



REPUBLIC OF KENYA



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Njuguna v VFS (Kenya) Limited (Employment and Labour Relations Cause 1055 of 2017) [2023] KEELRC 2860 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2860 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1055 OF 2017**

K OCHARO, J

NOVEMBER 2, 2023

BETWEEN

DAMARIS WAKONYA NJUGUNA CLAIMANT

AND

VFS (KENYA) LIMITED RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated the 6th of June 2017, the Claimant sued the Respondent seeking the following reliefs;
 - a. The termination of the grievant/Claimant by the Respondent be declared discriminatory, unlawful and unfair.
 - b. Terminal dues as enumerated in 3 (1) (a-c) above.
 - c. General damages for discrimination.
 - d. Interest on (b) and (c) above at the Commercial rates as published by the Central Bank of Kenya from when they became due.
 - e. The Respondent to pay costs of this Claim with interest at the Court rates.
2. Contemporaneously with the filing of the Memorandum of the Claim, the Claimant filed a witness statement dated 6th June 2017 and a list of documents of the even date. The Claimant further filed a further witness statement dated 18th August 2021.
3. Upon being served with the summons to enter appearance, the Respondent did and filed a Memorandum of Reply on the 31st of July 2017. The Memorandum of Reply was filed side by side with its witness's statement and documents that it intended to place reliance on in support of its defence.



4. The matter was heard inter-parties on merit. The Claimant's case was heard on 14th December 2021 while the Respondent's case was heard on the 24th February 2022.
5. At the hearing, the parties urged the Court to adopt the witness statements they had filed as well as the documents on record as their evidence in chief and documentary evidence, respectively. The Claimant and the Respondent's witness briefly gave oral evidence, clarifying matters in their witness statements and documents that required clarification, before proceeding to give testimony under cross-examination and re-examination.

The Claimant's case

6. The Claimant avers that she was employed by the Respondent as a Submission Officer at Level P5 vide a contract of employment dated 20th October 2015. At all material times during her employment, she discharged all the duties assigned to her with due diligence, to the best of her ability as provided and by the terms of the contract of employment.
7. The Claimant contends that on 18th March 2017, she attended an event that the Manager and her fellow China Team members did not. They had discouraged and warned her not to, otherwise their solidarity for her would cease thenceforth. Considering the event to be a pivotal platform for networking and enhancing teamwork in the best interest of the Respondent's Company, she failed to adhere to the advice.
8. The Claimant further states that on the 21st of March 2017, she was summoned to the Respondent's Regional Manager's office where she was informed that there had been a complaint against her. By email, the Embassy had alleged that she had pulled out two passports and handed them over to the Applicants prematurely. Further, the Respondent was to investigate the matter and get back to her.
9. On 22nd March 2017 she encountered a hostile workplace environment. Her team members were uncooperative and hostile to her. Faced with this, she sent an email to the Respondent's Human Resources Manager requesting to be transferred to another VAC. Unfortunately, the Human Resource Manager did not respond to her email. At around mid-day of the same day, she was issued with a suspension letter placing her under investigatory suspension. The investigation was to be over the incident that allegedly occurred on 27th February 2017.
10. The Claimant stated further that on 31st March 2017, she was called by the VAC Manager who instructed her to report to the office on Monday the 3rd April 2017. When she reported to the office as directed, she was introduced by the Deputy General Manager to one gentleman by the name of Victor, the new Respondent's Human Resource Consultant who was to deal with her case.
11. On interacting with Victor, he didn't question or discuss with her, on the alleged matter that led to her suspension. It occurred to her that he was not even aware of the incident. He however brought up an issue of 18th October 2016, over which she had been given a warning letter. She was later informed by the said Human Resource Consultant that it was in the best interest of everyone if she resigned from her employment with dignity. He offered to be her referee and assist her in securing another job if she resigned.
12. Nevertheless, the Claimant did not resign as egged by the Respondent but instead consulted her Advocate who wrote to the Respondent on 12th April 2017 demanding that the Respondent lift her suspension and reinstate her back to employment. The demand didn't elicit any response or action by the Respondent.



