



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1418 OF 2017**

*(Before Hon. Justice Ocharo Kebira on 28<sup>th</sup> February 2022)*

**LILIAN MUCHUNGI ..... CLAIMANT**

**VERSUS**

**GREEN BELT MOVEMENT.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant got into the Respondent's work force on the 28<sup>th</sup> March 1994 as an administrative secretary through a letter of appointment dated the even date. Clearly the employer-employee relationship that was created thereby ran on a smooth path as evidenced by her rise through the ranks over the years. However, twenty-three years into the otherwise smooth relationship it got into head winds. The relationship sank when the Claimant was summarily dismissed on the 25<sup>th</sup> May 2017.
2. Charging that the summary dismissal was unfair, the Claimant commenced the suit herein, through a memorandum of claim dated 5<sup>th</sup> July 2017 against the Respondent wherein she sought for the following reliefs:
  - a) *Kshs. 1,638,000, as particularized in paragraph 15 of the memorandum of claim.*
  - b) *Certificate of service;*
  - c) *Costs of this suit.*
  - d) *Interest on (a) above.*
3. Contemporaneously with the filing of the statement of claim, the Claimant filed a list of documents dated the 5<sup>th</sup> July 2017 under which the following documents were filed; employment contracts; appreciation letter; compulsory leave and extension of leave letters; notice to show cause letter; disciplinary hearing minutes; summary dismissal letter and a demand letter by her counsel. The documents were later to be produced as her documentary evidence.
4. Upon being served with summons to enter appearance, the Respondent did file a memorandum of appearance dated 16<sup>th</sup> August 2017, and subsequently filed a memorandum of defence dated 17<sup>th</sup> October 2017. Side by side with the filing of the defence, the Respondent filed documents that it intended to place reliance on to buttress its defence against the Claimant's claim. The documents being, a letter of appointment dated March 28, 1994, contract of employment executed on the 13<sup>th</sup> March 2016, Claimant's pay slip, amended employment contract executed on the 4<sup>th</sup> April 2017, minutes of the Respondent's board dated February 28<sup>th</sup> 2017, letter dated Thursday 23<sup>rd</sup> February 2017 sending the Claimant on compulsory leave, letter dated 22<sup>nd</sup> March 2017 extending the leave, letter dated 21<sup>st</sup> April 2017 extending the leave further, an invitation letter dated 20<sup>th</sup> April 2017, inviting the Claimant to appear before investigators, notice to show cause dated 11<sup>th</sup> May 2017, notice to attend a disciplinary hearing dated 16<sup>th</sup> May 2017, minutes of the first disciplinary hearing dated 19<sup>th</sup> May 2017, letter of summary dismissal dated 25<sup>th</sup> May 2017, monthly adjustment and leave balance records.
5. In compliance with the rules of procedure, the Claimant filed a reply to defence dated 25<sup>th</sup> October 2017 on the 30<sup>th</sup> October 2017. Even after pleadings had closed, the Respondent filed a document it termed response to the Claimant's reply to defence. Document which I must say is strange to this court's procedure rules.
6. Imperative to state that under further lists dated 6<sup>th</sup> February 2019 and 19<sup>th</sup> February 2019, the Respondent placed on record additional

documents that were to go into fortification of its case.

7. The long and short of the Respondent's pleadings was that the Claimant's summary dismissal was well anchored, the Claimant's claim lacked merit and she is not entitled to the reliefs she has sought.
8. The Respondent filed statements by its witnesses under a list of witnesses dated 6<sup>th</sup> February 2019.
9. At the close of pleadings, the matter herein got ripe for hearing and it was heard on the Claimant's case on the 15<sup>th</sup> September 2021, and the Respondent's on the 15<sup>th</sup> September and 29<sup>th</sup> September 2021. The court did direct that the parties do file written submissions, which submissions both have filed.

### **THE CLAIMANT'S CASE**

10. The Claimant's case is encompassed in her pleadings, her witness statement that she urged court to consider as part of her evidence in chief. The documentary evidence and her oral testimony in court.
11. It was the Claimant's case that as at the time she was being summarily dismissed, on the 25<sup>th</sup> May 2017, she had worked for the Respondent for a period of more than 20 years. As at the time of dismissal she was occupying the position of a Community Mobilization Officer earning a monthly salary of KES. 68,750. Under the contract of employment executed on 31<sup>st</sup> March 2016, her contract of service was set to end on the 31<sup>st</sup> December 2017.
12. The Claimant contended that prior to the dismissal she had diligently served the Respondent as evidenced by the Respondent's letter of appreciation dated 22<sup>nd</sup> December 2017, and that she had never been served with any warning letter.
13. It was her case further that on the 22<sup>nd</sup> February 2017, the Respondent denied her access to the office and its premises on the account that it was carrying out investigations. On the 23<sup>rd</sup> February 2017 she was sent on compulsory leave for one month to enable investigations on allegations of violations of procurement policy, violations of code of ethics and difficult work environment by her. The compulsory leave was to be extended for a further two months.
14. The Claimant testified that during the suspension period she was barred from engaging or interacting with staff and members of the Respondent in any way. According to her this made it impossible for her to reach out to fellow employees to be her witnesses at the disciplinary hearing. The compulsory leave letter was dated 23<sup>rd</sup> February 2017, and those that extended the leave, were dated 2<sup>nd</sup> March 2017 and 21<sup>st</sup> April 2017.
15. The instruction to remain away from office and not to interact with staff and stakeholders, was contained in the letter of 23<sup>rd</sup> February 2017. According to her this direction was never lifted at any time.
16. She further stated that on the 20<sup>th</sup> April 2017, she was instructed by the Respondent to attend an interview session with the Respondent's auditory investigators, on the 26<sup>th</sup> April 2017. She did oblige. The audit report that ensued from the session was never shared with her.
17. The Claimant stated that the Respondent subsequently issued her with a notice to show cause dated 12<sup>th</sup> May 2017, notice which she collected on the same day. The notice required a response by the 15<sup>th</sup> May 2017, within two days therefore. She responded to the notice through her letter dated 15<sup>th</sup> May 2017.
18. Through a letter dated 16<sup>th</sup> May 2017, the Respondent invited her to attend a disciplinary hearing which had been slated for the 19<sup>th</sup> May 2017 at 12.00 p.m. She asserted that she received this letter on the 17<sup>th</sup> May 2017.
19. Through its letter dated 25<sup>th</sup> May 2017, the Respondent expressed its decision of summary dismissal. The dismissal letter reflects grounds of dismissal that are different from those that had been put forth in the notice to show cause. There were additional counts. Additional counts that were never brought to her attention prior to or during, the disciplinary hearing, as those that required her representation.
20. According to her, two of the members who attended the disciplinary hearing, that is Nos. 5 and 7 as reflected on the disciplinary minutes were not members of staff of the Respondent. The person therein named as "D.O." was only mandated to attend the meeting and make recommendations to the board. He was not a member of staff.
21. The Claimant contended that one of the issues that came up [*see page 24 of her documents*] in the course of the disciplinary proceedings was that of seedlings. She informed the meeting that there was a document that had been generated by the supplies department for supplies to factories, which was in possession of the Project Manager, which document would have helped her answer to the issue. She did not have the document for this reason.
22. It was her case that she was not involved at all in procurement processes of the Respondent. At the material time she was only instructed to oversee a procurement process that had been commenced but which was alleged to be riddled with fraudulent activities by the officers who were undertaking the same.

