



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Aids NGOs Consortium (KANCO) v Okumu (Employment and Labour Relations Appeal 6 of 2023) [2023] KEELRC 2810 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2810 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 6 OF 2023**

**JW KELI, J**

**NOVEMBER 9, 2023**

**BETWEEN**

**KENYA AIDS NGOS CONSORTIUM (KANCO) ..... APPELLANT**

**AND**

**LINDA ACHIENG' OKUMU ..... RESPONDENT**

*(Appeal against the Judgement and Order of Hon. D.Alego (SPM) delivered on the 28th March 2022 at Kakamega CMELRC No 151 OF 2019 Linda Achieng' Okumu V Kenya Aids NGOs Consortium(KANCO)*

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgement and order of Hon. D.Alego (SPM) delivered on the 28<sup>th</sup> March 2022 at Kakamega CMELRC No. 151 of 2019 between Linda Achieng Okumu v Kenya AIDs NGO Consortium(KANCO) filed the Memorandum of Appeal dated 8<sup>th</sup> March 2023 and filed on 16<sup>th</sup> March 2023(pg.9 of the Record of Appeal) seeking the following orders:-
  - a. The Appeal be allowed.
  - b. The Judgment of the Honourable Court made on the 28<sup>th</sup> March 2022 in CMC ELRC No. 151 of 2019 Linda Achieng Okumu v Kenya Aids NGOs Consortium (KANCO) be set aside in their entirety and be substituted by appropriate orders of this Honourable court.
  - c. A declaration be made that a fair and lawful termination was conducted by the Appellant.
  - d. The costs be granted to the Appellant against the Respondent.
2. The Appeal was premised on the following grounds:-
  - i. The Learned magistrate erred in law and fact rendering that the Respondent was unfairly and unlawful terminated.



- ii. The learned magistrate erred in fact and in law in disregarding the Appellant's evidence on the Court's record showing that the Respondent was lawfully and fairly dismissed.
- iii. The Learned Magistrate erred in fact and in law by failing to consider the Appellant's written submissions and still going ahead to pass judgment against the Appellant despite the submissions being duly filed.
- iv. The Learned Honourable Magistrate erred in law and in fact in finding that the Respondent had not been paid her December 2018 pay in spite of the evidence on record showing that the respondent was paid.
- v. The Learned Magistrate contradicted herself by admitting that the claimant flouted the rules of the organization but still went ahead to pass judgement against the Respondent.
- vi. The Honourable learned magistrate erred in fact and in law in awarding the Respondent a 12 months compensation for unfair and unlawful termination in spite of the evidence on record that the Respondent was fairly and lawfully terminated by the Appellant.
- vii. The Learned Magistrate totally misdirected herself in delivering the judgement in favour of the Respondent , failing to consider and appreciate the evidence on record, thus reaching a wrong an unfair conclusion that the Appellant unfairly , wrongfully and unlawfully terminated the Respondent.

### **Background to the appeal**

3. The Respondent/Claimant vide a Memorandum of Claim dated 30<sup>th</sup> October 2019 sought before the trial magistrate court the following reliefs:-
  - a. A declaration that the Claimants dismissal wa unjust, illegal, wrongful and unfair.
  - b. An order compelling the Respondent as a result of unfair termination to pay to the Claimant.
    - i. One month pay in lieu of Notice. Kshs. 40,000
    - ii. Days worked and not paid in December 2018 Kshs. 30769
    - iii. 24 days annual leave
    - iv. 12 months compensation as per Section 49(c) of the *Employment Act*.
    - v. Costs of the Suit and interest thereof, at court rates
    - vi. Certificate of service
4. The Respondent/Claimant in addition filed her verifying affidavit sworn on 30<sup>th</sup> October 2019, her list of witnesses dated on even date, her undated witness statement and her bundle of documents, all filed on 31<sup>st</sup> October 2019(Pg. 12 – 30 of the record are all pleadings by the Claimant before the lower court ).
5. The claim was opposed. The Appellant/Respondent entered appearance on 28<sup>th</sup> November 2019 and on even date filed a Statement of Response dated 21<sup>st</sup> November 2019(Pg.-31-34) which was accompanied by the Appellant/Respondent's list of witnesses dated 10<sup>th</sup> August 2021; the witness statement of Beatrice Awino dated on even date(Pg. 35-39), the list and bundle of documents dated on even date and its bundle of documents(Pg. 40-54).



