



**Mwangi v Loxea Limited (Cause E583 of 2021)  
[2023] KEELRC 2771 (KLR) (6 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2771 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E583 OF 2021  
JK GAKERI, J  
NOVEMBER 6, 2023**

**BETWEEN**

**ALICE WANGUI MWANGI ..... CLAIMANT**

**AND**

**LOXEA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 22<sup>nd</sup> July, 2021 alleging breach of contract, unfair, wrongful and unprocedural termination, unfair labour practices and administrative action, withholding of housing allowance and violation of fundamental rights and freedoms.
2. The Claimant prays for;
  - i. A declaration that termination of the employment was unfair, invalid and wrongful and unprocedural.
  - ii. A declaration that the Respondent contravened the Claimant’s constitutional rights under Articles 10(2), 24(3), 25(c), 28, 29(d), 41, 47 and 50(1) of *the Constitution* of Kenya, 2010.
  - iii. An order do issue that the Respondent remits the Claimant’s unpaid salary for April and May 2021.
  - iv. An order do issue that the Respondent remits the Claimant’s housing allowance from November 2019 to March 2021.
  - v. An order do issue that the Respondent remits the Claimant’s 9 years severance pay at 1.5 month’s per year.
  - vi. Salary in lieu of notice.
  - vii. Leave days.



- viii. Damages for unlawful, unfair and unprocedural termination (12 months' salary).
  - ix. Special damages for medical costs incurred.
  - x. Exemplary damages.
  - xi. A fine of Kshs.100,000/= in lieu with the provisions of Section 16(4) of the *Employment Act, 2007*.
  - xii. Any further and/or other relief that this Honourable Court may deem fit and just to grant.
  - xiii. Costs of this suit.
  - xiv. Interest from date of filing until payment in full.
3. The Claimant's case is that she was employed by the Respondent on 5<sup>th</sup> December, 2011 as the Operations Assistant initially on probation for one month at Kshs.55,000/= per month and the employment was subsequently formalized vide a contract of service dated 29<sup>th</sup> June, 2012.
  4. The Claimant further avers that on 11<sup>th</sup> November, 2019, the predecessor of the Respondent Tsusho Capital Kenya Ltd changed its name to Loxea Ltd though the change was not reflected in the contract of employment.
  5. It is the Claimant's case that the absence of a job description notwithstanding, she performed exceptionally and served diligently and had no disciplinary issues.
  6. The Claimant avers that on 25<sup>th</sup> March, 2021, she received a letter informing her that her employment would be terminated on account of redundancy effective 31<sup>st</sup> March, 2021 but was later issued with a notice to show cause dated 16<sup>th</sup> April, 2021 on alleged unauthorised transfer of 3 logbooks and responded by letter dated 18<sup>th</sup> April, 2021.
  7. It is the Claimant's case that the redundancy notice was unprocedural and the notice to show cause was an afterthought.
  8. That the show cause letter invited her for a disciplinary hearing slated for 22<sup>nd</sup> April, 2021 which she attended and was summarily dismissed vide letter dated 3<sup>rd</sup> May, 2021.
  9. The Claimant characterises the termination as unfair and procedurally flawed.

### **Respondent's Case**

10. In its Memorandum of Reply dated 19<sup>th</sup> August, 2021, the Respondent confirms that the Claimant was offered formal employment on 29<sup>th</sup> June, 2012 after completion of the probationary period and the Respondent changed its name to Loxea Ltd which did not affect its rights or obligations to the Claimant.
11. The Respondent avers that the Claimant was first employed as an Administrative Assistant and later as the Operations Officer and clause 3 of the contract itemised her duties.
12. The Respondent further avers that the Claimant's fraudulent action of unauthorised transfer of 3 logbooks, which would have resulted to substantial financial loss amounted to gross misconduct and justified the summary dismissal.
13. That the Claimant's position was declared redundant by reason of the operational requirements of the Respondent and the requisite notice was provided but the Claimant was dismissed after discovery



of gross misconduct on 23<sup>rd</sup> March, 2021, the discharge of three motor vehicles KBQ 761C, KBR 376T and KCD 170R without prior authorization from the Respondent as the motor vehicles had outstanding loan balances.