23. On the count of procurement of lanterns, she stated that during the hearing one Nancy Muthiani was called upon to testify as a witness for the Respondent. The witness was categorical that the directions in regard thereto were given by Aisha Karanja and Teresa Muthoni [project head]. She did not mention the Claimant.
24. She contended that a charge relating to receiving and storage of the lanterns was introduced at the hearing. According to the evidence of Nancy at the disciplinary meeting, one Eunice Rafula, the store keeper, received the solar lamps, and called the Claimant to witness. It was the Claimant's evidence that she gave instructions that the lamps be stored in the Human Resource Manager's office for safety reasons. A theft that had occurred at the store earlier.
25. She asserted that she was not aware of any storage policy.
26. As regards the charge on energy jikos, the Claimant held that the issue was only brought up in the course of the hearing. The Claimant asserted that she at all material times had nothing to do with distribution of the energy jikos. Her role was largely limited to training trainers. Teresa Muthoni was in charge of the jiko project.
27. She would only get involved in distribution as and when she got invited to. And wherever she was, she would just be a member in the distribution team. One of such instances was when there was a distribution of the jikos in Uganda. The recording in regard thereof was done by Teresa Muthoni.
28. During the hearing the member-D.O asked her why she did not provide a report for the distribution, and answer was that the issue was not raised in the show cause notice and that distribution fell under the docket of procurement.
29. Further, that though Nancy did mention to the committee in the course of the proceedings, that one Mr. Kariuki had some documents relevant to the matter, Mr. Kariuki was not called to appear before them, and tender the documents.
30. Regarding the charge on the alleged failure to account for the USD 747, the Claimant asserted that she duly accounted for the amount.
31. On this, the Claimant stated further that normally guests would visit the organization [Respondent] wanting to understand its workings. Relevant to the funds in issue, were the Swedish students who visited the organization. Their visit entailed that the taken to villages to stay with women [members of the Respondent] and understand village life. The money in issue was their contribution.
32. The Claimant stated that as at the time the students came in she did not have other money, yet they [the students] were supposed to be taken to Nakuru. This constrained her to call the Executive Director for authority to spend the USD 747. The executive Director sanctioned the expenditure on condition that the same was to be accounted for. When the Claimant got back to the office she duly accounted for the same. She handed over all receipts and a balance of about Kshs. 20,000 [Twenty thousand] to the accounts department.
33. The Claimant asserted that this issue featured in the proceedings. She referred the court to *page 45 of her bundle of documents i.e. page 19 of the disciplinary hearing proceedings* and stated that thereat one of the committee members [J.O.] stated that there were no witnesses present on the issue but their statements were available. However, she was not given the statements. She took a position that the statements were not valid.
34. In the course of the hearing, with a view to demonstrate that she duly accounted for the sum, she asked the accountant, Javan, to tender the receipts that she had handed offer to him for accounting purposes. Though the accountant indicated that receipts were in the office, in answer, the receipts were never availed to the disciplinary committee.
35. The Claimant contended that one was supposed to account for the money like the one in issue, within 21 days. In the defaulting, the same could be recovered from one's salary at the end of the month. There was no email written to her on any issue concerning the funds or surcharge on her.
36. The accountant [Javan never complained at and time that the funds had not been fully accounted for.
37. The Claimant contended that she was not in charge of receipting. That no other person, save the accounts department had authority to issue receipts. At no time did she have a receipt book.
38. The Claimant stated that her counsel did write a letter to the Respondents demanding for documents to enable her appeal. The documents were never given to her, instead on the 31<sup>st</sup> day May 2017, the Respondent wrote a letter to the advocate expressing its decision not to release the documents on an account that they would not deal with external people.
39. According to the Claimant, the Respondent's Human Resource Manual provided for a disciplinary procedure. At paragraph 10.2.3 [a] [iii] thereof it is clear that external representation was allowed at every step of the disciplinary process.
40. She contended that the manual provided that a suspension period would only last for a period of 21 days, however contrary to it, she was on suspension for 3 [three] months.
41. According to the Claimant, paragraph 10.2.5.5. provided that investigations over an employee's conduct were supposed to be done either by the line manager, if not appropriate, one appointed by the Head of department in consultation with the Human Resource manager. Jared Odhiambo was not any of them.

42. Testifying on the manual the Claimant further stated that it at paragraph 10.2.8.6 [a] and [g] provided that an employee shall be given a period of 5 days to attend the disciplinary hearing. The period is extendable at the request by an employee for an additional 5 days. Paragraph [g] provided that any documents that were to be used in the hearing were supposed to be circulated to all, in any case within 24 hours to the hearing. The Claimant asserted that she saw the investigation report after the dismissal. It was not supplied to her at the disciplinary hearing or before. Further that she was not given an opportunity to look at the documents that were being referred to in the proceedings as and when they were referred to or at all.
43. Cross-examined by counsel for the Respondent, the Claimant stated that she worked for the Respondent as a Community Mobilization Officer. She was familiar with policies and internal procedures of the organization therefore.
44. The Claimant admitted that reasons for the twenty-one [21] days' suspension were given to her.
45. As regards the response that she was called upon to make, she stated that though she responded, she was prejudiced as the two days she was given were too short a time.
46. Teresa Muthomi was the head of Jiko and lamps project. She reiterated that she [the Claimant] was only involved once in the distribution of jikos, however she would not remember the exact date, only the location which was in Uganda.
47. As regards the USD 747, the Claimant stated that the money was received from the students with the authority of her Director Ms. Aisha. She sought authority from her to spend the money, spend to safeguard the reputation of the organization. Whether in giving the authority her line manager was in violation of organizational policy, she was not aware.
48. The Claimant reiterated her testimony that she duly accounted for the funds and even handed in the balance.
49. She stated that she was not given any report from the field at any time. She remembers that she met the investigators, however, they did not give her any documents. The Respondent only released the minutes of the disciplinary hearing and other documents to her after the dismissal.
50. It was her contention that she called for the documents at the meeting but they were not availed to her.
51. The Claimant contended that she wanted to have a witness from outside the organization but she would not because the notice to show cause letter forbade it. The letter required her to get along with a colleague to the meeting, she did not manage as none of them would agree as they had been instructed not to talk to her.
52. She further contended that the alleged anonymous letter was not brought to her attention at any time prior to the dismissal. It was not even mentioned during the hearing. It was brought forth after the dismissal.
53. She asserted that she was not a member of the procurement committee. That though the email correspondence at page 26 of the Respondent supplementary bundle of documents indicates her name as among the committee members, her stint in the committee was only for a year. Then there was no procurement policy. Referred to the policy document at page 1 of the supplementary bundle of documents, she stated that the document was never approved by the board.
54. Under re-examination by her counsel, and shown the notice to show cause letter, the Claimant stated that she was supposed to respond to it by 5 p.m. of 15<sup>th</sup> May 2017. She was not advised that if the time was not adequate, she would seek for an extension. Further that she had never seen any policy document and trained on it.
55. Yearly people would be picked from departments to be representatives in the committee.