6. The matter proceeded by way of viva voce evidence with parties calling their witnesses (Pg. 164-166). The parties filed written submissions after the hearing(Pg. 55-74 ) and judgement was delivered on 23<sup>rd</sup> January 2023(Pg. 75-80). The court noted that the Respondent’s submissions were not before the Learned Magistrate when writing the Judgment.
7. The Learned Magistrate entered judgment for the Claimant/ Respondent against the Appellant which she delivered on the 28<sup>th</sup> March 2023 as follows:-
  - a. One month pay in lieu of the notice
  - b. Her annual leave days’ pay
  - c. December Pay 2018
  - d. 12 months compensation as per the Employment Act minus statutory legal deductions,
  - e. Costs of the claimant and interest thereto
  - f. Certificate of service (PAGES 79-80)

### **Written Submissions At Appeal**

8. The court directed that the appeal be canvassed by way of written submissions. The Appellant’s written submissions drawn by NOW Advocates LLP were dated 23<sup>rd</sup> June 2023 and filed on 26<sup>th</sup> July 2023, together with its authorities. The Respondent’s written submissions drawn by Odhiambo Opar & Co. Advocates were dated 13<sup>th</sup> September 2023 and filed on 14<sup>th</sup> September 2023, together with her authorities.

### **Determination**

9. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

### **Issues for determination**

10. The Appellant in its submissions identified the following issues for determination in the appeal:-
  - a. Whether the trial court erred in law and fact in finding that the Respondent’s dismissal was unfair and unjustifiable.
  - b. Whether the trial court erred in fact and in law in awarding the Respondent reliefs sought.
11. The Respondent in her submissions identified the following issues for determination in the appeal:-



- a. Whether the trial court erred in law and in fact in finding that the Respondent's dismissal was unfair and unjustifiable.
  - b. Whether the respondent deserved the reliefs awarded by the trial court
  - c. Who bears the costs of this appeal.
12. The Court finds that the issues placed by the parties for determination in the appeal are with regard to both substantive and procedural fairness before the termination of employment and framed the issues as follows:-
- a. Whether the trial Learned Magistrate arrived at the wrong conclusion on substantive and procedural fairness; and
  - b. Whether the Respondent was entitled to reliefs sought.

### **Appellant's submissions**

13. The Appellant submits that pursuant to Section 44(4) of the *Employment Act*, in dismissing the Respondent, the Appellant considered the Respondent's lack of performance in her duties whose consequence affected the Appellant's operations, which the Appellant considers was a breach of a "fundamental obligation" which justified the Appellant's decision to summarily dismiss her.
14. The Appellant submits that it justifiably dismissed the Respondent for having flouted the rules of the organisation, a position which the trial magistrate duly noted, yet proceeded to find that the Respondent was unfairly dismissed. To buttress this assertion the Appellant relied on the Court of Appeal decision in *CFC Stanbic Ltd Vs Danson Mwashako Mwakuwona(2015)eKLR* where the court expressed itself as follows:-

"...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

Consequently, we find that the trial court's finding that the termination of the respondent was unfair was not supported by the evidence on record..."

15. The appellant submits that based on the Respondent's conduct of irresponsibility, insubordination and wilful disobedience of her supervisor's directions, she exposed the Appellant in bad light before its donors and stifled its operations. The Appellant submits that the Respondent's truancy led to the stalling of its Linkages Project as the Respondent's conduct to abscond did augur well with the Appellant's donor- FHI 360.
16. The Appellant submits that the Respondent had been employed effective from 1<sup>st</sup> February 2016 as a Records officer at the Appellant's office in Kakamega, but was later re-appointed as a Data officer for



the Linkage Project(“the project”) in Kakamega, on a 14 -months’ contract which was to commence on 1<sup>st</sup> October 2018 to 30<sup>th</sup> September 2019.