14. The Respondent avers that the fraudulent actions were discovered during the currency of the Claimant's employment as notice period ended on 30<sup>th</sup> April, 2021.
15. It is the Respondent's Case that the suspension of the redundancy and subsequent disciplinary process was procedural and in consonance with the provisions of the Employment Act as the Claimant was afforded a platform to ventilate her side of the story.
16. According to the Respondent, the unauthorised discharge of the three logbooks amounted to fraud.
17. The Respondent avers that it conducted investigations on the discharge and the Claimant had done so deliberately with intent to defraud the Respondent as she acted without authorization and admitted wrong doing.
18. The Respondent prays for dismissal of the suit with costs.
19. The Claimant's reply to the Memorandum of Reply raises no new issues.

#### **Claimants' Evidence**

20. On cross-examination, the Claimant explained the process of discharge of logbooks and admitted that the same had not been followed in this case as there was no approval by the Operations Manager and Collections Department.
21. The witness testified that the discharge arose out of confusion of the names.
22. That she had no information about the vehicles in question.
23. The Claimant admitted the mistake as well as the fact that the customers had not paid the discharge charges and the Respondent's cash was used.
24. It was her testimony that the Respondent had Standard Operations Procedures.
25. On re-examination, the witness testified that the logbooks were in the names of Loxea Ltd and the clients.

#### **Respondent's Evidence**

26. RWI, Nancy Chagalwa confirmed on cross-examination that the Claimant was reporting to her. It was her testimony that the Claimant had committed fraudulent acts but the witness had not provided the particulars.
27. It was her testimony that the committee considered the absence of authorization email, or loan clearance letter, no payment had been made and the same had not been signed off by the Operations Manager. The Claimant had initially indicated that the logbooks were in a Safe yet they were not and the company would have lost Kshs.1.4 million.
28. RWI testified that she appeared at the disciplinary hearing as a witness.
29. RWII Petronila Rop, confirmed that she had been an employee of the Respondent for 15 years and served as the Human Resource Business Partner and no new contract of employment was given to the Claimant after change of name by the Respondent.



30. It was her testimony that the redundancy was occasioned by restructuring and some positions were declared redundant but confirmed that the notice of redundancy made no reference to the alleged restructuring and was not copied to the Labour Officer.
31. The witness confirmed that there was no investigation report on record or evidence of service.
32. That the Claimant's response was that the discharge was erroneous.
33. On re-examination, RWII testified that the Claimant's response to the notice to show cause was an admission that she made a mistake as she had no authority to act in the manner she did.
34. It was her testimony that he Labour Officer was served.

### **Claimant's Submissions**

35. As to whether a contract of service was issued after the Respondent changed its name, counsel submitted that since no new contract was issued in accordance with Section 10(5) of the [Employment Act, 2007](#), the fine under Section 16(4) of the Act was merited.
36. On housing allowance from November 2019 to March 2021, it was submitted that there was no contract of service after the name change as Tsusho Capital Kenya Ltd did not exist, the Respondent should be compelled to pay housing allowance.
37. As regards redundancy, reliance was made on the sentiments of Maraga JA (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR and the holding in Cargill Kenya Ltd V Mwaka & 3 others (2021) KECA 115 to urge that consultations was an integral part of the redundancy process and was not undertaken nor were other provisions of Section 40(1) of the [Employment Act, 2007](#) complied with.
38. On payments on termination of employment, it was submitted that the Respondent had not provided copies of payslip, bank transfer or acknowledgement receipt as evidence of any payment to the Claimant.
39. As to whether the Claimant was entitled to damages for psychological health impairment and depression, counsel relied on the Claimant's medical report showing that she had suffered depression and cited the decisions in M K V Seventh Day Adventist Health Services & Maragia Omwega (2016) eKLR and LWW V Charles Githinji (2019) eKLR where the court awarded damages of Kshs.6,000,000/= and Kshs.500,000/= respectively.
40. On the alleged fraudulent conduct, counsel submitted that the same was not proved against the Claimant.
41. Reliance was made on the holding in CF Capital Plc V Willoughby (2011) EWCA Civ 1115 to urge that once a notice is given in a unilateral act, it cannot be withdrawn other than by consent as the Respondent purported to do.
42. The South African decision in Herbst & others V Fidelity Guards (J16499) ZALC 84 was cited on the effect of notice of cancellation of a contract.
43. The sentiments of the court in Vijay Morjaria V Nan Singh Madhusingh Darbar & another (2000) eKLR on the essence of pleading the particulars of fraud in a suit to urge that the Respondent did not set out the particulars, no loss had been suffered and the logbooks were in the names of the Respondent and the clients.