### **THE RESPONDENT'S CASE**

56. Two witnesses testified for the Respondent. The 1<sup>st</sup> witness was Jared Odhiambo. The witness introduced himself to court as a forensic auditor with 12 years' experience. The witness sought to have his witness statement dated 4<sup>th</sup> February 2019 adopted as his evidence in chief, and the Respondent's documents filed under the two lists dated 19<sup>th</sup> February 2019 and 8<sup>th</sup> September 2021 as the Respondent's documentary evidence.
57. The witness stated that at all material times, he was engaged by Crowe Erastus & Company [formerly known as Howarth Erastus & Company] Certified Public Accountants as a consultant to undertake a forensic audit relevant to the instant matter.
58. The witness contended that Crowe Erastus was engaged by the Respondent in March 2017 to carry out investigations regarding certain aspects of their operations, thus:
- a) Evaluate procurement processes and activities and assess whether they conform to documented policy; and check reasonableness of policies and verify list of outstanding supplier balances.
  - b) Review the approval process for usage of the Respondent's vehicles and tabulation of mileage covered and purpose of the journeys; and verify if recoveries were made for private usage.

- c) Verify the program costs reported and if they match to activities carried out, including confirming that the intended beneficiaries benefited from the activities/materials distributed.
- d) Evaluate staff field advances and accountabilities and justification of the reported expenditure.
- e) Review staff recruitment process and basis for termination of staff. Verify staff appraisal, training, award and salary adjustment process and justification of the same; review senior staff meeting minutes and communication to the staff.
- f) Evaluate and report on GBM whistle blowing policy and employee complaint procedure.

59. The witness stated that in the course of their investigations, they found that the standard operating procedure had been revised un-procedurally and improperly by the then executive Director as demonstrated by an email dated 29<sup>th</sup> January 2015 and the revised policy copies.

60. The investigators found that procurements in question were not conducted by the procurement committee, as was required by Clause SOP 7.3, nor the new committee that was appointed by the then executive Director [Aisha Karanja] on the 7<sup>th</sup> January 2015. There was no evidence that the procurement committee met, discussed the bids and chose 5 bidders based on the GOM supplier selection criteria.

61. The witness contended that there were procurements that were carried out by the Claimant together with other officers of the Respondent without following the said down and/or prudent procedure that one of such procurements was that in respect of seedlings for the upper Tana project. The procurement was undertaken under the Nature Conservancy [TNC] project for a total sum of Kshs. 3,400,732 and was procured by only two officers – the Claimant and the Respondent’s Administrative officer in charge of procurement [Nancy Muthiani].

62. The witness stated that seedlings were purchased in the dry month of December 2016 and therefore would not successfully natured for full germination and maturity. The seedlings were planned for purchase and planting in the month of October / November for planting during the rainy season.

63. The procurement process that had been initiated in the month of September 2016 was cancelled by the Executive Director by rejecting the local purchase orders that had been prepared on suspicion that the quotations presented by the project officers in charge of tree planting were overpriced. He further stated that the Executive Director ordered for a new process that was not urgently undertaken.

64. The witness stated that on the 6<sup>th</sup> December 2016 the Executive Director sent a team comprising of the Claimant and Nancy Muthiani to verify existence of the seedlings and their prices from the farmers who had initially presented their quotations before the LPOs for seedlings were cancelled. The team prepared a report, in the report it was noted that the GBM tree planting and water harvesting team did not negotiate with suppliers and thus they were not able to obtain lower unit prices.

65. The witness contended that on this basis, the Claimant and Nancy Muthiani proceeded to obtain invoices from suppliers of seedlings upon which LPOs were raised and presented for the executive Director’s approval.

66. On this, the witness stated that the Respondent’s policies and procedures as well as best/prudent procurement practices were not followed in the procurement of the seedlings, and to be specific,

- a) The total value of the tenders/invoices/quotations obtained [Kshs.3,004,732] exceeded the threshold for a simple purchase and should have been taken to the procurement committee for evaluation. The quotations were obtained and evaluated by the two officers and the procurement approved for pay by the Executive Director [Aisha Karanja].

- b) The seedlings procured were not distributed to farmers as intended because the rains had stopped. They were therefore transported to various factories within the region to be kept for later distribution during the rainy season in April 2017. There were no records available to confirm the number of seedlings delivered to each coffee factory. The investigators visited the factories and verified existence of seedlings, however, some had already withered, due to lack of good care. The staff members responsible for the distribution included the Claimant.

67. He stated that during the interviews as part of the investigations, the Claimant] explained that she was only involved in the picking of the seedlings from the suppliers and delivered them to factories. She further indicated that it was not her responsibility to ensure that the seedlings were signed for by the management of coffee factories that received items.

68. On the procurement purchase of Energy Savings Jikos and Solar Lamps, the witness stated that in the month of May 2016 a total of Kshs. 225,000 was spent to purchase 250 pieces for distribution to Respondent’s members who had been trained. The Jikos were single sourced from Rumbani Energy upon basis of the recommendation by the Claimant, without following the procurement guidelines. That of the 250 pieces purchased, only 200 pieces were recorded as received and accounted for in the organization stores records. During the interviews the Claimant indicated that she only gave suggestions that the items be purchased from the supplier as a way of promoting them since the group was a member.

69. The witness stated that some time [June 2016] the Respondent incurred Kshs. 220,000 in purchasing 200 pieces of lanterns for distribution to members who had trained in natural resource management McArther program. Quotations were raised but not executed by the procurement committee as per policy guideline. The tender was awarded to a supplier Kahuru B. Network Women Group despite quoting higher than D. Light Kenya by Kshs.15,480. Nancy Muthiani, the Administrative officer in-charge of procurement was interviewed and that it came out that the decision was made single handedly by the Claimant on the basis of supporting group.