17. The Appellant submits that the Respondent was summarily dismissed on 20<sup>th</sup> December 2018, for the reason of failing to avail herself during the Data and Quality Assurance(DQA) and Monitoring and Evaluation (M&E) Support supervision that was to be undertaken on 19<sup>th</sup> and 20<sup>th</sup> December 2018.
18. The Appellant submits that the Respondent had applied for a 24-days’ leave on 5<sup>th</sup> December 2018 which was granted by her supervisor and she agreed to avail herself, off her leave days, during the dates of the Data and Quality Assurance(DQA) and Monitoring and Evaluation (M&E) Support exercise, a position she confirmed when she signed her Leave hand over Form dated 5<sup>th</sup> December 2018(R-Exh- 6 at Pg. 48 of the Record). The leave form indicated at the bottom that “The staff to be present the day Haggai will come for DQA and support supervision and compensate the day”.
19. The Appellant argues that the Respondent was additionally reminded through the email of 18<sup>th</sup> December 2018( Pg. 50 of the Record) of her duties during the M& E exercise on data and clinical issues, but she did not respond to the said email which prompted her supervisor through the Human Resource Department to reach out to the Respondent through phone but could not reach her. A subsequent email was sent by the Human Resource Manager on 19<sup>th</sup> December 2018(Pg.50-51), requiring the Respondent to report to work urgently for the M& E supervision, but no response, explanation or apology was received from the Claimant. Further the respondent’s supervisor swore before court that she had called and send text messages to the Respondent and the Technical officer, they were to work with during the M& E exercise, reminding them of the exercise to be held on 19<sup>th</sup> and 20<sup>th</sup> December 2018, but the Respondent never showed up(Pg. 166).
20. The Appellant submitted that, while the respondent argued during hearing that she could not access her work emails to see the reminder to attend the M& E Exercise, the Appellant submits that the Respondent alleged that she had carried the work laptop for data taking, which the Appellant argues could not be undertaken without the Respondent accessing the company email.
21. It is submitted for the appellant that the Respondent’s laxity in performing her duties had been brought to question previously through her supervisor’s email of 2<sup>nd</sup> July 2018, due to her failure to enter data on the E-CASCADE data entry system for three weeks, which the Appellant acknowledged on the same day and promised to undertake as from 5<sup>th</sup> July 2018.
22. The Appellant submits that, the Respondent’s slow progress on the project was further raised by the M& E officer for FHI 360(“the Donor”) through the email of 19<sup>th</sup> December 2018, where the said officer noted the absence of an E-peer Calendar that had been requested previously to be submitted during monthly reporting, a job the Respondent had failed to undertake; the data entry on the E-CASCADE data Entry system had stalled with a slight increase from 44 % to 56 % since the last visit of August 2018, and which low rate of implementation of the system led to failure for clinical and outreach data to be captured.
23. The Appellant submits that, the Respondent had been given various chances to correct her ways and the result of her failure to so correct led to the Executive Director summarily dismissing her on 20<sup>th</sup> December 2018 for serious misconduct pursuant to section 41, 43(2) and 44(2) of the [Employment Act](#), 2007.
24. The Appellant submits that the Respondent after dismissal deleted all data in the work laptop before she returned it , which caused the Appellant to loose vital data.