44. Counsel further submitted that the foregoing evidenced the violation of Articles 28 and 29(d) of *the Constitution* of Kenya, 2010 as the disciplinary hearing caused the Claimant mental anguish.
45. The decision in *Musa Mbwagwa Mwanasi & 9 others V Chief of Kenya Defence Forces* 7 another (2021) eKLR was relied upon to urge that the Claimant was entitled to compensation, additionally submitting that the court was one of equity where all wrongs were remediable.
46. On exemplary damages, it was submitted that the Claimant was entitled to aggravated damages since the Respondent elevated a mistake to an act of fraud and pleads for Kshs.1,000,000/= as damages.
47. Finally, on the reliefs sought, counsel submitted that the Claimant was entitled to a total of Kshs.9,492,263.00 for 12 months compensation, house allowance, salary for April and May 2021, notice pay 9 years, severance pay, 9.5 leave days, constitutional violation, exemplary damages, damages for psychological impairment and the fine.

### **Respondent's Submissions**

48. As regards the change of name by the Respondent on 11<sup>th</sup> November, 2019 to Loxea Ltd, counsel submitted that the same did not alter the legal or employment status of the Claimant who was notified of the change.
49. Counsel relied on the provisions of Section 13(6) and (7) of the *Employment Act*, 2007 to discount the Claimant's counsel's submission on the effect of change of name of an employer.
50. On housing allowance, it was submitted that there was a contract of employment between the parties which applied with regard to housing allowance as per clause 5.1 of the contract of employment.
51. Section 31(2) of the Act was also cited to buttress the submission that no housing allowance was payable to the Claimant as it had already been paid.
52. On termination of the Claimant's employment, counsel submitted that as the Respondent had initially intended to terminate the Claimant's employment on account of redundancy, it had complied with the requirements of Section 40(1) of the *Employment Act*. That RWI was the one who discovered the misconduct since a stocktake revealed that the logbooks were missing, an essential security in the Respondent's business.
53. Counsel submitted that by the time the Respondent suspended the clearance process, the Claimant was still an employee of the Respondent as the notice of redundancy was scheduled to end on 30<sup>th</sup> April, 2021 and the Respondent had power to suspend the process and the disciplinary hearing followed thereafter.
54. Counsel urged that the Claimant admitted that mistake during the hearing.
55. According to counsel, the Claimant must have colluded with the customers to facilitate the transfer and the only outstanding issue was collection of the log-books, but it was discovered earlier.
56. Counsel queried the Claimant's argument that she reversed the transfers. What if the same had not been discovered?
57. Counsel urged that based on the evidence on record, the requirements of Section 44(4)(g) of the *Employment Act* and Chapter 5 of the Respondent's Employee Handbook had been complied with.
58. The Court of Appeal decision in *Kenya Revenue Authority V Ruelwa Waithaka Gitahi & 2 others* (2019) eKLR was relied upon as were the sentiments of the court in *Kenya Power & Lighting Co. Ltd*



- (V) Aggrey Lukorito Wasike (2017) eKLR and Bamburi Cement Ltd V William Kilonzi (2016) eKLR on the employer's burden of proof under Section 43 and 47(5) of the [Employment Act](#) to urge that the dismissal was fair.
59. Reliance was also made on the band of reasonableness test.
60. As regards the Claimant's final dues, counsel submitted that none were due as the Claimant failed to sign the discharge voucher and the dues could not be processed.
61. That the Claimant was entitled to salary and allowances upto 3<sup>rd</sup> May, 2021, leave balance and pension refund in accordance with rules of the scheme.
62. As regards the prayers sought, counsel submitted that the prayer for damages for psychological impairment was unproved as the medical report produced was unsubstantiated by a medical doctor and its authenticity was doubtful.
63. The sentiments of the court in MKK V CWN (2016) eKLR were cited to urge that the Claimant failed to establish that the mental depression was a result of the Respondent's actions and the claim was untenable.
64. Counsel submitted that the general damages are unavailable even where a finding of unlawful or unfair termination of employment is made.
65. It was submitted that the Claimant was not entitled to any of the reliefs sought.