70. The witness alleged that 200 of the pieces were not received in the Respondent's stores. The items were not kept in the stores but in the Human Resource office on the instructions of the Claimant. There was no proof as to the total number of the items received since the invoice was not signed / stamped 'received'. The items were issued to five distribution teams without any record.
71. The witness stated that there was no accountability in the distribution of both the energy saving Jikos and solar lanterns from the stores. From the record that was availed only 39 pieces of 250 jikos and 29 pieces out of 200 lanterns were acknowledged to have been received by the intended recipients by signing. Responsible staff members for these procurement and distribution included the Claimant.
72. On the USD 747, the witness stated that there was a violation of the Respondent's financial management policies and practices that requires income received to be receipted, recorded and banked.
73. The funds were received in cash by the Claimant in September 2016 from a group of students from Sweden who had stayed at the Respondent Langata Training centre. This amount was not receipted and banked despite the fact that the officer was instructed by the Executive Director through an email dated 14<sup>th</sup> September 2016, to collect the cash and ensure it was receipted.
74. The witness stated that interviews held with the Finance manager [Javan Lawala] on 23<sup>rd</sup> May 2017 revealed that only Kshs. 15,560 was accounted for out of the total USD 747.
75. That on interviewing the Claimant, she insisted that she duly accounted for the funds. This despite the fact that there were no records in the finance office to support the claim. That She further asserted that it was not her responsibility to issue receipts.
76. The witness stated that the statements of Pauline Njeri and Javan Lewala that were obtained during the interviews confirmed that the Claimant did not fully account for the funds.
77. The witness testified that upon conclusion of the investigation, they presented a report to the Respondent. Subsequently they were informed that the Respondent had decided to take action against the Claimant and the Executive Director. He attended the disciplinary meeting concerning the Claimant which was held on 19<sup>th</sup> May 2017. His role was merely to explain and give details of their findings.
78. The witness was cross-examined by counsel Njuguna for the Claimant. Counsel referred the witness to page 20 of the minutes and the witness is admission stated that contrary to what he told court that only Kshs. 15,560 was accounted for, the minutes reflect that he told the committee that she returned Kshs. 15,560.
79. That witness identified the document at page 200 of the Respondent's supplementary bundle of documents, as hand written statement dated 18/05/2017, by Javan Mwandawiro. He stated that at paragraph 5 of the statement the witness stated that there was full accountability. That infact there was a refund of over expenditure when the Claimant surrendered the Kshs. 15,560.
80. That the witness [Javan] stated that the balance of Kshs. 10,000 was into the Respondent's Mpesa.
81. He stated further that Lilian [the Claimant] was to ensure the receipt was issued for the funds, however, the responsibility of issuing the receipts fell on the accountant.
82. Referred to page 169 of the supplementary record, the email by the Executive Director the witness stated that from the onset Javan knew that a receipt was to be issued, as the email was copied to him.
83. The witness stated that the Executive Director gave instructions for the expenditure. As a result, she was a relevant witness in their investigations, however they did not have any statement from her. They had sufficient information, therefore there was no need.
84. Lilian [the Claimant] was not involved at all in the initial procurement that was cancelled procurement due to allegations of fraud. After cancellation the she was among those appointed to verify the procurement. She was basically of obeying a command from her boss.
85. The witness stated that at page 4 of the minutes, the Claimant refers to one Peter Misiko, Peter was one of those who were suspected of the fraud.
86. The witness confirmed that one of the persons who participated in the disciplinary proceedings, Lilian Njeri was a board member. The is captured in the minutes as having stated that Kshs.3,000,000 was paid to suppliers upon approval by the Chief Executive Director and the Board. Lilian Njeri was the treasurer. She held the view that a cheque would not be signed if supplies were not made.
87. The witness stated that in the disciplinary meeting, as revealed from the minutes, Lilian Njeri stated that the record was incomplete. Lilian Njeri besides being a member of the Respondent's board, was also a signatory to its accounts.
88. Referring to the documents at page 59 of the supplementary bundle of documents by the Respondent, the witness stated that the documents related to the procurement after cancelled one. The Claimant did not sign any document in regard thereto. The document was signed by the Executive Director only. The document at page 72 [the local purchase order] is prepared by Nanacy Muthiani and approved by the Executive Director.
89. The witness asserted that at the disciplinary hearing his role was limited to tabling the report nothing more, not even calling witnesses.
90. The witness went ahead to state that he called a number of witnesses, one of them Peter Misiko who was one of those that the Director

suspected to be fraudulent.

- 91.** On the purchase of energy jikos, the correct position was that the Claimant only made a recommendation to a person who was in charge of the project, Teresia Muthoni, not that the Claimant single sourced the jikos as stated in paragraph 16 of his witness statement of 8<sup>th</sup> February 2019.
- 92.** The witness acceded that the Claimant never signed on the document[s] regarding the purchase of the jikos [see page 132 – 136 of supplementary bundle – Respondent’s]
- 93.** Nancy Muthiani who featured in his investigations testified in the proceedings as a witness for the Respondent. At page 11 of the disciplinary hearing minutes, the witness stated that the instructions for the purchase of the lanterns came from the Executive Director not the claimant.
- 94.** Nancy Muthiani gave a statement to the investigators. In her statement which is part of the Respondent’s bundle she did not mention about the Claimant. Her statement did not have anything regarding procurement. It only touched on receiving.
- 95.** As regards storage of the lanterns, the witness stated that one Rajura was the store keeper at the material time. The store keeper called Teresa and the Claimant when the goods were being delivered. The investigators did not get a statement from the store keeper. She already left the employment of the Respondent. The lanterns were stored in Human Resource office which was within the premises of the Respondent.
- 96.** Concerning the distribution of the lanterns, the witness stated that at the disciplinary hearing Lilian [the Claimant] was blamed for not keeping a record. In the statement by one of the employees, Paul Thiongó which is part of the Respondent’s documents, on delivery of lamps, only two people are mentioned. The Claimant was not. The witness states that the delivery form had been given to Teresia Muthoni.
- 97.** Finally, in his evidence in cross-examination the witness stated that he was not aware whether the policy document was at any time given to the Claimant.
- 98.** In his evidence in re-examination, the witness stated that clause 8[6] of the employment contract required the Human Resource manager to avail the human resource manual to the Claimant. However, from where he stood, he would not state when the policy was given to the Claimant.
- 99.** He stated that according to the statement of Nancy Mathiani the instructions for the lanterns to be kept in the Human Resource office came from the Claimant.
- 100.** The witness stated that all through Nancy Muthiani was not honest, to an extent that he had to caution that she was misleading the meeting.
- 101.** He stated that initially the Claimant and others were called to verify the procurement, but later they went ahead to procure the seedlings.
- 102.** It was the responsibility of the person who receives the money to pursue issuance of the receipt. The Claimant did not.
- 103.** The Respondent’s 2<sup>nd</sup> witness was Cyrus Kimamo, a former secretary of the Respondent’s Board. The witness urged the court to adopt his witness statement dated 5<sup>th</sup> December 2019 as his evidence. The same was so adopted.
- 104.** The witness stated that in the month of February, 2017 the Respondent received an anonymous letter alleging gross misconduct involving some employees of the Respondent. The information was received just before a strategic planning session which was to run between 22<sup>nd</sup> – 23<sup>rd</sup> February, 2017.
- 105.** He stated that the facilitators of the session [wolfhart Pentz and Kerstin Humberg], had sent out a survey to be filled anonymously. The survey aimed at among other things, to establish the employee’s satisfaction levels. It emerged that the Claimant together with other employees coached other junior employees on how to fill the survey forms, and they were coached to conceal gross misconduct of the Claimant together with other employees.
- 106.** The witness stated that the coaching was however, not one of the listed grounds for summary dismissal of the Claimant. She cannot therefore be heard to say that she was not given an opportunity to rebut the accusation.
- 107.** The facilitators conducted their own investigations by interviewing staff members. The investigations revealed that indeed staff were coached to manipulate the strategic plan. Information touching on misconduct at the work place was received.
- 108.** The matter was considered primarily by the Respondent, a couple of issues emerged including, hostile working environment, procurement policy violations, transport and code of ethics violations, among others.
- 109.** The witness further stated that on the 23<sup>rd</sup> February 2017 the Claimant with 5 [five] others were sent on a one month leave of absence with full pay pending investigations which touched on procurement policy, a hostile work environment, transport and code of ethics violations. As the investigations were not concluded within the month, the leave of absence was extended for a period of one month on two intervals. 22/03/2017 and 21/04/2017.