## Respondent's submissions

25. The Respondent submits on her part that she was summarily dismissed on 20<sup>th</sup> December 2018, for allegedly absconding her duty by failing to present herself during the Data and Quality Assurance(DQA) and Monitoring and Evaluation (M&E) Support supervision when she failed to appear on the second day of the said exercise on 20<sup>th</sup> December 2018.
26. The Respondent submits that, she applied for her leave on 5<sup>th</sup> December 2018, which was approved on 10<sup>th</sup> December 2018 and she was never informed that the M & E supervision was to be held on 19<sup>th</sup> and 20<sup>th</sup> December 2018. She submits that during her leave, her position was not in vacuum as she had handed over to the Program officer, Lilian Wanjiku and her leave was to run from 10<sup>th</sup> December 2018 to 2<sup>nd</sup> January 2019.
27. The Respondent submits that she had availed her personal email and contact details before proceeding on leave, to which all communications were to be directed while she was on leave since she could not access the work email which was only accessible while at work. She submits that she never received any phone calls from her supervisor and the evidence of the same was not produced during hearing.
28. The Respondent submits that under Section 45(2) of the *Employment Act*, termination of an employee is unfair if the employer fails to prove that the termination was grounded on valid and fair reasons relating to the employee's conduct , capability or based on the operational requirements and that fair procedure was followed. The Respondent submits that for dismissal to be fair there must be both substantive and procedural fairness. To buttress this assertion the respondent relied on the decisions in Walter Ogal Anuro Versus Teachers Service commission (2013) eKLR, Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR; and Pamela Melima Lutta vs Mumias Sugar Company Limited(2017) eKLR.
29. The Respondent submits that she was never made aware of the remarks on her leave form relating to being available for the M & E supervision , as she was only required to appended her signature on an online platform, and the hard copy containing the said remarks was never availed to her.
30. The respondent submits that she was on leave as of 10<sup>th</sup> December 2018 and her duties had been assigned to the program officer, Lilian Wanjiku.
31. The Respondent submits that the Appellant did not provide proof that there was any effort to reach her on her phone or personal email and argued that where an employer alleges that an employee had absconded work there must be proof of efforts to get the employee to resume her duty by the employer. To this end she relied on the decision in Felista Achola Ikatwa v Charles Peter Otieno(2018)eKLR.
32. The Respondent submits that there was no show cause letter prior to her dismissal asking her to give her account on why she should not be dismissed nor was she invited to any disciplinary hearing. She submits that there was no valid reason for her dismissal which is a required under Section 41 of the *Employment Act*. She submits that the allegation that she deleted the Appellant's data in the work laptop is false and geared at painting her negatively as she handed over all the Appellant's property to the Human Resource.

## Determination The Main Issues:-

1. Issue a. Whether the trial learned Magistrate arrived at the wrong conclusion on substantive and procedural fairness; and
2. Issue b. Whether the Respondent was entitled to reliefs sought.



### **Preliminary issue - Appellants' submissions in the Lower Court**

33. At the onset, it is important to highlight that, the Appellant argued that the Trial Magistrate failed to consider its submissions before judgement, yet the same had been duly filed. An email of 26<sup>th</sup> November 2021 in the application dated 25<sup>th</sup> April 2022, filed on 18<sup>th</sup> May 2022, showed that the Respondent had sent the submissions to an email at Kakamegamagistratecivil@gmail.com. As to whether the Appellant confirmed if the same was duly filed and stamped is not apparent. The Respondent's submission in the lower court on the other hand were duly stamped in the day they had been filed. The Appellant/Respondent was obliged to ensure its submissions were filed. In any event the court on Appeal considers all documents filed in its finding.

### **Issue A). Whether The Trial Learned Magistrate Arrived At The Wrong Conclusion On Substantive And Procedural Fairness**

Relevant Judicial Holdings /legal provisions on fair termination of employment

34. Section 43 of the *Employment Act*, 2007 provides that:

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

35. Section 45 (2) of the Act provides that:

- (2) A termination of employment by an employer is unfair if the employer fails to prove-
  - a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason -
    - (i) related to the employee's conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

36. The procedure for termination of employment for reasons related to the employee's conduct, capacity, compatibility or based on the operational requirements of the employer is as prescribed under section 41 of the *Employment Act*. This procedure is mandatory and it is provided:- “(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.”

37. It was not in dispute that there was no hearing of the Respondent before the summary dismissal. The procedure applicable for summary dismissal of an employee for reasons under section 44 of the



Employment Act as stated under section 41(2) of the Employment Act(supra). No employee under the current legal dispensation may be dismissed from employed without being accorded a fair hearing opportunity. The right to fair hearing is a non -derogable right under Article 25 of the Constitution which reads:- ‘Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited— (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of habeas corpus.’”

38. The Respondent was vide letter dated 20<sup>th</sup> December 2018 dismissed from employment without being given opportunity to be heard. The employee was on leave and it was alleged she had been recalled for work vide email of 19<sup>th</sup> December 2018.(page 21 is the Summary Dismissal letter ) The letter stated that the Respondent was dismissed with immediate effect. There was no notice to show cause nor hearing.
39. The court finds and holds there was no procedural fairness.

