and requested for various documents including the investigation reports and access to his computer or emails but his case was that he was denied access. It was urged for the claimant that the hearing proceeded but the respondent failed to provide the claimant with a copy of the duly confirmed and signed minutes relating the hearing. It was the claimant's case that the procedure was unfair. For the respondent it



was submitted that section 41 of the Employment Act on notice and hearing had been fully complied with. It was submitted, and the Court agrees, the notice of enquiry served the same essential purpose as a notice to show cause because it set out the reasons for which the respondent was considering to terminate the claimant's contract of service. The respondent has shown that clause 8.1 of the Disciplinary Procedure allowed suspension on full pay during the investigation in event of alleged serious misconduct and the investigations or respondent would be prejudiced by the continued presence of the employee. The respondent has shown that the suspension was after mutual discussion of the issues on 01.09.2021. Further at the meeting of 03.09.2021 the claimant did not contest the suspension being imposed. The suspension was imposed by letter dated 06.09.2021 and extended twice until 31.10.2021. The Court returns that the suspension was within the provisions of the respondent's Disciplinary Procedures and was with full pay as it was a necessary preliminary procedure paving way for investigations. It appears not to have been unfairly imposed. The notice for disciplinary hearing was dated 26.10.2021 and the disciplinary enquiry hearing fixed for 03.11.2021. While the invitation letter allowed him to access documents or information on office computer to prepare for the hearing, the claimant's testimony was that he did not access the documents by the link that was stated on the invitation letter. However, the claimant appears not to have notified the respondent by 27.10.2021 per notice of inquiry of such difficulty or at a later date that he had failed to access the documents. It appears to the Court that the respondent's procedure will not be faulted on that score and on a balance of probability, the claimant accessed the documents. The alleged bias about chairman of the inquiry panel appears to be a point abandoned looking at the claimant's submissions. It would appear that RW1 and RW2 were simply performing their professional and due roles during the disciplinary proceedings or hearing. As submitted for the respondent, during the disciplinary proceedings, the claimant appears not to have raised any objection on the composition of the inquiry or disciplinary panel. The panel has been shown to have comprised South African nationals on account of the claimant's seniority reporting on dotted line to Kenya CEO but a solid reporting line to the regional CFO based in South Africa and the same was confirmed by exhibit OMM1. Further, the respondent's case that Andrew Mutuma the Kenya Country CEO was also embroiled in a disciplinary proceeding and could not sit has not been challenged. The respondent has shown that the disciplinary hearing took place on 03.11.2021 both physically and virtually. The claimant was informed all his rights at the hearing per section 41 of the Employment Act and record of proceedings reduced in minutes. The claimant and RW1 for the respondent submitted on the disciplinary hearing. RW2 who was chairing the hearing invited the claimant to a mitigation meeting. Disciplinary panel met on 11.11.2021 and submitted a report on 12.11.2021, the date of the letter of summary dismissal. Examining the steps undertaken the Court returns that the respondent substantially complied with due process as per section 41 of the Act and as envisaged in section 45 of the Act.

57. To answer the 3<sup>rd</sup> issue for determination, the Court returns that the termination was unfair in substance but not unfair in procedure.
58. The 4<sup>th</sup> issue is on remedies. The Court returns as follows:
- a. The claimant has established that the termination of the contract of service was unfair and unjustified as the reasons for summary dismissal were not valid and were unfair.
  - b. The termination was on 12.11.2021. The claimant prays for reinstatement. As submitted for the respondent under section 49 of the Employment Act, reinstatement is available only in exceptional circumstances. It was submitted that in *Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others* [2014]eKLR, the Court of Appeal held that under section 49 (4) of the Act, the factors to consider in reinstatement include the wishes and expectation of the employee; the common law principle that there should be no order of specific performance in a



contract of service except in very exceptional circumstance; the practicability of reinstatement; any compensation paid by the employer; and, chances of the employee securing alternative employment. The respondent has submitted that looking at the allegations and circumstances of the separation it would not be appropriate to grant an order of reinstatement. It is submitted that the claimant has not offered exceptional circumstances that would justify reinstatement. Further, in view of the role of CFO, there was a replacement already in place. Thus, by the letter dated 02.02.2022, the position was offered to one Josephine Njoroge who accepted the offer on 07.02.2022. The Court has considered the submissions and returns that particularly due to the position having been filled, it would not be practicable to implement reinstatement. The prayer is declined.