- 110.** The Respondent engaged the services of an external consultant, Howarth Erastus and Company to conduct a forensic investigation. The Claimant was interviewed by them on the 26<sup>th</sup> April 2017. At the conclusion of their investigations, the consultants handed over their investigation report to the Respondent.
- 111.** The Respondent reviewed the report, and decided to take disciplinary action against the Claimant and the Executive Director. The Respondent did not take disciplinary action against the others, as one Charles Peter Mwangi, the then Senior Programme Officer, resigned in the course of the investigations, Teresia Muthoni Maina, Samuel Kariuki Mungai and Lucy Nyawira Anthony were not summarily dismissed as it was found that the Claimant and the Executive Director were found to bear most responsibility, having had direct involvement in the issues at hand.
- 112.** On the 11/05/2017, the Claimant was issued with a notice to show cause. The notice outlined the specific charges against her. The Claimant in her response simply denied the allegations that were contained in the notice without giving substantive explanations.
- 113.** The Claimant was invited for a disciplinary hearing that was slated for the 19<sup>th</sup> May 2017 by a letter dated 16<sup>th</sup> May 2017, to make representations on the charges.
- 114.** In attendance of the meeting were two external persons, Jared Odhiambo from the consultant organization and Dan Omondi, a Human Resource consultant, who assisted the Respondent in the process. Their role was minimal. They did not participate in the decision making.
- 115.** The witness contended that the Claimant was informed of her right to be accompanied by a representative of her choice and was also allowed to call witnesses. She was given ample opportunity to respond and present her case.
- 116.** Considering the gravity of the issues that were raised against the Claimant and in light of her oral response/representations during the hearing, and her written response, the Respondent decided to terminate her contract. The representations were considered unsatisfactory.
- 117.** On the 22<sup>nd</sup> May 2017, a decision was made to summarily dismiss the Claimant from employment. Through its letter dated 25<sup>th</sup> May 2017, the Respondent communicated the decision to the claimant, and required her to clear with it for her dues to be paid.
- 118.** The terminal dues of Kshs.65,884.50 were not paid out immediately since the Claimant failed to clear with the Respondent. However, this notwithstanding, the Respondent paid the terminal dues through her counsel.
- 119.** Cross examined by counsel Njuguna for the Claimant, he stated that in paragraph 3 of his witness statement he acknowledged that the Respondent inter alia empowers community by first recruiting women groups, have them in their register and empower them by buying seedlings from them.
- 120.** He further stated that the Claimant got involved in the matter when the Executive Director instructed her do procurement. She did verification and procurement.
- 121.** Only the Claimant and the Director were dismissed. The Head of the project, Mercy Karandi, was not.
- 122.** The witness asserted that the document [a survey form] at page 74 of the Respondent's documents was a procurement document. However, pressed further he admitted that it was a summary of the verification exercise that the Claimant conducted following the instructions by the Executive Director.
- 123.** The witness contended that had the Claimant not heeded the instructions of the Executive Director, to go do the verification, she would not have found herself in the situation she is.
- 124.** On the contents of the dismissal letter, the witness stated, true, on the count on seedlings, the letter indicates without specificity that the Claimant and other officers procured without following the standard operating procedures. The letter identified not any single clause with particularity that was breached.
- 125.** Referred to page 207 of the Respondent's bundle of documents, the witness stated that it indicates that the Head of project Mary karanda was involved in the initial procurement that was cancelled. The Claimant was not.
- 126.** Nancy Muthiani was the Administrative officer in charge of procurement. She was therefore by virtue of this position under an obligation to ensure that documentation was proper. This notwithstanding, she was not dismissed.
- 127.** On the solar lanterns issue, the witness stated that the charge was that the Claimant and Nancy Muthiani procured unprocedurally. Nancy Muthiani implicated the Claimant, indicating that they did the procurement together.
- 128.** The Claimant's name does not feature anywhere on the documents regarding the purchase of the lanterns.
- 129.** Referred to page 35, of the Claimant's documents [*minutes 10 of 11*] the witness confirmed that in response to a question by D.O. as regards who authorized the purchase, Nancy Muthiani stated that it was the Executive Director in consultation with Teresia Muthoni who was in charge of the program. The Claimant is not mentioned. Nancy Muthiani was speaking here as the organization's witness.
- 130.** According to the procurement policy document, the Respondent presented, [*see page 8*] price is not the only considerable aspect in awarding a tender.

131. Concerning the storage, the witness stated that the Human resource office is within the Respondent's Headquarters building. The Claimant was not the occupant of the office. The items did not move from the office.
132. The witness stated that in the notice to show cause, the charge on the energy saving Jikos only related to procurement thereof, not distribution. The issue of the distribution was brought up at the hearing. The Claimant complained about this, nonetheless the committee proceeded to convict her on the same.
133. The Claimant was not given a copy of the investigation report.
134. On the USD 747, the witness stated that it would have been wrong for the Claimant to have a receipt book. She was not in charge of the receipt books. Without a receipt book, she would not be able to issue any.
135. For lanterns, her only mistake was that she made a recommendation to other members. However, other members had a right to decline the recommendation.
136. Under re-examination, the witness stated that Nancy Muthiani was in charge of procurement.
137. When the Executive Director instructed the Claimant via email to have the receipt issued and use the money the instructions were right.
138. The investigations did not reveal any wrong doing on the part of Nancy.
139. The fact that Kaulo 3 was a member of the Respondent did not give it an automatic qualification for tenders.

### **Analysis and Determination**

140. From the pleadings, evidence by the parties and the number of points that have been raised and wide field that has been covered in arguments by counsel for the parties, the following broad issues, commend themselves as the issues for determination, thus:

- (i) Whether the dismissal of the Claimant from her employment was procedurally fair.
- (ii) Whether the dismissal was substantively fair.
- (iii) What reliefs if any are available to the Claimant?
- (iv) Who should bear the costs of this suit?

### **Whether the dismissal was procedurally fair.**

141. Section 45 of the Employment Act dictates that no employer shall terminate the employment of an employee unfairly. Section 45 [2] [c] provides the foundation for insistence of a fair procedure, if a termination of employment were to be considered fair – **Lydia Moraa Obara -vs- Tusker Mattresses Limited [2021] eKLR**.

142. Section 41 of the Employment Act, 2007 supplies the structure of procedural fairness, it provides:

*“(1) subject to section 42 (1), an employer shall, before terminating the employment of an employee, on 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 preferring 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 representation 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.”*

143. There is now firm jurisprudence that the procedure provided for in the above stated section is mandatory and non-adherence to the same by an employer has the effect of rendering the termination of an employee's employment or summary dismissal of an employee unfair, pursuant to the provisions of section 45 of the Act. As regards the mandatory nature of the provision, the Court of Appeal in the case of **Prof. Macha Isunde -vs- Lavington Security Guards Limited [2017]eKLR**, the Court of Appeal stated:

*“There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on employers in matters summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43] – prove that the reasons are valid and fair [section 45] – prove that the grounds are justified [section 47 [5], among other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and hearing before termination [emphasis mine].*

144. One can easily get an impression from the stated Court of Appeal decision that the procedure contemplated in the section entails two components. That cannot be true, as said by this court elsewhere, the procedure has three components, the information, hearing and

consideration components. The procedure runs from the contemplation by the employer to act against the employee to the communication of the decision by the employer to employee.

145. Worth stating that the promulgation of the Employment Act, 2007, imported applicability of the tenets of natural justice into employment contracts. A discussion of the import of section 41 on a matter cannot be done in isolation from other provisions of the Act, the provisions of the Fair Administrative Actions Act, relevant international standards, and provisions of the Constitution and more specifically those that relate to fair hearing.

146. It is through these lens that I shall determine the procedural fairness or otherwise of the dismissal in issue.

147. The Claimant's counsel argued that the Claimant was not accorded a fair hearing by the Respondent. Fair hearing requires that the employee be given sufficient opportunity to prepare. To buttress this he cited a holding in the case of **David Wanjau Muhoro -vs- Ol Pajata Ranching Limited [2014]eKLR** quoted **Ruth Adhiambo Apindi -vs- Unilever Kenya Limited [2020] eKLR**, thus:

*“First the right to sufficient time between the date of service to show cause and the date of hearing to prepare for the hearing, second THE RIGHT TO FULLY UNDERSTAND THE CHARGES. General charges such as dishonesty, fraud and fraudulent activities are vague and offer an employee no opportunity to respond intelligibly. Lastly, the employee has a right to documentation. The employee must be given the documents the employer intends to rely on at the hearing.”*

148. It was argued that the Claimant was put on suspension from employment for a period of three months with effect from 23<sup>rd</sup> February 2017 in total disregard of the Human Resource Manual which provided for a maximum of 21 days. The principle of fairness was violated.