### **The question of Substantive Fairness**

40. The other limb of fairness in termination is based on the validity of the reasons for the termination as stated under section 43 and 45(2) of the Employment Act (supra).
41. Further to the law the Court upholds the reasonable employer test in Lord Denning in British Leland UK LTD V Swift (1981) I.R.L.R 91 where the reasonableness test was defined to wit:- ‘ the correct test is: ‘ was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him , then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair..’” This is also the test relied on by the Appellant in Court of Appeal decision in CFC Stanbic Ltd Vs Danson Mwashako Mwakuwona(2015)eKLR (supra).
42. The Summary Dismissal Letter of 20<sup>th</sup> December 2018 (R-Exhb-9) read in part:-

“I refer to an email sent to you through the Human Resource office on 19<sup>th</sup> December 2018 recalling you from leave to support Monitoring and Evaluation activities coordinated by the donor. I note you have not reported to work today as per the email and this has affected the performance of the project.

From your annual leave request your supervisor clearly indicated that you must be present during Data Quality Assurance(DQA) support Supervision by FHI 360 because you are Officer in charge of data. You were not at work during this exercise and therefore you have knowingly failed and refused to obey a lawful an proper command which is within the scope of your duty to obey , issued by your employer.

After consideration that the above issues that are actually true, it is clear that you are not able to manage your role designated to you by the organization and execute your responsibilities professionally as a Data Officer.

Following the Kenya Employment Act, 2012 Sections 41, 43 (2) and 44(4), I have come to the conclusion that your actions constitute serious misconduct warranting summary dismissal with immediate effect....”

You will be expected to return all KANCO documentation and assets in your custody.”

43. The dismissal letter outlined that the Respondent was aware she was to be present during the M& E Supervision as she had been informed by her supervisor and that an email had been sent to her on 19<sup>th</sup> December 2018 from the Human resource recalling her from leave , which she did not heed to.



44. The Respondent argued that she never received the work email as she could not access it from her phone when she was away from work and that she never received the instructions that she could be attending the M& E exercise when she signed her leave handover form. She argued that she left her phone number through which she could be reached on, and states that she never received any calls.
45. During hearing, the Respondent stated that she signed her leave form on 5<sup>th</sup> December 2018 which did not have any remarks as to whether Haggai was to attend the M& E supervision. She stated that the email from Beatrice Awino(DW) that confirmed that Haggai would provide E & M was of 18<sup>th</sup> December 2018(the letter of dismissal referred to email of 19<sup>th</sup> December 2018 page 21). The Respondent stated that she never received any invite for the meeting of 19<sup>th</sup> and 20<sup>th</sup> December 2018, as while out of office ,emails were sent to personal Gmail accounts.
46. I agree with the Respondent that there was no way the Appellant would have known who was to provide the M& E Support at the time when the Respondent was proceeding for leave and this position was confirmed on 18<sup>th</sup> December 2018, when Wycliff Odera , the senior Program officer of the Donor-FHI360, confirmed that the M& E Support would be conducted by Haggai and that the exercise would be undertaken on 19<sup>th</sup> and 20<sup>th</sup> December 2018.(pg.50 email of 18.12.2018 at 12.37.). DW then re-forwarded the email informing the Respondent and other recipients on the same day at 12.50; asking them to prioritize the exercise to be held on 19<sup>th</sup> and 20<sup>th</sup> December 2018. DW on 19.12.201 at 9.38 am, through an email , sought the Human Resources' help to recall the Respondent and a Laureen and indicated that she had forwarded them the email. There was no mention that DW had called the Respondent, but rather that she had forwarded to them the said email on the exercise.
47. At this point, it was clear that the specific dates as to when the M& E supervision was to be undertaken had not been communicated to any of the persons in the Appellant's organization, and the assertion that the Respondent was aware that the exercise was to be undertaken beforehand on the stated dates was not true.
48. As to whether the Respondent was aware that she was to attend the M& E exercise, the Respondent sent her leave application form and handover form through the email of 5.12.2018 at 13.25 for review by DW who was her immediate supervisor and copied the HR office. Through an email of 10<sup>th</sup> December 2018 at 1.49pm, the Respondent made a follow-up on her leave application request which was yet to be approved. The Human Resource through the email hr@kanco.org responded to the Respondent's follow-up email stating that she had been granted 24 days with a deadline of 31<sup>st</sup> January 2018 and to make plans accordingly(page 46 is the thread of the emails) . (The court finds that the date of 31<sup>st</sup> January 2018 was a typing error by the Appellant and it ought logically to have been 31<sup>st</sup> December 2018).
49. There was no proof, either from the Human Resource or DW that the reviewed Leave application form (pg-49 of the Record ) and the hand-over form(R-Exhibit 6-pg.48) were availed to the Respondent after approving her leave or indicating the remarks by her supervisor at the bottom relating to the DQA and Support Supervision respectively. The communication of 10<sup>th</sup> December 2018 subject : ‘ 2018 Annual Leave days 24 days approved, simply informed days of the leave.’ That in the mind of the court was conclusive communication on the leave. The Respondent was not informed she was required during her leave period at time she proceeded on leave. The leave commenced on 10<sup>th</sup> December 2018(page 49)
50. The only communication relating to the leave application form from the Appellant was on 10<sup>th</sup> December 2018, which indicated that the respondent's leave had been approved for 24 days. The Respondent signed the leave hand over form on the 5<sup>th</sup> December 2018 with officer to be in charge