- c. The Court finds that the termination having been found to have been sudden and unfair, the claimant is awarded Kshs 828,889.58 being in lieu of the due one-month contractual and statutory termination notice.
- d. The contractual basis of Kshs 37,998.54 claim for director's fees was not established and is hereby declined. The submission for the respondent in that regard is upheld.
- e. As submitted for the respondent, the claim for pensions, telephone allowances, yearly bonuses, full medical cover, and salary for unexpired period of service of 10-years and 8-months to retirement are all with respect to a period after the contract of service had been terminated. The contract having been terminated, the same benefits lapsed accordingly. There is no reason attributable to the respondent that diminished or is shown to make it impossible for the claimant to mitigate his circumstances by engaging gainfully after the termination. As submitted for the respondent the claims and prayers in that regard were unjustified as they had no contractual basis.
- f. As per the respondent's submissions, the claimant has not by evidence shown the basis of the claim for 28 leave days as his outstanding leave days were 7.67 per the letter of summary dismissal and in his appeal, he did not complain about that computation.
- g. The claimant prayed for 12 months' gross salaries in compensation for the unfair termination. As submitted for the claimant section 49 of the *Employment Act* guides the Court in an award of the compensation for unfair termination. As submitted for the respondent, in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR, the Court of Appeal held that justice must flow in both directions and the Court must ensure justice for both the employer and employee. The Court has found that the reasons for termination were not valid and they were unfair. While urging that the 13<sup>th</sup> month cheque of December 2019 and other amendments had a long impact, it has been found that the impugned amendments were actually in the purview of the HR Department in Kenya office and the 13<sup>th</sup> month cheque for 2020 and 2021 had in fact been approved by the global or regional offices and strictly by correspondence to the head of HR Department in Kenya and to the exclusion of the claimant. Thus, the Court has found that the HR Kenya office and not the claimant was fully responsible. The only mitigating factors were that the respondent appears to have meticulously followed the disciplinary procedure and the claimant appears, but very remotely so, to have not gone beyond his strict role by not verifying that in approving the 13<sup>th</sup> month cheque in 2019, the HR Department in Kenya had actually obtained the regional or global approvals as well. The court says very remotely so because the regional South African office had received all the minutes or correspondence on the various meetings by the Kenya office on the 13<sup>th</sup> month cheque and in that sense, it is not possible, on a balance of probability, Kenneth Kaunda, the head of HR Department in Kenya had approved the same without the blessings or knowledge



or approval of the regional South Africa office. The Court has considered the submissions and evidence that the claimant had a clean service decorated with awards of excellent performance and he desired to continue in service. Taking the highlighted factors into account, the Court returns that an award of 10 months' gross salaries will meet the ends of justice for the unfair termination in the instant case making Kshs8, 288,895.80.

- h. The injunction not to interfere with the claimant's contract of service or not to recruit for the accruing vacancy appears overtaken as an interlocutory measure in the suit or not necessary in view of the declined order of reinstatement. As submitted for the respondent, the prayer is indeed overtaken as the respondent already recruited for the vacancy of CFO after the unfair summary dismissal of the claimant.
  - i. The Court has already found for the respondent that the claimant has not established the alleged discrimination on account of race or nation of origin. The claim and prayer for damages in that regard is declined as not justified.
59. The counterclaim is that the claimant should pay the respondent a sum of Kshs 126,633.34 on account of unreimbursed fuel expenses. It is stated that the arrangement was that the respondent provided the claimant a fuel card to fuel his private car per respondent's car policy standards. The practice was that any amount expended from using the card would be offset from an employee's payroll in the subsequent month. Further, the respondent being involved in processing payroll made an unauthorised exemption of himself from such recovery through the payroll but could issue personal cheques on monthly basis. It was submitted that he failed to issue cheques for May, October, November and December 2021 subject of the instant counterclaim. The respondent relies on an internal email dated 30.12. 2021 not addressed to the claimant purporting to tabulate the amount in issue. It is the respondent's case that since the claimant has not challenged the same, he is liable. In the response to the respondent's statement of response and defence to counterclaim the claimant denied owing the respondent as was counterclaimed and challenged the respondent to strictly prove the claim. In the respondent's reply to the defence to the counterclaim, the respondent repeated the counterclaim and stated that the claimant had refused to reimburse the sum of money as counterclaimed. The claim is for a liquidated sum of money. It is that it is specifically pleaded and then strictly proved. On a balance of probability, the Court returns that the respondent has failed to prove the counterclaim. First it is not shown that the claimant was given the fuel card with specified credentials for identification. Second, it is not shown that the claimant used the card by expending fuel worth the amounts claimed for each month. Third, it is not shown that a demand was made and the claimant refused to pay as counterclaimed or alleged. Finally the alleged counterclaim is said to have accrued prior to termination and during the period of disciplinary proceedings but the respondent appears not to have made any claim or demand in that regard including in the letter of summary dismissal. The Court finds that the counterclaim was a mere afterthought and has not been established at all.
60. The claimant has substantially succeeded and the counterclaim has failed. The Court returns that the respondent will pay costs of the suit and counterclaim.
61. In conclusion judgment is hereby entered for the claimant against the respondent for:
- a. The declaration that the termination of the contract of service herein by the respondent was unfair and unjustified as the reasons for summary dismissal were not valid and were unfair.
  - b. The respondent to pay the claimant a sum of Kshs 9,117,785.38 less PAYE by 01.02.2024 and failing interest to be payable at Court rates from the date of this judgment till the date of full payment.



- c. The dismissal of the counterclaim with costs for the claimant.
- d. The respondent to pay costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