149. Counsel for the Respondent in response to this argument submitted that since the investigation process was confidential and its integrity had to be maintained, the Claimant was requested to remain away from office and to avoid interacting with staff and stakeholders on the Respondent's official business. Expressing the importance of suspension pending investigations counsel cited the holdings in the case of **Elinathan G. Kairu -vs- Nakumatt Holdings Limited [2017]**, thus:

*“The essence of any investigations at the workplace is to address an issue apparent. The employer has the right to send any employee on leave to allow for investigation such as to allow the removal of such an employee from the shop floor for independent investigations. See Saundu Amolo -vs- Principal Namanga Mixed Day Secondary School and 2 others [2014] eKLR. The rationale is that a suspension must be clear as to its purpose. It must be clear as to whether a sanction or an interim measure is to allow for investigations. Once the purpose of the suspension is addressed, the employee must be taken through the motions of section 41 of the Employment Act, 2007.”*

150. In her submissions, counsel for the Respondent did not address this court on whether or not the suspension went beyond the period that was stipulated in the Human Resource Policy Manual as argued by the Claimant's counsel and if it did, what would be its implication regarding the procedural fairness of the process leading to a sanction against an employee.

151. The Respondent placed before this court its Human Resource Policies and Procedure Manual. I have had an occasion to consider its postulations regarding suspension. Under clause 10.2.5.4 it provides that suspension may take two forms, disciplinary suspension and investigatory suspension. What happened here is the latter. Investigatory suspension is provided for in detail under clause 10.2.5.4.2 thus:

*“[a] An investigatory suspension may be warranted in circumstances where an employee is suspected of an offence serious enough in or out of the workplace to indicate termination. In this instance, the employee will be suspended pending the outcome of the investigation.*

*(b) If the case against the employee is dropped, or if the investigation concludes that no disciplinary action is indicated, the employee is entitled to reinstatement with back pay for the work hours missed [if applicable].*

*(c) If the case is deemed valid, the suspension will be unpaid and if necessary, termination be invoked.”*

152. The manual expressly provides that periods of suspension should not exceed twenty-one [21] days.

153. The Respondent's witness was cross-examined on this point, suspension period. He indeed confirmed that the Claimant's suspension lasted for more than the 21 days. The various letters produced by the Respondent were also testament of this.

154. My view on this point is that investigatory suspension is an act that falls outside the ambit of section 41 of the Employment Act, it cannot aid a determination as to whether or not the procedure contemplated under the said provision was adhered to or not. However, if it is proved that a suspension of an employee was in breach of the terms of the employment contract, or without reasonable and proper cause, a common law cause of action can be attracted in favour of the employee, cause of action independent of, and sometimes preceding his termination. For instance, the employee can potentially seek to claim financial loss resulting from unfair and or unprocedural pre-dismissal treatment which encompasses suspension.

155. The Claimant's counsel submitted further in demonstration that the dismissal was procedurally unfair, that the Respondent denied the Claimant adequate period to attend the disciplinary hearing. Clause 10.2.5.6 of the Respondent's Human Resource policies and procedure manual provided for a 5 days' notice, but the Claimant was given only 2 [two] days. The invitation letter to attend the disciplinary meeting dated 16<sup>th</sup> May 2017 was issued to the Claimant on the 17<sup>th</sup> day of May 2017 and required her to attend the meeting on the 19<sup>th</sup> May 2007.

156. The fact of the notice being two days' one is not challenged both in the evidence by the Respondent and submissions by its counsel. In its submissions all that was raised on this point is that the Claimant did not challenge the shortness of the notice or seek an extension of time.

157. Clause 10.2.5.6 of the Respondent's Human Resource Policies and Procedure Manual, provides for a detailed hearing process. Sub-clause [d] which I have keenly considered provides:

*"The employer shall be informed by letter giving at least [5] five working days' notice that a hearing is to be held. The employee may request an alternative date to allow up to an additional five working days to prepare their case or if the representative is unavailable."*

In the entire of its provision on formal hearing, the manual suggests not that the employer [read Respondent] had the liberty for any reason whatsoever to issue to an employee a shorter notice than is contemplated under sub-clause [a]. The 5 [five] days' notice period was the minimum that the Respondent would accord.

158. The court has struggled to understand the reason or justification why the Respondent would want to depart from its own provided procedure, it sees none. The Respondent did not even demonstrate any if it ever existed.

159. With due respect, to counsel for the Respondent, the submission that the Claimant cannot be heard to raise the issue of the notice as she did not challenge the same or seek for an extension does not make sense. First, in my view stipulations of a Human Resource Manual in a workplace becomes part of an employment contract terms. Non-compliance of any of the stipulations of the manual, is a breach of a contractual term. It cannot be a defence at a hearing of a claim arising out of the breach, for the employer to assert that the employee did not challenge the breach. Second one wonders challenge where? The manual itself did not provide for a mechanism for such challenge and third, established policies and procedures at the workplace are meant to aid the sails of the employer-employee relationships, acquire and maintain, precision, certainty and consistency, the thinking expressed in the submissions does not appreciate this.

160. Imperative to state that it is an implied duty on the employer to adhere to the tenets of natural justice. The right to fair hearing, which is part of the procedural fairness in matters termination of an employee's employment requires that an employee be given reasonable time to prepare for his or her defence adequately. Assuming that there was no specific notice period provided for, considering the nature of the matter before me as can be discerned from the material brought forth by the parties, I would still hold that the notice of two days was not sufficient for preparation for an intelligible defence. The holding in the Olpajata case cited above is squarely applicable in this matter.

161. Further on procedural unfairness, counsel for the Claimant submitted that contrary to the provisions of the Human Resource Policies and Procedure Manual, the Respondent failed to circulate the investigation report, witness statements, field reports and other documents that were intended to be used in the disciplinary hearing, to the Claimant at least 24 hours before the hearing.

162. In response to this position taken by the Claimant, the Respondent's counsel submitted that the Respondent followed the provisions of its manual duly, and that the Claimant did not demonstrate that she suffered any prejudice at all as a result of not being given any of the documents as alleged.

163. Having said this I must turn to consider what the Respondent's manual provided for in regard to documents that are intended to be relied on during a disciplinary hearing. Clause 10.2.5.6 [g] provides:

*"Any documents to be used at the hearing by either side including the investigator's report, should be circulated to all those attending at the earliest opportunity, in any case, 24 hours before the hearing."*

164. I find this stipulation to be one that is truly in accord with the tenets of natural justice, the constitutional provisions on fair trial and the fair procedure contemplated in the Employment Act. It postulates a right in favour of an employee faced with a disciplinary process. It was in my view intended to ensure a fair process. It does not give the Respondent the liberty to choose when to apply it and or in whose favour. It is coached in a manner that the furnishing of the documents becomes a matter of course.

165. One cannot be off mark to assert that it is the legitimate expectation of employees to expect the employer to adhere to the terms of its Human Resource Policies and Procedure Manual just like the employer would legitimately expect of them. To allow the employer the liberty to decide when to apply or not the terms which are even coached in mandatory terms would breed discrimination and chaotic relationships at the place of work.