13. It is the Claimant's case that on the 21st of April 2017 she was asked to pick up her Notice of disciplinary Meeting dated 19th April 2017 from the Respondent's office, the disciplinary meeting was slated for 26th April 2017. She attended the disciplinary meeting on the material day but the Respondent did not hear or let her make any representations regarding the allegations made. Besides, she was not informed of the results of the investigations. Despite this, the Claimant was given a termination letter of even date summarily terminating her services on the grounds of gross violation of the Respondent's Code of Conduct.
14. The Claimant contends that the Respondent's allegations that she picked from the safe two passports from a bunch of five and released them to an agent without the Manager's knowledge and authorization were fabricated. One couldn't manage to separate the passports in the system since they had to be paid for in a bunch. Furthermore, the passports storage safe is accessible to every employee and also covered by CCTV Cameras, and anyone could have accessed the safe.
15. The Respondent's policy dictates that any incidents are to be reported within 24 hours of their occurrence. However, she only came to hear of the stated incident of the 27th of February 2017 on the 21st of March 2017 after she was summoned by the Managers and subsequently suspended and summarily dismissed from her employment.
16. She further asserted that she never sent an apology email to the Manager over the alleged incident. She only apologized and sought forgiveness for an incident of late coming. No complaint had been made against her to necessitate the apology and request for forgiveness alleged. If there was any complaint[s] the same would be about all the staff members because they were all Submission Officers.
17. Lastly it is the Claimant's case that she faced stigmatization, mental distress and hostility during her employment after she attended the event on the 16th of March 2017. She was coerced and put under duress to resign, coercion and pressure which she refused to succumb to. Further, she was harassed and discriminated against as she was not treated with equality as her fellow staff members. It is her position that her termination was unfair, unlawful and discriminatory owing to unequal treatment received from the Respondent and thus seeks her terminal dues as tabulated hereunder:
 - i. One month's salary in lieu of notice.....Ksh. 45,000.
 - ii. 12 months' gross salary compensation pursuant to section 49(c) of the [Employment Act 2007](#).....Ksh. 540,000.
 - iii. Unpaid House Allowance for 16 months Ksh. 45,000 X1/3 X16 months.....Ksh. 240,000.
18. Under cross-examined and referred to her warning letter dated 18th October 2016, she testified that the charge in the said warning letter was the submission of a document to the embassy without the knowledge of the Manager. It was not possible to re-submit as the system would not accept the Application. She declined to receive the letter because the account of events as was set out therein was wrong.
19. It was her testimony that complaints would come through the supervisor. They would not get directly to the Submission Officer[s]. Once received at the Manager's desk, the affected staff would be notified of the complaint.
20. She testified further that she Submissions Officer. Carrying out audits was outside her mandate. It was the preserve of the Managers.



21. She testified that following the ill-treatment by her colleagues, she made a formal complaint about it to Ms Gugu who was in South Africa. Ordinarily, she was not dealing with Ms. Gugu directly.
22. The witness reiterated that the messages she wrote to Ms. Gloria were concerning her late coming. The messages were for dates 14th February 2017 and 28th February 2017. The date of the alleged offence was stated as 27th February 2017. In the messages, however, she does not mention expressly the late coming.
23. According to the company's policy, any incident happening must be reported immediately.
24. She further told the court that she attended a disciplinary hearing but she was not given a fair hearing. The minutes were fabricated. Before the hearing, she had on the 3rd of April 2017 requested the Human Resource Manager to supply her with the CCTV footage.
25. It is her testimony that the warnings by the embassy were not directly addressed to her. The embassy would address individual employees handling the specific documents, but she was denying that there was a complaint addressed to the Respondent.
26. On re-examination, she asserted that she did not receive the warning letter. The signature thereon purportedly acknowledging receipt of the same was not hers.
27. Where the passports were kept there was a CCTV camera and access to the place was not limited to a particular employee. Every employee had access.