#### **Determination**

66. After careful consideration of the pleadings, evidence on record and submissions by the parties, the issues for determination are;
- i. Whether the purported termination of the Claimant's employment on account of redundancy was justified.
  - ii. Whether the change of name by the Respondent had any effect on the relationship between the Claimant and the Respondent.
  - iii. Whether termination of the Claimant's employment by the Respondent was unfair.
  - iv. Whether the Claimant is entitled to the reliefs sought.
67. On termination on account of redundancy, while counsel for the Claimant argued that the notice could not be suspended or withdrawn, counsel for the Respondent urged that since the Claimant was still an employee of the Respondent, it had the power to do so and the provisions of Section 40(1) of the [Employment Act](#), 2007 were complied with.
68. It is common ground that redundancy is one of the legally recognized ways of separation and the [Employment Act](#), 2007 sets out the circumstances in which an employee may be declared redundant.
69. Section 40(1) of the [Employment Act](#), 2007 is couched in mandatory terms and the seven (7) conditions therein prescribed must be complied with for a redundancy to pass muster, ranging from the requisite notice or pay in lieu of notice, notice to the union and the local Labour Officer or the employee and the local Labour Officer, and its contents (reasons for the extent of the redundancy), selection criteria, payment of leave days in cash and severance pay.
70. In this case, contrary to the Respondent's witness testimony that notice of the purported redundancy was given to the Labour Officer, no evidence was availed.



71. Relatedly, the letter to the Claimant dated 25<sup>th</sup> March, 2021 under reference Notice of Redundancy makes no reference to the alleged restructuring of the Respondent wholly or sectionally.
72. The letter makes no reference to the reasons for and extent of redundancy.
73. It requires no belabouring that no selection criteria was attached and there were no consultations which is an imperative.
74. From the evidence on record, it is unambiguous that the provisions of Section 40(1) of the *Employment Act*, 2007 were not complied with and the purported redundancy could not pass muster.
75. Closely related to the foregoing is the issue whether the Respondent could validly suspend the Claimant's clearance process and arguably withdraw or cancel the redundancy notice dated 25<sup>th</sup> March, 2021.
76. The Claimant's counsel cited foreign decisions (United Kingdom and South Africa) to assert that a notice once given cannot be recalled or withdrawn otherwise than by agreement.
77. Granted that the sentiments in *Toyota SA Motors (PTY) Ltd V CCMA & others (CCT 22814) (2015) ZACC 40*, *Herbst & others V Fidelity Guards (Supra)* and *CF Capital Plc V Willoughby (Supra)* were echoed against a particular background and circumstances, it is necessary, in the court's view for the court to ascertain whether these propositions of law are consistent with the provisions of the *Employment Act*, 2007.
78. Section 2 of the *Employment Act*, 2007 defines redundancy as;

“The loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.”
79. This definition is clear that in a redundancy, an employee loses employment involuntarily and at the instigation of the employer grounded on circumstances that render sustenance of employment impossible.
80. Significantly, courts have held that although Section 40(1) of the *Employment Act*, 2007 has no provision for consultations, it is now a legal requirement in accordance with the International Labour Organization Conventions whose provisions find expression in the Article 41 of *the Constitution* of Kenya, 2010.
81. In the court's view, the realization that the process of redundancy is consultative would appear to suggest that if for instance the consultation yielded a viable alternative, the employer has the leeway to withdraw or revoke the notice of redundancy to accommodate the other option.
82. Additionally, since redundancy is opted to as a last resort, rendering it difficult to withdraw or revoke the redundancy notice would not augur well with imperatives of business.
83. Finally, and as adverted to elsewhere in this judgement, the redundancy notice does not terminate the employment until the effective date and before such date, the employer should have liberty to withdraw the notice.
84. A redundancy notice is not tantamount to “cancellation of a contract” a phrase not used in the common law tradition.