166. This court considers that, the Respondents own witness [RW2] admitted in cross-examination that the documents, including the investigation report were not given to the Claimant, the accusations that were against the Claimant required her to have the documents in order to adequately prepare for and put forward her representation on them, and in respect of the USD 747 as clearly comes out at pages 21 & 22 of the minutes of the disciplinary hearing, clearly expressed that she needed the documents that she had given Javan for purposes of accounting for the sum, placed before the committee, and that for unexplained reasons the documents were not availed, and come to a compelling conclusion that she was not accorded a fair hearing. I agree with the decision in **David Wangare Muhoro -vs- Ol Pajeta Ranching Limited [2014] ekLR** and **Rebecca Ann Maina & 2 others -vs- Jomo Kenyatta University of Agriculture & Technology [2014] ekLR**, that an employee has a right to documentation. He/she must be given the documents the employer intends to rely on at the hearing. This becomes even more imperative when the nature of the accusation is that they are heavily anchored on documents, the Human Resource Policies and Procedures provide for an outright entitlement to the documents by the employee, and where the employee either before or in the course of the disciplinary proceedings has demanded that the documents be availed.

167. The Claimant contended and this was not challenged, that even during the disciplinary hearing, she was not shown the documents that were being referred to.

168. It was the Claimant's position, which position was buttressed by her counsel's submissions that unprocedurally, the Respondent allowed strangers to drive the disciplinary process, which according to the manual is supposed to be an internal matter, to her prejudice. Counsel submitted that clause 10.12.2.2 [6] stipulates:

*"The procedure is internal to GBM and a part from external trade union representatives does not allow for any external representations."*

169. In my view representation means standing or acting for another, especially through delegated authority. Looking at the circumstances of the matter in their whole, it cannot be said that the investigator and the Human Resource Management consultants who were drawn into the disciplinary process, were so as representatives for the Respondent. I am unable to borrow the Claimant's counsel's submission on their role in the proceedings and its connection to the clause cited.

170. If the Claimant were to complain of their participation in the proceedings, then the complaint would be the extent of their participation, but since the Claimant's counsel has not raised this, I will not delve any further.

171. It was further submitted on behalf of the Claimant that the Respondent introduced new charges which were not in the notice to attend the disciplinary hearing, at the hearing to the prejudice of the Claimant. According to counsel, the letter dated 16<sup>th</sup> May 2017, had three specific charges that the Claimant was invited to defend herself over, namely, participating in the procurement process of solar lanterns without following GBM standard operating procedures; collecting and failing to account USD 747.

172. As a result of the introduction of new charges, the dismissal of the Claimant got anchored on other charges that she never defended or adequately defended herself against. The new grounds for dismissal obtained in termination letter. They included:

*(i) She received the lanterns without necessary documentation and had them stored in the Human Resource office instead of GBM store leading to lack of accountability in their receipt and distribution.*

*(ii) She undertook the procurement through single sourcing without following the laid down procurement policy.*

*(iii) She in spite of clear email instructions from the Executive Director to ensure that the clients were issued with a receipt, none was issued.*

173. Other than submitting that fair and proper procedure was adhered to in that the Claimant was informed of the issues raised against her, given an opportunity to make representations but made unsatisfactory representations, little care was given to making a specific response to this pertinent issue.

174. The letter [notice to show cause] dated 11<sup>th</sup> May 2017, read in part:

*"Further to your leave of absence and subsequent independent investigation the Green Belt Movement [GBM] Board wishes to notify you the following charges raised against you:*

*1. Tree seedlings for Upper Tana Project.*

*" Together with other officers you participated in procurement process purchasing tree seedlings for the Upper Tana Project which was done without GBM's Standard Operating Procedures [SOP]. Further that upon procurement the seedlings were distributed to coffee factories without any form of accountability. The procurement amounted to*

*Kshs.3,004,742.*

*2. Purchase of solar lanterns.*

*" Together with other officers you participated in the procurement of solar lanterns valued at*

*Kshs.220,000 under the McArthur project which was done without following GBM's Standard Operating Procedures.*

*3. Purchase of Energy saving jiko.*

*" Together with other officers you participated in the procurement of energy saving jikos valued at*

*Kshs.250,000 under the McArthur Project which was done without following GBM's Standard Operating Procedures.*

*4. Collecting and failing to account for cash [USD] on 16<sup>th</sup> September 2016, at Lang'ata Training Centre.*

*" You collected USD 747 in cash from clients on or about 16<sup>th</sup> September 2016, at Lang'ata Training Centre and failed to account for the same.*

175. From the earliest point, these are the charges the Claimant was called upon to answer to and she did respond through her letter dated 20<sup>th</sup> April 2017. In my view, considering that the issuance of the letter was post-investigations, and after the board's consideration of the report and other factors, any disciplinary proceedings and action by the Respondent would be upon basis of the counts on the notice to show cause. If there were to be any additional charges then the same would be subject of a further notice to show cause, as that is what fair process and clarity would entail.

176. The notice to attend a disciplinary hearing addressed to the Claimant was enveloped in the Respondent's letter dated 16<sup>th</sup> May 2017. The charges that were outlined therein as the ones the Claimant was to answer to at the hearing were word by word in content as they were in the letter dated 11<sup>th</sup> May 2017.

177. The information component of the fair procedure envisioned in section 41 of the Employment Act requires that the employer with specify and clarity to inform the employee the grounds that are intended to be basis for a sanction against the latter. This will enable the employee to prepare adequately for the representation contemplated under the section. For purposes of the disciplinary hearing concerning this matter the grounds were put forth on the latter dated 16<sup>th</sup> May 2017, the Respondent would not be permitted to expand the grounds at the hearing or at any stage in course of the hearing or thereafter, without it being preceded by a notice, and an invitation extended to the Claimant to prepare and respond to the same.

178. The court has given serious consideration on the contents of the dismissal letter, true as counsel for the Claimant submits the grounds upon which the dismissal was anchored, are expressed to have occurred appear in a more expanded way. Items that would have otherwise formed independent grounds upon which the Claimant would have been called upon to defend herself against are brought on board. No doubt, this ran counter to, fair procedure, the tenets of natural justice, the Claimant's right to fair administrative action and the right to fair hearing.

179. It was further submitted that the charges against the Claimant were too general lacking specificity. This denied the Claimant a fair opportunity to prepare for an adequate defence.

180. In all the counts, the Claimant was accused of flouting the Standard Operation Procedures. The breached procedures were not mentioned specifically. Without specificity one would not adequately prepare for her defence and defend herself adequately.

181. By reason of the premises hereinabove, I am convinced that the summary dismissal was not procedurally fair.

#### **Whether the dismissal was substantively unfair.**

182. Counsel for the Claimant submitted that the Claimant's dismissal was without a valid and fair reason contemplated under section 43 and 45 of the Employment Act. It was a burden on the Respondent to prove the reason[s] and that they were fair and valid.

183. Counsel for the Respondent submitted that section 45 [2] of the Employment Act provides that termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason[s]. The standard of proof is on a balance of probabilities. She placed reliance on the case of **Joseph Munyao Kayulo -vs- Kenya Teachers. Service Commission**.