The Respondent's case

28. The Respondent's case was presented by Gugulethu Yalo, the Respondent's Human Resource Manager. The Respondent confirms that indeed the Claimant was engaged by the China Visa Application Centre as a Submissions Officer at Level P5 with effect 20th October 2015 at a consolidated monthly salary of Ksh. 45,000.
29. The Respondent contended that the Claimant was under the supervision of one M/s Gloria D' Silva and part of the Supervisor's duties included weekly audits of the passports whose Visas had been processed. During one of the audits, the Claimant's supervisor noticed that two passports were missing from a bunch of five. The said passports had been processed but were not due for collection as no payment had been made in their respect.
30. The witness averred further that after the said incident, the Claimant sent her supervisor various text messages asking for forgiveness for her actions. Subsequently, a formal complaint was made to the Respondent's Management who started an investigation into the matter.
31. The Respondent contended that on various occasions, there had been numerous complaints from the Chinese Embassy regarding visas submitted with errors and which did not meet the set criteria and on one occasion the embassy recommended the issuance of a warning letter to the Claimant.
32. It is further contended that prior to the Claimant being issued with a warning letter, the Claimant had been issued with several verbal warnings by her supervisor due to the complaints by the Applicants of the Claimant being rude to them. She was similarly issued with a warning on one occasion when she confronted a colleague and launched verbal assaults and insults at the said colleague.
33. The Respondent averred that after the said formal complaint was made to its Management, the Claimant was placed on an investigatory suspension.



34. It was the Respondent's case that a Human Resource Consultant was hired to oversee the disciplinary process during which the Claimant's supervisor, as per the Respondent's Policy gave her statement of account on the events and the Claimant's conduct that had attracted the various warnings.
35. The Respondent further asserted that the Claimant was issued with a letter giving notice of a disciplinary meeting and requiring her to attend the meeting. Further, the letter expressed her right to accompaniment with a colleague of her choice. On the material day, she availed herself to the said disciplinary hearing without a representative and upon the Respondent's enquiry, she sought to be allowed to call one of her fellow employees by the name of John Paul with the designation of an Operations Officer. She was allowed to, and he attended the meeting on the Claimant's invitation.
36. It is averred that during the said hearing, the Claimant was questioned about her actions leading to the previous warnings which she acknowledged and confirmed that they were her mistakes. The Claimant however denied taking the two passports from the bunch of five but surprisingly she never asked for any evidence in this regard in the form of the CCTV footage which would have been furnished during the disciplinary hearing.
37. It was stated that after the said disciplinary hearing, the same was adjourned to the afternoon during which deliberations took place where it was unanimously agreed that the Claimant's services be terminated as no plausible explanation was given for her actions.
38. The witness stated that the decision was in the best interest of the Company to safeguard its business as the Claimant's actions had brought great disrepute to it which exposed it to a risk of losing one of its major clients due to her actions.
39. It was further contended that it was unanimously agreed that the Claimant was to be paid all her dues including that which she was not legally entitled to, considering she was summarily dismissed from her employment.
40. It was the Respondent's case that the minutes of the said disciplinary hearing were recorded and later typed out and signed by all persons present save for the Claimant who refused to sign on the minutes and the letters in acknowledgement of the payment of her dues.
41. It was averred that the Claimant was given a certificate of service and paid all her dues being salary for the period up to 26th April 2017 and pro-rata leave earned but not taken as of 26th April 2017, all of which were received, but the Claimant refused to acknowledge receipt of the same. It is the Respondent's position that the requisite legal procedure contemplated by law was followed at the time of terminating the Claimant's contract.
42. When cross-examined she testified that when the incident happened she was not in Kenya but was informed of the said incident after it happened.
43. The Passports are mainly handled by the operation team. The process can be elaborated better by operations. She was not in a position to. When the passports arrive at the office from the mission they are kept in a safe. She could not tell who receives them at the office, however, the Operations Manager testified in the disciplinary proceedings. He explained the procedure and the default.
44. The Respondent had CCTV cameras in its offices. The witness could however not tell who had or did not have access to the safe.
45. It was her testimony that the Claimant was called for a meeting by the Human Resource Consultant, in attendance were the, said consultant, Deputy Manager (Operations), the Claimant and herself. She only joined via a call.