85. In the court's view, the Respondent's action of suspending clearance by the Claimant was not inconsistent with the law.
86. The Claimant was still its employee as subject to its policies and procedures.
87. As to whether the change of name by the Respondent from Tsusho Capital Kenya Ltd to Loxea Ltd had any effect on the relationship between the Claimant and the Respondent, counsels have adopted contrasting positions citing different provisions of the *Employment Act*, 2007. While the Claimant's counsel relied on Section 10(5), the Respondent's counsel relied on Section 13(6) and (7) of the Act.
88. While Section 10(5) of the *Employment Act*, 2007 require consultation of the employee and revision of the contract to reflect the changes made and notification of the change, Section 13(6) and (7) of the Act are specific to the change of name and are thus more relevant than Section 10(5) of the *Employment Act*, 2007.
89. Significantly, however, neither Section 10(5) nor Section 13(6) and (7) prescribe the effect of change of name by an employer and in particular, a registered company such as the Respondent.
90. The effect of change of name by companies is governed by the provisions of the *Companies Act*, 2015.
91. Needless to belabour, change of name by a registered company is the prerogative of members and directors of the company and employees have no role to play.
92. Section 66 of the *Companies Act* provides that;
1. A change of a company's name has effect from the date on which the certificate of change of name is issued.
  2. The change does not affect any rights or obligations of the company or invalidate and legal proceedings by or against it.
  3. Any legal proceedings that might have been continued or commenced against it by its former name may be continued or started against it by its new name.
93. It is common ground that the Respondent changed its name from Tsusho Capital Kenya Ltd to Loxea Ltd on 11<sup>th</sup> November, 2019 and as correctly submitted by the Respondent's counsel, the change of name had no effect on the employment relationship between the Claimant and the Respondent.
94. Contrary to the Claimant counsel's submissions that the change of name by the Respondent vitiated the employment contract, that was not the case as the change of company name does not implicate the corporate or legal status of a company. As a legal person distinct and separate from its members and managers as authoritatively enunciated in the locus classicus House of Lords decision in *Salomon V Salomon & Co. Ltd (1897) AC*, a registered company owes its existence to its registration which is evidenced by the Certificate of Incorporation issued by the Registrar of Companies under Section 18 of the *Companies Act*, 2015.
95. The change of name by the Respondent did not affect the existence of the company contrary to the Claimant's counsel submissions.
96. Similarly, a registered company is identifiable otherwise than by its name, its directors, membership and the unique identifying number given on registration, among others.
97. In sum, there was neither discontinuation or interruption nor vitiation of the employment contract between the Claimant and the Respondent.



98. As to whether termination of the Claimant’s employment was unfair, counsels have adopted opposing positions.
99. Whether termination of a person’s employment was unfair or not is dependent on whether the employer complied with the relevant provisions of the *Employment Act*, 2007.
100. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*, the provisions of the *Employment Act*, 2007 set out the entire architecture of termination of a contract of employment.
101. It provides for the requisite notice, procedure, reason(s) for termination and proof, summary dismissal and justification.
102. Specifically, Section 45 of the Act provides that;
  1. No employment shall terminate the employment of an employee unfairly.
  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.
103. The net effect of the foregoing provisions of the *Employment Act*, 2007 is that for a termination of employment to pass muster, it must be shown that there was a substantive justification for the termination and it was conducted in accordance with a fair procedure as exquisitely captured by *Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* and *Naima Khamis V Oxford University Press (E.A) Ltd (2017) eKLR*.
104. I will now proceed to apply the foregoing provisions of law to the facts of the instant case.