while she was away indicated as Lilian Wanjiku who signed on 5<sup>th</sup> December 2018. There was no indication in the said email from the Human Resource that there was an attached reviewed Handover form capturing the Supervisor's comments. The court was of the opinion the said supervisor comments were not in existent as at 10<sup>th</sup> December 2018 when the Human Resources communicated the approved leave to commence same day.

51. The Respondent in that position could not have been aware of any planned DQA and Support Supervision, if the Human Resource office and the DW, who was the Respondent's supervisor, failed to avail the said information to the respondent but rather filed away her leave application form and handover form without informing her.
52. It is therefore my opinion that, there was no way that the Claimant/Respondent could have been aware that she was to attend the M& E supervision at the time she proceeded on leave, which had been approved by the Appellant's Human Resource office without any indication of return to work during the leave period.
53. There was no proof to effect that the Respondent had prior knowledge that an M& E exercise was to be conducted as stated and no evidence to that effect was provided by the Appellant. The only evidence available before the Trial Court was the Email sent by Wycliff Odera , the senior Program officer of the Donor-FHI360, who confirmed that the M& E Support would be conducted by Haggai and that the exercise would be undertaken on 19<sup>th</sup> and 20<sup>th</sup> December 2018(pg.50 email of 18.12.2018 at 12.37. )
54. DW then re-forwarded the email informing the Respondent and other recipients on the same day at 12.50; asking them to prioritise the exercise to be held on 19<sup>th</sup> and 20<sup>th</sup> December 2018. DW on 19.12.201 at 9.38 am, through an email, sought the Human Resources help to recall the Respondent and a Lauren and indicated that she had forwarded them the email. DW confirmed during hearing that in communicating, emails were sent on both work and personal emails, but there was no proof that the emails were ever sent on the Respondent's personal email.
55. The email alluded to in the Summary dismissal letter (R-Exhibit- 8) from the Human Resource office of 19<sup>th</sup> December 2018 9.38am alluded to the fact that the Respondent was aware that the M& E Supervision was to be undertaken despite her leave having been approved and that there was evidence in email form to prove that fact. The court noted an email to the Human Resources by Beatrice to : 'recall Lauren and Linda to make sure they attend SIMS today...' (page 50). What followed was email by the said Human Resources same day at 7.09 pm to 'lokumu@kanco.org' stating in part , 'Dear Linda Good Evening, We have been informed that you are supposed to be part of the M&E activities by FH360 but you were available(sic). The donor states that you were aware of this activity before.....my effort to communicate with you through mobile phone was not possible.... Ensure you are in the office tomorrow without fail.'" The court finds that there was no communication to her personal email or phone. The communication is vide official email on the eve of the meeting. It is not reasonable that an employee on statutory leave will be checking official emails. Annual leave is a legal right of the employee to be off work. If the employer requires to recall an employee then they ought to reach out to them in their unofficial contact either physically on given address for leave or personal email or phone. It is the employer to take extra steps to reach this employee who might as well be on the beach side enjoying their time off.
56. Based on Section 45 as to whether the reason for the termination was a fair reason, the trial court held that "the Claimant may have flouted rules of the organisation but was she given a proper hearing internally....." From this assertion it is clear that the Trial court found that the Respondent breached company policy. The court found no basis of this reasoning of the Respondent having possibly flouted rules of the company from evidence before the court.