46. She told the court that the Claimant did not ask for the CCTV footage. Further, the Claimant was accompanied by a colleague. It was he who asked for the CCTV footage.
47. The CCTV footage was not supplied. The witness did not see a reason why it was not if it was requested as the Respondent ensures fair procedure in disciplinary matters.
48. She further testified that when the Claimant was suspended, investigations were carried out. The outcome was that she handed over the passports before the date of collection.
49. The warning letter was given to the Claimant. There is no signature acknowledging receipt, she refused to sign.
50. Referred to page 16 of the Respondent's documents, the witness stated that the document appears as a screenshot. She could not tell what the message was about. However, there was a notification that she was running late, and in the message of the 28th she seemed to be apologizing for something she had done.
51. Further, the safe register that was tendered in evidence by the Respondent was a safe register relating to safe opening and closing. The register is handled by different people, one person per day. The recordings on the register for the 27th of February 2017 appear to have been done by different people as exhibited by the different handwritings. The witness stated further that she was not in Operations and could not give adequate details involving the register.
52. The witness contended that she could not recall when the Claimant's terminal dues were paid but she supposed it was within a reasonable time.
53. In her evidence in re-examination, the witness stated that the Respondent has presented evidence regarding payment of the Claimant's dues. The payments were made on 4th May 2017.
54. The text message was sent to M/s Gloria and the date of the incident was on 27th February 2017. The employees accessing the safe signed the register for that.

The Claimant's submissions

55. The Claimant's counsel filed written submissions on the 12th of September 2022.
56. It was submitted that the Respondent's actions of coercing and putting the Claimant under duress to resign from her employment amounted to unfair labour practice contrary to Article 41 of the [Constitution](#) 2010.
57. Counsel further submitted that there were no investigations carried out. If there was any investigation carried out, the CCTV footage should have formed part of the Respondent's evidence of her culpability. The Respondent was under a duty to prove the Claimant's culpability. To fortify this point reliance was placed on the case of [Pius Machafu Isindu v Lavington Security Guards Limited](#) (2017) eKLR where it was held:

“ 13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); and prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and



hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act/Rules*. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

“..To declare and define the fundamental rights of employees, to provide basic conditions of employment of employees...”

58. Similarly, reliance was placed on the case of *Kenya Plantation & Agricultural Workers Union (KPAWU) v Finlays Tea (K) Limited* (2022) eKLR where it was held:

“29. Again, the alleged insulting behavior and rudeness to the management have not been proved. None of the defence witnesses stated that the grievant used such words or was rude to the management. The said offences were not mentioned in the show cause letter. As already observed above, the witnesses just stated that the grievant shouted at the coordinator but did not state the words used.

30. In view of the foregoing matters I find and that the respondent has failed to discharge its burden of proving that there was a valid and fair reason(s) to justify the summary dismissal of the grievant as required by section 43, 45 and 47(5) of the *Employment Act*.

31. I gather support from the Court of Appeal decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where the court held that: -

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

59. It was submitted that the Respondent’s reason of terminating her services was inexistence and invalid. The Respondent did not prove the said reason and has not discharged its burden of proving the justification of the said termination.

60. The Claimant’s counsel submitted that the charges against the Claimant and her dismissal from employment were wholly anchored on the alleged investigations. Certainly, it was unfair and unjust of the Respondent not to avail the report of the investigation and findings therefrom to the Claimant.

61. The counsel further submitted that during the disciplinary hearing, the Respondent did not hear or let the Claimant or her witness make any representations regarding the allegations made before terminating her employment. Reliance was placed on the case of *Andrew K. Tanui v Postal Corporation*



of Kenya (2014) eKLR to demonstrate that that amounted to procedural unfairness. In the court the held thus;

“ This procedure was flawed. It does not show that the Claimant was advised of his right to be accompanied to the Board hearing. No significant hearing took place. An Employer should not merely recite the grounds listed in a letter to show cause and then ask the Employee if there is anything to add or subtract; the Employer must make an effort to explain the charges to the Employee at the hearing, call evidence in showing the truthfulness of those allegations, and if there are Witnesses, allow the Claimant the opportunity to question the Employers’ Witnesses. Evidence contained in documents must be produced. The Forensic Audit should have been supplied to the Claimant before the hearing date, and should have prominently featured at the hearing. Conversely, the Employee must be allowed the opportunity to adduce evidence and call Witnesses. The hearing process is different from the letter to show cause. If these were the same processes, there would be no need of a formal hearing. The hearing itself is not a mere technical appearance before a Disciplinary Panel; the opportunity to be heard means much more than being asked to add, or subtract, any answers that may have been given in responding to the letter to show cause. The Respondent failed the procedural test on these grounds.”