### **Reason For Termination**

105. Both the notice to show cause dated 16<sup>th</sup> April, 2021 and the summary dismissal letter accuse the Claimant for having discharged 3 vehicle logbooks without authorization or following the laid down procedure.
106. The motor vehicles involved were KBQ 761C, KBR 376T and KCD 170R.
107. According to the Respondent, the Claimant’s conduct was fraudulent and demonstrated extreme negligence and carelessness on the part of the Claimant.
108. In her response to the notice to show cause dated 18<sup>th</sup> April, 2021, the Claimant stated that she had transferred all her roles to one Nancy and had assisted them to undertake an audit of all logbooks available in the Safe and those at the National Transport and Safety Authority (NTSA) for collection and the team was satisfied with the handover and no issues were raised on 31<sup>st</sup> March, 2021, but two weeks later, Nancy informed the Claimant that on reconciliation, three logbooks were neither in the Safe nor pending at NTSA.
109. The Claimant stated that she promised to follow up and have the three logbooks “returned to the company.”



110. It is unclear how the Claimant realized that the logbooks were outside the Respondent's premises and had to be returned.
111. This would appear to suggest that she was aware of their whereabouts as confirmed by the opening statement of paragraph 6 of her response, that she traced them from the NTSA System and jointly registered in the name of Loxea Ltd and the clients and the issue of unauthorised transfer did not arise.
112. On cross-examination, the Claimant explained the logbook discharge procedure to the court and was emphatic that she discharged the three logbooks without complying with the procedure and had no approval from the Operations Manager.
113. She also admitted that the discharge was by mistake as she confused the names. The Claimant did not explain which names were confusing but at the hearing, she gave the name of William Odhiambo, Hassan and Joseph. It is unclear as to which of the names the Claimant confused and with which other ones.
114. Equally, the Claimant admitted that she did not call the clients to pay for the discharge but she used company's money to do so, which was irregular.
115. In her response to the notice to show cause, the Claimant is unequivocal that she had committed no wrong as the logbooks were in the name of the Respondent and the client as they ought to and they were delivered to the Respondent.
116. The Claimant by design or default omitted the pith and substance of the Respondent's case against her, the unauthorised discharge of the three (3) logbooks yet they had outstanding loans.
117. At the hearing, the Claimant explained the circumstances in which the transfers were effected, confirming that she had no instructions to discharge the logbooks.
118. Her defense was that she was overwhelmed by what was happening around her, namely the impending redundancy and indisposition of her parents.
119. She cited depression and filed a Medical Report from Metropolitan Hospital by Dr. Maurice Kirimi Muchui dated 28<sup>th</sup> June, 2021 and the diagnosis is indicated a severe depression.
120. The Claimant was attended to on 21<sup>st</sup> April, 2021, a day before the disciplinary hearing.
121. Regrettably, the medical doctor did not testify and the report was not produced by an expert nor was the evidence tested. Its probative value is nominal.
122. Minutes on record reveal that the Claimant explained how she used her contact at the NTSA to have the logbooks re-registered in the name of the Respondent and the clients.
123. Asked how the change was effected, the Claimant explained that since the logbooks were still in NTSA's custody, changes could be made though the Respondent was not consulted.
124. Strangely, the Claimant told the disciplinary committee that the change of names on the logbooks was not paid for due to a systems error at the NTSA yet on cross-examination, she admitted that payment was made.
125. Further, the Claimant told the committee that she was unaware of the location of the logbooks until she was informed by Nancy that they were missing.
126. It also emerged that the Claimant had in the handover confirmed that the three logbooks were in the custody of the Respondent.