57. The Court opines as a reasonable employer, the Appellant would have considered the circumstances at the time before the Dismissal such as :-
- i. The employee had proceeded on annual leave without any notice of any M& E supervision to be undertaken,
  - ii. The employee had handed over her assignments to Wanjiku and was on annual leave until 3<sup>rd</sup> January 2019 when she was to resume duty (page 49 is the leave form) which was beyond the date of the M& E Exercise;
  - iii. The Communication to the employee about the M& E exercise was notified to the employee on the eve of the expected exercise and on official email yet she was on statutory annual leave.
  - iv. Considering all these circumstances, it was unreasonable on the Appellant's position; because the Appellant could not show that the Respondent had been given a copy of the Handover form which contained the requirement that she was to be available for an M& E exercise. The Appellant's could not prove that the Respondent had been called on phone nor did they produce the phone records.
58. Annual leave is a statutory right which accrues as a result of service and is due under Section 28(5) of the *Employment Act*, "(5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days." The Human Resource Manager, Ann Gituma, on 14<sup>th</sup> November 2018 had informed the Respondent that she had 24 days unutilized for the year 2018 and had advised that she utilises them by 31st December 2018(Pg. 46 of the Record). The Respondent had proceeded on leave on this basis. It is not reasonable to expect that the Respondent had been aware that she would be recalled without having been informed explicitly at time of leave approval that she could be required to come for another work related exercise during the period of the leave.
59. As to previous allegations of the performance of the Respondent, the Appellant did not issue the Respondent with further warnings relating to her performance since the email of 3<sup>rd</sup> July 2018 and no show cause letter to that effect was issued to the Respondent.
60. In the upshot the Court finds and determines that the reasons for the summary dismissal of the Respondent were not valid and justified. No reasonable employer would have terminated the services of an employee in the circumstances.

**Issue b). Whether the claimant was entitled to the reliefs sought.**

61. Having seen that the reasons for the Respondent's dismissal was not valid and that the procedure leading to the summary dismissal of the Respondent was procedurally unfair. The issue to determine is whether the claimant was entitled to the reliefs sought granted by the trial court. The Respondent had prayed for:-
- i. One month pay in lieu of Notice. Kshs. 40,000
  - ii. Days worked and not paid in December 2018 Kshs. 30769
  - iii. 24 days annual leave Kshs. 32,000
  - iv. 12 months compensation as per Section 49(c) of the *Employment Act*.
  - v. Costs of the Suit and interest thereof, at court rates



- vi. Certificate of service
62. The Trial Court entered judgement against the Respondent as follows:
- i. One month pay in lieu of the Notice.
  - ii. Her annual leave days' pay
  - iii. December pay 2018
  - iv. 12 months Compensation as per the Employment Act minus the statutory legal deductions
  - v. Costs to the Claimant and interest thereto.
  - vi. Certificate of service
63. As at the time of her dismissal the Respondent was earning a Monthly Gross Salary of Kshs. 40,000/- (C-Exh-90 and produced letter of appointment dated 1<sup>st</sup> October 2018 with gross salary of Kshs. 40,000 per month). This was confirmed by DW during cross-examination.

#### **Notice Pay**

64. Having upheld that the Respondent's dismissal was unfair, the Respondent was entitled to the One month pay in lieu of the Notice as granted t Kshs. 40,000/-.The award of Notice pay is upheld.

#### **Leave pay**

65. The Respondent testified that she proceeded on leave on 10<sup>th</sup> December 2018 and was dismissed on 20<sup>th</sup> December 2018. Her leave was to lapse by 2<sup>nd</sup> January 2019. Therefore, the claimant had a remainder of Fourteen untaken leave days out of the 24 days approved for leave. Thus  $Kshs. 40,000 \times 14/30 = Kshs. 18,666.67/-$  The award for the leave by the Learned Magistrate is set aside and substituted with  $Kshs. 18,666.67/-$ (rounded to 18667/-)