62. Similarly in the case of Postal Corporation of Kenya v Andrew K. Tanui (2019) eKLR (supra) it was held:

“ Four elements must thus be discernible for the procedure to pass muster:-

- (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 is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

63. Lastly Counsel submitted that the disciplinary hearing purported to be conducted by the Respondent was a sham and not aimed at confirmation of the valid reasons for the termination of the Claimant. The summary dismissal was without any just cause contrary to sections 43 and 45 of the Employment Act and thus the Claimant was entitled to the prayers sought in the Statement of Claim. Reliance was placed on the case of Charles Kinyua & Another v Meru Central Dairy Co-operative Union Limited (2015) eKLR where the Court held:

“ Further the minutes for the disciplinary hearing of 9.11.2011 filed for the respondent clearly show that the claimants were merely informed the allegations as levelled against them without their being heard in self-defence or at all and the meeting found them culpable as alleged without considering whether the alleged misconduct had been established. The general manager who was the complaint was an active participant at that hearing and the claimants were not heard at all. In the opinion of the court, such casual and biased proceedings cannot be relied upon to show that at the time of the termination the respondent had a reasonable basis to believe that the claimants had engaged in the misconduct as was alleged by the respondent.”



The Respondent's submissions

64. The Respondent filed its submissions on the 13th December 2022 distilling two issues for termination thus:
- i. Whether the termination of the employment of the Claimant was discriminatory, unfair and unlawful in the circumstances.
 - ii. Whether the Claimant is entitled to the reliefs sought.
65. For the first issue, the Respondent's Counsel submitted that the Claimant had failed to adduce evidence in support of her claim of unfair termination of employment and instead sought to shift the said burden to the employer contrary to what section 47(5) of the *Employment Act* 2007 contemplates. The section which provides:
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
66. It was further submitted that the Claimant had failed to satiate her burden of proof as required and had not demonstrated the unfair nature or any element of unfairness in the termination of her employment. Notably, the Claimant does not address the issues or incidences leading to the issuance of warning letters nor demonstrate changed behaviour or reforms in her conduct. As such, it cannot be stated that the Respondent didn't have a justification for the decision to dismiss. To buttress this point, Counsel relied on section 43 (2) of the Act which provides:
- “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.”
67. The Respondent submitted that it had at all material times demonstrated fairness by accommodating the Claimant despite prior complaints and warnings on her conduct. Despite the accommodation, she continued to act contrary to the Respondent's code of conduct. The Respondent carried out investigations into her actions after which the disciplinary hearing was held. Further, the minutes of the disciplinary hearing also demonstrate the admittance by the Claimant to the previous warnings and the failure to acknowledge the same.
68. The Respondent submitted that the action against the Claimant was triggered by a complaint raised by the Embassy. The complaint prompted it to investigate the complaint. The outcome of the investigation pointed at the fault on the part of the Claimant, as a result, a notification was issued to her, a disciplinary hearing ensued, and her explanations were not satisfactory, hence the decision to dismiss her. The decision was justified. It therefore discharged its legal burden under section 47 (5) of the *Employment Act*.
69. On the alleged discrimination, the Respondent submitted that the Claimant had failed to demonstrate any unequal treatment against her compared to any other employee of the Respondent in any manner whatsoever. The claim for discrimination and victimization is not founded, it should fail. To fortify this submission reliance was placed on the case of *Michael Louw v Golden Arrow Bus Services* (1999) ZALC 166 as cited in *OL Pejeta Ranching Limited v David Wanjau Muhoro* (2017) eKLR.



70. It was submitted that the Respondent followed the requisite procedure before terminating the Claimant herein. The Claimant was given several warnings, letters of suspension and a disciplinary hearing as well as the opportunity to be represented by a colleague. Reliance was placed on the case of *Pamela Nelima Lutta v Mumias Sugar Co. Limited* (2017) eKLR where it was held:

“What constitutes a fair termination is a matter that is now well settled by the wealth of jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.”

71. Lastly the Respondent submitted that the Claimant is not entitled to any of the reliefs sought. She was the author of her misfortunes and thus her Claim should be dismissed with costs.

Analysis and determination.

72. From the pleadings, the evidence on record as well as the submissions by the parties herein, the following issues present themselves for determination:

- i. Whether the Claimant’s summary dismissal was procedurally and substantively fair.
- ii. Whether the Claimant is entitled to the reliefs sought or any of them.
- iii. Who should bear the costs of the suit?

Whether the Claimant’s summary dismissal was procedurally and substantively fair

73. The *Employment Act* puts forth two aspects that must be considered by the court whenever called upon to interrogate fairness of an employee’s dismissal from employment or termination of her or his from employment. The aspects are procedural fairness and substantive justification.