127. For unexplained reasons, the discharge of logbooks took place on 23<sup>rd</sup> March, 2021 but they were not collected until the Claimant did so after they had been retransferred to the Respondent and the clients.
128. From the Claimant's evidence in court and at the hearing, it would appear to the court that the Claimant was aware of where the three logbooks were. This finding is reinforced by the fact that when the Claimant was made aware of the fact that the logbooks were missing, she did not request Nancy to check for them but promised to follow up and "have them returned back to the company" and subsequently traced them in the NTSA System and returned them.
129. Relatedly, these logbooks were processed in a unique manner as the Claimant had no approval. Clients were not called upon to pay the requisite discharge charges, and they were processed by the NTSA free of charge courtesy of a Systems error according to the Claimant.
130. In the court's view, had the Claimant processed one logbook and alleged it was a mistake or an account of confusion of names, such explanation would have sounded credible unless there was evidence of previous mistakes.
131. Puzzlingly, in this case, the Claimant discharged a total of three logbooks and blames confusion and a "systems error" at the NTSA, processed all the three without charges, sounds implausible bearing in mind that the Claimant disclosed that she had a contact at the NTSA who facilitated the change of names before the logbooks were returned to the Respondent. It is difficult not to infer that the same contact facilitated the discharge.
132. On cross-examination, RWI, Nancy Changalwa confirmed that determining the gravity of the Claimant's misconduct, the disciplinary committee considered several factors, namely; absence of an authorization email or letter, no payment was made by the clients for the discharge, the discharges were not signed off by the Operations Manager and the Claimant had indicated that the logbooks were in the Safe yet they had been discharged.
133. Collectively, the number and nature of the transgressions by the Claimant as regards the discharge of the logbooks transcend typical carelessness or negligence.
134. The blatant disregard for procedure camouflaged as confusion and system error is puzzling.
135. Section 43(2) of the [Employment Act](#), 2007 provides that;
- "The reasons or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee."
136. In *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2021) eKLR, the court stated that;
- "In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists."
137. The Court of Appeal expressed similar sentiments in *Kenya Revenue Authority V Reuwel Withaka Gitahi & 2 others* (2019) eKLR as follows;
- "The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons it genuinely believed to exist causing it to terminate the employee's services. That is partly a subjective test."



138. The foregoing comports with the sentiments of Lord Denning in *British Leyland (UK) Ltd V Swift* (1981) I.R.L. R 91 as follows;

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him, the dismissal was unfair. It must be remembered in all these cases that there was a band of reasonableness within which an employer might reasonably take one view . . .”

139. The circumstances in which the three (3) logbooks were discharged and subsequently re-transferred to the Respondent and the clients after the discovery and the overall manner in which the Claimant conducted herself leaves little doubt that the Claimant was aware of what was happening to the logbooks.

140. For the above stated reasons and guided by the provisions of the *Employment Act*, 2007 and judicial authorities, the court is satisfied that the Respondent has on a preponderance of probabilities established that it had a valid and fair reason to terminate the Claimant’s employment on 3<sup>rd</sup> May, 2021.

141. The foregoing finding comports with the provisions of Section 44(4)(c) of the *employment Act*, 2007 which provides for summary dismissal where;

“an employee wilfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly.”

## Procedure

142. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (Supra), Section 41 of the *Employment Act*, 2007 provides an elaborate mandatory process to be complied with by the employer before termination of the employment contract.

143. The specific elements of procedural fairness have been elaborated upon in various decisions such as *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR where the Court of Appeal itemised four elements as follows;

- i. an explanation of the grounds of termination in a language understood by the employee.
- ii. the reason for which the employer is considering termination.
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made.
- iv. hearing and considering any representations made by the employee and the person chosen by the employee . . .”

144. While the Claimant’s counsel urged that the threshold for a fair termination had not been met as the redundancy process was procedurally flawed, counsel for the Respondent submitted that the termination was procedural in that the Respondent suspended the Claimant’s clearance process to address the Claimant’s misconduct which culminated in her dismissal from employment.

145. It is common ground that the Respondent issued a notice to show cause dated 16<sup>th</sup> April, 2021 which also suspended the Claimant’s clearance process and suspended her from office.

146. The letter identified a single charge, the unauthorised transfer of 3 logbooks.



147. The letter accorded the Claimant the right to reply within 4 days and invited her for a disciplinary hearing scheduled for 22<sup>nd</sup> April, 2021.
148. Finally, the letter informed the Claimant of her right to be accompanied by a fellow employee at the hearing.
149. In the court's view, the Claimant had sufficient time to respond to the notice to show cause and prepare for the hearing and as adverted to elsewhere in this judgement, she responded by letter dated 18<sup>th</sup> April, 2021.
150. It is also not in contest that the Claimant was present at the hearing and confirmed that she did not wish to be accompanied by a witness.
151. During the hearing, the Managing Director gave a brief on the case and gave the Claimant an opportunity to explain how the 3 logbooks were discharged. Other members of the committee sought explanations on various issues and the Claimant responded accordingly.
152. The Claimant contested paragraph 4 of the minutes on page 2 as well as paragraph 5 of page 2 on the location of the 3 logbooks. It was her testimony that she merely requested for a reversal of the error.
153. The Claimant did not deny having discharged the 3 logbooks without authority or fault the Respondent's procedure.
154. Finally, the minutes indicate that the Claimant was informed that management would deliberate the matter and communicate the outcome as soon as practically possible and did so on 3<sup>rd</sup> May, 2021.
155. For the foregoing reasons, it is the finding of the court that the Respondent has demonstrated that it terminated the Claimant's employment in accordance with a fair procedure.
156. Having found that the Respondent had a substantive justification for terminating the Claimant's employment and having further found that it did so in accordance with the provisions of the [Employment Act](#), 2007, it follows that the Claimant's case is for dismissal and it is accordingly dismissed.
157. On the reliefs sought, the court proceeds as follows;