#### **Claim for December salary pay**

66. The Respondent had worked for 20 days (inclusive paid Leave days )in the month of December (letter of summary dismissal dated 20<sup>th</sup> December 2019 page 21)until she was dismissed and was entitled to the salary for the said days. The Appellant argued that the Respondent had been paid the salary for December and leave days. On cross-examination the Respondent/Claimant said she was not paid December salary.
67. The Appellant (DW)on re-examination took a contrary position to its position in its Statement of Defence (Para. 9(d)that the claimant was not entitled to the same as she had absconded work. Parties are bound by their pleadings. The respondent was bound by it pleading of not having paid the said salary under Paragraph 9(d) of its respondent(page 33). Proof of payment could have been availed as the Appellant is the custodian of the said proof of payment. The burden of proof of payment of December salary lay on the Appellant once the Respondent/Claimant alleged she was not paid. The court finds there was no proof of payment of December salary for days worked to the Respondent. The court awarded entire December 2018 salary. This was erroneous award as the Claimant was summarily dismissed on 20<sup>th</sup> December 2018. She was only entitled to salary for 20 days. The award is set aside and substituted as follows:- Award for 20 days worked in December 2018 thus  $Kshs. 40,000 \times 20/30 = Kshs. 26,667/-$  Compensation for unfair and unlawful termination of employment



68. The Trial Court granted the Respondent maximum compensation minus the statutory legal deductions. Compensation for unfair termination/dismissal is guided by the Statutory capping under Section 49 of the *Employment Act*, 2007. See Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR) where the court held:- “ In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others.”
69. From the hearing and as held herein, the Respondent had testified that she was not employed and considering the circumstances surrounding her termination which was unfair and unprocedural. The Trial magistrate granted the maximum compensation within the statutory limit. The valid contract of employment dated 1<sup>st</sup> October 2018 was for 1 year and ending 30<sup>th</sup> September 2019. The Respondent’s/claimant’s employment was terminated on the 20<sup>th</sup> December 2018. The Respondent/Claimant had less than 10 months to serve. I do find it is unfair to award compensation beyond the remaining contract period. The award of 12 months maximum compensation was excessive in the circumstances. The court sets aside the award.
70. The court awards the claimant compensation equivalent of 9 months taking into consideration she had been in service since January 2016 and was dismissed while on statutory leave without valid reason and the process was unfair, the court also considered the claimant had been unable to secure another job as at time of the trial. The award is thus substituted with award for equivalent of 9 months’ last gross salary with statutory deduction of statutory PAYE only thus 9x 40,000 award of Kshs 360000/- subject to PAYE deduction.
71. The upholds award of Costs of the case awarded to the Claimant and Interest.
72. The grant of a Certificate of service is a statutory right under Section 51 of the *Employment Act*. The same is upheld.

### Conclusion

73. The Court upholds the Judgment of Hon. D.Alego (SPM) delivered on the 28<sup>th</sup> March 2022 at Kakamega CMEELRC No. 151 of 2019 to effect that the summary dismissal of the Claimant/Respondent from employment of the Respondent/Appellant was unfair and unlawful. The Court sets aside the judgment on reliefs granted to the Claimant by the Hon. D.Alego and substitutes the same with the following Orders-
  - i. Award on Notice pay for the sum of Kshs. 40000/- .
  - ii. Award for payment in lieu of 14 untaken leave days for the sum of Kshs. 18667/-.
  - iii. Award for 20 days worked in December salary for the sum of Kshs. 26,667/-.
  - iv. Compensation for unfair and unlawful termination awarded at the equivalent of 9 months’ last gross salary thus 9x Kshs. 40,000 awarded for total sum of Kshs 360,000/-
 (All awards total sum of Kshs. 445,334/- payable subject to PAYE statutory deduction only).
74. Interest is awarded at court rates from date of Judgment of the Magistrate court (28<sup>th</sup> March 2022) until payment in full.
75. Cost of the suit to the Claimant at the lower court is upheld.



76. The Appellant was partially successful on appeal. Each party to bear own cost in this appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 9<sup>TH</sup> NOVEMBER 2023.**

**JEMIMAH KELI,**

**JUDGE.**

In The Presence Of

Court Assistant: Lucy Macheso

Appellant : Absent

Respondent: Opar Advocate