74. Section 41 of the *Employment Act* provides the structure for procedural fairness. It provides:

“(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.”

75. The provision is couched in a mandatory manner any form of non-adherence to it, legally renders the termination or summary dismissal unfair by dint of section 45[2] of the *Act*.

76. It is trite that procedural fairness entails the duty of the employer to explain to the employee unambiguously the nature of the accusations for which it is contemplated that his/her employment be terminated, an opportunity for the employee to make representations on the grounds, and consideration by the employer of the representations before taking decision.



77. By dint of the provision of section 45(2) the duty to prove that there was procedural fairness in the process leading to the decision to terminate or dismiss lies on the employer.

78. In the case of *Walter Anuro Ogal v Teachers Service Commission* (2013) eKLR the Court held:

“Procedural fairness ought to be met before dismissing an employee. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

79. Similarly in the case of *Mary Chemweno Kiptui v. Kenya Pipeline Company Limited* [2014] eKLR Mbaru J held that:

“Invariably before an employer can exercise the right to terminate the contract of an employee, there must be a valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representations made by the affected employee.”

80. There is no doubt that the Claimant was issued with a disciplinary notice on the alleged misconduct against her. The said letter states in part:

“19th April 2017

Dear Damaris Njuguna,

Re: Notice of disciplinary meeting

Further to your suspension letter dated 22nd March 2017, I am writing to inform you that you are required to attend a disciplinary meeting on 26th April 2017 at 10:30 am, which is to be held at our offices on 2nd Floor, West 1 Building, Nairobi.

The purpose of the hearing is to consider an allegation of misconduct against you. This allegation is that without your Manager’s knowledge and authorization, you removed from the safe two passports from a bunch of five and issued to the agent before the collection date.....

You are entitled, if you wish, to be accompanied by another work colleague as a witness to the hearing.”

81. It is clear that the Claimant was notified of the charge[s] against her in the invitation notice as well as the right of accompaniment. The Claimant was accompanied to the said disciplinary hearing by a colleague by the name of John Paul who was an Operations Manager. Up to here, one will conclude that the notification component of the statutory procedural fairness aspect was satisfied. No doubt she was allowed to be accompanied by a colleague to the disciplinary hearing as contemplated under section 41 of the *Act*. In my view, this is a partial fulfilment of the hearing component. Hereinafter, I will demonstrate how, and why I hold that the hearing component was not fully satiated.

82. The Respondent produced a document captioned “outline of the procedure to be followed during Damaris Njuguna disciplinary hearing on the 26th April 2017 at 10.30 am at Head Office”. There can be no doubt that the document was well-detailed and a wholesome adherence to it would birth a perfect disciplinary process full of procedural fairness. Unfortunately, the guideline was not duly adhered to. The minutes tendered in evidence do reflect this.