**a. Declaration on termination**

158. Having found that termination of the Claimant's employment by the Respondent was lawful, the prayer for a declaration that it was unfair is unmerited.

**b. Declaration on violation of rights**

159. Neither the Claimant's written statement nor the oral testimony adduced in court demonstrate how and to what extent the provisions of Articles 10(2), 24(3), 25(c), 28, 29(d), 41, 47 and 51 of [the Constitution](#) of Kenya, 2010 were violated.

The declaration sought is unmerited.

**c. Unpaid salary for April and May 2021**

160. Neither the Claimant's written statement dated 22<sup>nd</sup> July, 2021 nor the oral evidence adduced in court on 11<sup>th</sup> May, 2023 make reference to any unpaid salary for April and May 2021. The prayer is declined.



**d.Unpaid house allowance November 2019 to March 2021**

161. Neither the Claimant's written statement nor the oral evidence led in court show that the Respondent did not pay the Claimant's house allowance from November 2019 to March 2021 or the amount due.

**e.Severance package for 9 years**

162. Having found that the Claimant's employment was terminated on account of a summary dismissal as opposed to a redundancy, the claim for severance pay which is only payable in cases of redundancy is unmerited and is declined.

**f.Salary in lieu of notice**

163. Having found that termination of the Claimant's employment by the Respondent was substantively justifiable and procedurally fair, the prayer for salary in lieu of notice is unsustainable and is declined.

**g.Leave days**

164. The letter of summary dismissal dated 3<sup>rd</sup> May, 2021 stated that the Claimant would be paid leave balance and the memorandum dated 6<sup>th</sup> May, 2021 from the Human Resource Department to the Payroll section stated that the Claimant was entitled to 9.5 leave days earned.

165. In the absence of other particulars, the Claimant had 9<sup>1</sup>/<sub>2</sub> leave days earned for which the Claimant is entitled to payment for the 9<sup>1</sup>/<sub>2</sub> days.

**h.12 months compensation**

166. Having found that the termination of the Claimant's employment was not unfair, the prayer for compensation is unsustainable and is declined.

**i.Damages for violations of constitutional rights**

167. Having found that the alleged violation of various articles of *the Constitution* of Kenya, 2010 was not proved by evidence, the prayer for damages is declined.

**j.Special damages for medical cost**

168. The Claimant tendered no evidence of the particulars of this claim or its justification.

The claim is declined.

**k.Exemplary damages**

169. The Claimant tendered no evidence to demonstrate entitlement to exemplary or punitive damages or demonstrate that her case fell within the restricted circumstances in which punitive damages is payable. (See *Obonyo & another V Municipal Council of Kisumu* (1971) EA 91, *D.K Njagi Marete V Teachers Service Commission* (2021) eKLR among others).

The claim is declined.

**l.A fine of Kshs.100,000.00 under Section 16(4) of the *Employment Act*, 2007**

170. This court has no jurisdiction to impose the fine prayed for as neither Article 162(2)(a) of *the Constitution* of Kenya, 2010 nor Section 12 of the *Employment and Labour Relations Court Act*, 2011 confer upon the court jurisdiction in criminal cases.



The prayer is dismissed.

171. In the court's view, the only payments due to the Claimant were those set out in the letter of summary dismissal dated 3<sup>rd</sup> May, 2021 if still owing to date.

172. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 2023**

**DR. JACOB GAKERI**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