83. From the onset, and throughout proceedings herein, the Claimant maintained that she was not allowed to make representations on the allegations or charges that faced her. The Respondent in the converse held that she did. Whether she did or not can easily be discerned from the minutes in respect of the disciplinary hearing. I say this cognizant of the fact that minutes of a disciplinary hearing in the ordinary run of things should fairly reflect the contents of the proceedings thus; those present in the meeting; charges read out to the employee; representations by the employee and or her accompanying colleague or trade union representative; evidence by the employer's witnesses; any observations by the panellists/ committee members; and any applications by the employee and or the colleague or trade union representative; and decision[s] by the committee/panel.
84. The guidelines mentioned above contemplated the foregoing. The minutes that were kept with great respect are too sketchy. They do not fairly reflect, how the management presented the allegations and the evidence basis of the allegations, whether there was any witness for the management, whether he or she was cross-examined, the presentations by the employer's witness; the explanations given by the Claimant on the charges, whether she was questioned by the chairperson of the panel or any member of the panel and the answers given, and brief concluding remarks by the panel and the Claimant.
85. Where procedural fairness in the termination of an employee's employment is in contest the minutes of a disciplinary hearing become a pivotal instrument through which presence or otherwise of the same can be gauged. Employers should take heed that the procedure leading to an employee's dismissal or termination of an employee's employment should not be allowed to be infested by casualness. Taking the disciplinary hearing minutes cannot afford casualness.
86. It has not escaped the memory of this Court that in her evidence in chief, the Respondent's witness asserted that the Operations Manager testified in the disciplinary hearing and in detail explained the process of passport safekeeping and the fault that was on the part of the Claimant. I have carefully considered the minutes, they disclose not that the Operations Manager testified and on what. Further, the witness testified that the colleague who accompanied her demanded the CCTV footage, again this cannot be seen captured in the minutes. In my view, this speaks to the casualness that afflicted the disciplinary hearing and the recording of the minutes thereof.
87. Lastly, the Claimant asserted that prior to the date appointed for the hearing, she asked for CCTV footage of the safe room from the Human Resource Manager. Undeniably, the same was not given to her. The Respondent didn't rebut her evidence. All that the Respondent opted to was to assert that she didn't ask for the same during the hearing. I find considerable difficulty to fathom the Respondent's reasoning. The employer is duty bound to facilitate procedural fairness and the employee's right to a fair hearing. Crucial documents and or items once requested for by an employee to enable him or her to prepare for his or her defence should be availed to the employee with ease and seamlessly not unless there is a reasonable and justifiable reason that impedes the same.
88. The foregoing premises considered in their totality leaves this Court with no option other than concluding that the Respondent did not discharge its legal burden of proving that it fully adhered to the prescripts of procedural fairness. I consequently return that the summary dismissal was procedurally unfair.
89. I now turn to consider the second feature, substantive justification. No doubt, the reason for the dismissal of the Claimant was set out in the letter dated 26th April 2017. The Claimant removed two passports from the passports safe from a punch of five and issued them to an agent before the collection date. According to the Respondent, this amounted to gross misconduct.



90. The law places upon the employer the duty to besides establishing the reason for termination of an employee's employment, prove that the reason[s] was fair and valid. The Claimant vehemently opposed the Respondent's reason for the summary dismissal. She asserted that the safe where the passports could be kept before they are released to the applicants could be accessed by any person. There was a likelihood that the passports were released by another officer. Indeed, the Respondent's witness in her evidence under cross-examination testified that the safe register for the 27th of February 2017 evidently shows that on that day the safe was not accessed by one person considering the different signatures and handwritings obtaining thereon. To discount the Respondent's accusation against her, the Claimant requested for CCTV footage. Without explanation, the same was not given to her or utilised during the disciplinary hearing as evidence. The Respondent's witness testified that during the disciplinary hearing, the Claimant's colleague asked for the footage. No decision was made on the request. The footage was not furnished as requested.
91. The tone of the Respondent's witness's evidence was to the effect that at all material times the CCTV footage was available, and one that expressed her surprise why the same was not released when it was requested for.
92. In the circumstances of the matter, the production of the CCTV footage for purposes of the disciplinary hearing was crucial. Production of the same as evidence before this court too. I have carefully considered the evidence of the Respondent's witness regarding this issue and find no plausible explanation as to why the CCTV footage was not furnished to the Claimant prior to the hearing when it was requested for or during the disciplinary hearing when it was asked for by the colleague who accompanied the Claimant. The matter of the CCTV footage featured prominently in the Claimant's pleadings. The Respondent therefore had notice that the same will be made an issue in the proceedings herein. A reasonable litigant could have found it necessary to tender the same as evidence in the proceedings herein. It didn't seize the opportunity. By reason of these premises, I am impelled to make an adverse inference. Had the footage been produced either during the disciplinary hearing or in the proceedings herein, the production would not have helped the Respondent's case. Conversely, it would have demonstrated that the Claimant didn't pick and release the passports as alleged or at all.
93. The Respondent's witness admitted that when the alleged incident happened she wasn't in Kenya. Further, the Operations Manager gave detailed evidence during the disciplinary hearing on the process of handling the applications, handling passports and processing of visas. That she [the witness] was not able to give details as regards the handling of passports and heard her as saying including those in the safe. The Operations Officer was not called to testify in this matter. In my view, in the circumstances of the matter, he was the most crucial witness. This didn't help the Respondent's case. It diminished it instead. In so holding I draw support from the case of *Hema Hospital v Dr. Wilson Makongo Marwa* [2015]eKLR.
94. In a bid to demonstrate the guilt of the Claimant the Respondent's witness contended that the Claimant sent a message to her supervisor concerning the incident asking for forgiveness. However, while admitting that she wrote the message, the Claimant asserted that the forgiveness sought was about reporting late to work not the issue of processing the passport. Pressed under cross-examination the Respondent's witness stated that she was not able to tell what the message was all about. However, I got her as urging the court to consider the timing of the message and conclude that it was concerning the incident. In essence, the witness was inviting this Court to get into the space of speculation. I decline the invitation.
95. Considering these premises, I conclude that the Respondent didn't place before this Court sufficient evidence from which I can draw the conclusion that there was a valid and fair reason for the dismissal



of the Claimant from employment. Imperative to state that a reason can only be considered valid if it has been proven to be actually in existence.

Whether the Claimant is entitled to the reliefs sought.

i. One month's salary in lieu of notice.

96. The Claimant's employment was in nature one terminable by a 28 days' notice pursuant to the provisions of section 35 of the *Employment Act*. Clause 24.5 of the employment contract provided for a thirty days' termination notice. The Court is cognizant of the fact that the statutory provision or contractual provisions notwithstanding in circumstances where the sanction of summary dismissal has been properly and justifiably attracted the employer has the liberty to give a shorter or no notice at all. Having found that the summary dismissal was unfair, I will not hesitate to award the Claimant pay in lieu of notice. If I failed to, I shall have aided the Respondent to benefit from its own wrongdoing. I hereby award the Claimant Ksh. 45,000 as salary in lieu of notice.

ii. House Allowance since employment

97. The Claimant further sought a house allowance totalling Ksh. 240,000. Payment of a house allowance is a statutory requirement and one that is couched in mandatory terms. Employers are bound by Section 31(1) of the *Employment Act*, 2007, to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary.

98. The Claimant's evidence is that she was not paid a house allowance for the one year and six months she was in the service of the Respondent.

99. The Respondent on its part stated in its response to the claim, that the Claimant's salary was a consolidated figure of Kshs. 45,000, which consolidation, included housing allowance. There can be no doubt that the law envisages consolidation of basic salary and other employee benefits like house allowance. However, the employer cannot in my view argue successfully that the salary of the employee was a consolidated salary without demonstrating that indeed his argument flows from the contract of employment. I have carefully considered the terms of the employment contract; none provides that the KShs.45,000 was a consolidated salary. Further, the Respondent tendered no evidence wherefrom such can be discerned. Consequently, I am not persuaded that the Claimant's salary was a consolidated salary and inclusive of house allowance.

100. The Respondent did not discharge its statutory obligation under section 31 of the *Employment Act*. I find the Claimant entitled to an award of unpaid house allowance for the entire period he was in the service of the Respondent, one year and six months, thus;

$(15/100 \times 45,000 \times 16 \text{ months}) = \text{Ksh. } 108,000.$

iii. 12 months compensation for the unfair termination.

101. The Authority for the court to make the award flows from section 49 (1) (c) of the *Employment Act* 2007. The authority is exercised depending on the circumstances of each case. The circumstances influence the grant and the extent thereof. I have considered that liability in this matter attaches against Respondent on both procedural and substantive aspects of dismissal, the length of period the Claimant had worked for the Respondent, and the fact that it has not been demonstrated that she influenced the dismissal in any manner, and conclude that the Claimant is entitled to compensation to the extent of 7 month's gross salary for the unfair dismissal thus, Ksh. 315,000.



iv. General damages for discrimination.

102. The Claimant contended that she was discriminated against by the Respondent. I cannot hesitate to state that her allegation was a bald allegation that was not supported by any evidence. I reject the Claim without much ado.

Who shoulder the cost of the suit?

103. The cost of this suit is to be borne by the Respondent.

104. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms;

- a. A declaration that the Claimant’s summary dismissal was both procedurally and substantively unfair.
- b. Salary in lieu of notice.....Ksh. 45,000.
- c. Unpaid House Allowance for 16 months...Ksh. 108,000.
- d. Compensation pursuant to the provision of section 49 (1) (c) of the Employment Act, 7 (seven) months’ gross salary, Kshs. 315,000.
- e. Interest on the sum awarded above at court rates, from the date of this judgment till full payment.
- f. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF NOVEMBER 2023.

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OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Mago holding brief for Mr. Wambugu for Claimant

Mr. Tanui for the Respondent

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.



OCHARO KEBIRA
JUDGE