184. As regards the duty of the court in determining the appropriateness of the sanction by an employer against an employee, counsel cited the case of **Evans Kamadi Misango -vs- Barclays Bank of Kenya Limited [p2015] eKLR** where the court held:

*“To my mind, the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The HULBURY's Laws of ENGLAND [4<sup>TH</sup> EDITION VOLUME 16] at page 482 expounds this principle as follows:*

*“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts. It must make a wide inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach [the range of reasonable 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 another; the function of a tribunal as an industry jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the bond of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the bond the dismissal is fair but if it falls outside the bond, it is unfair.”*

185. The test Court applied in the matter cited by counsel for the Respondent is the “reasonable employer test” that was enunciated as follows by Denning MR in **British Leyland UK Limited -vs- Swift [1981] 1RLR 91 at 93:**

*“Was it reasonable for the employer to dismiss [the employee]? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.”*

186. Counsel for the Respondent cited a further holding by the court in the same matter thus:

*“It is not the role of the court to re-enact the internal disciplinary process already undertaken at the workplace. The responsibility of the court is to examine the legality and reasonableness of the action taken by an employer against an employee and if the set of standards are satisfied, then the court will not interfere ..... and the court finds that the Respondents had a valid reason for terminating his employment.”*

187. The court was in essence stating that the discretion to dismiss lies primarily with the employer; the discretion must be exercised reasonably and interference should not lightly be contemplated. The deferential approach.

188. Looking at the provisions of the Employment Act, it is not difficult to conclude that the approach posted by the Respondent is not rooted therein. In my view, considering validity and fairness of the reasons – section 45, and justice and equity of the decision – section 47 [5] requires a broader approach than that would in determining reasonableness. This view is emboldened by the constitutional court of South Africa holding in **Sidumo -vs- Prestenburg Plantinum mines [2007] 12 BLLR 1097** thus:

*“There is nothing in the constitutional and statutory scheme that suggest that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal as an impartial adjudicator ..... Any suggestions by the Supreme Court of Appeal that the differential approach is rooted in the prescripts of the LRA cannot be sustained.”*

189. The court’s decision is therefore reached not with reference to the evidential material that was placed before the employer at the time of its decision but on the basis of all the evidential material before the court. To the extent that the proceedings are a hearing *denovo*. In my view this is an approach that will deliver justice.

190. Section 43 of the Employment Act places an obligation upon the employer to prove the reason or reasons for the termination, and where the employer fails to do so, then the termination shall be deemed unfair within the meaning of

section 45.

191. Section 44[4] provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal of an employee. However, it is imperative to state that the list therein is not an exhaustive list. An employer can summarily dismiss an employee on an account outside those in the catalogue for as long as the account has a characteristic as I will demonstrate hereinafter.

192. It was the Respondent’s case that Claimant’s acts and or omissions that were in issue during the investigations, at the notice to show cause level and hearing amounted to grounds for summary dismissal.

193. It is not enough for an employer to state that an employee committed one or more of those actions obtaining in the list provided for in section 44 [4] of the Employment Act 2007, or its Human Resource Policy. An employee’s misconduct does not inherently justify a summary dismissal unless it is “so grave” that intimates the employee’s abandonment of intention to remain in employment. In **Laws -vs- London Chronicle Limited [1959] 2 ALL L.R. 285** the English Court of Appeal stated the following at page – 287.

*“Since a contract of service is but an example of contracts in general so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable the question must be whether the conduct complained is such as to show the servant to have disregarded the essential conditions of the contract of service.”*

194. Whether an employee’s misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances, the contextual approach –

**Darius Kiseu Mwamburi -vs- Co-operative Bank of Kenya Limited [2021] eKLR.**

195. In **Mckinley -vs- BC Tel** ..... it was held:

*“29. When examining whether an employee’s misconduct justifies his or her dismissal, courts have considered the context of the alleged insubordination within this analysis a finding of misconduct does not by itself give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such the employment relationship could no longer viably subsist.”*

196. By reason of the above premises, this court is enjoined to consider the real presence of the Claimant’s alleged acts of omission or commission, the context within which they occurred, and the gravity of the same.

197. As indicated in the notice to show cause and the notice to attend a disciplinary hearing, the first charge against the Claimant was that in relation to procurement of seedlings for the Upper Tana Project. The accusation was to the effect that the Claimant with other offices participated in procurement process of purchasing tree seedlings for the project. How the Claimant got involved in the project is not in contest. She was instructed to undertake a verification on a procurement that had already been initiated, following allegations of fraudulent activities by the officers who were tasked to do the procurement. The instructions were from the Executive Director. She obliged and carried out the exercise, and consequently handed in a report.

198. As regards her involvement in the procurement as was alleged, I have given serious consideration on the contents of the disciplinary hearing minutes and the evidential material before this court and find it difficult to see anything demonstrating the Claimant’s active or any participation in the procurement process. In fact, the Respondent’s witnesses’ testimony under cross-examination attests to this. They confirmed that all the procurement documents that the Respondent placed before this court were not executed by the Claimant save for the seedlings and identification form at page 74 of the Respondent’s supplementary bundle of documents, which had nothing to do with the procurement.

199. The Respondent's 2<sup>nd</sup> witness asserted that action was taken against the Claimant and the Executive director because they bore the highest responsibility in relation to the subject issues that were. Looking at the disciplinary proceedings, the documents placed before this court by the Respondent, and the evidence of its witnesses, more especially under cross examination, there is nothing that can be basis for this assertion, in fact a critical look at them point at the innocence of the Claimant.
200. The Respondent's 1<sup>st</sup> witness alleged that after the verification mentioned hereinbefore, the Claimant and Nancy went on to collect orders from suppliers and forwarded the same to the Executive Director for approval and payment, the specific suppliers are not mentioned, the orders were never placed before this court. I make an adverse inference that they were not in existence.
201. In the dismissal letter the Respondent brought on board a further ground **"upon procurement the seedlings were distributed to coffee farmers without any form of accountability"**. Thus, court has had sight of the GBM correction form at page 73 of the Respondent's supplementary bundle of documents. The form is clearly an accounting form, signed by Nancy Muthiani. It shows the quantity of seedlings picked from which supplier and by which motor vehicle. From the material before this court, one is unable to see any policy or item of procedure that required the Claimant and not the person who signed this collection form, to prepare distribution forms. Nancy Muthiani was the Administrative Assistant in charge of procurement.
202. In sum I find that the Respondent did not prove that the alleged misconduct [read ground] was existent and applicable against the Claimant, and that it was a valid and fair ground in the circumstances of the matter. The Respondent failed to discharge its burden under section 43 and 45 of the Act.
203. The Respondent's witnesses and its counsel in her submissions, asserted that the seedlings were taken to the farmers without a record being kept, in breach of the Respondent's Procurement Policy and Standard Operating Procedures, which policy and procedure specifically is what they chose not to indicate to this court.
204. The 2<sup>nd</sup> Charge that the Claimant faced, and which she defended herself against at the disciplinary hearing, was that which related to the purchase of solar lanterns. It was the Claimant's counsel's submission that at the disciplinary hearing, Nancy Muthiani was the witness who was presented to tender evidence in support of the charge. That however her evidence before the Committee totally exonerated the Claimant.
205. I have considered the investigator's evidence [*at page 10 of the minutes*] it tells the basis of his recommendation on the culpability of the Claimant on the alleged irregular purchase of the lanterns. It was based on the view that there was evidence that the Claimant directed that the procurement be given directly a particular group, Kahuro B, Network Women Group.
206. True, it clearly emerges from the minutes that Nancy Muthiani was intended to be the investigator's star witness in relation to this specific accusation. The witness got very categorical, the directives on the purchase were from Aisha Karanja after they consulted with Teresa Muthoni who was in charge of the program-*page 11, minute 6*. For the categorical answer which exonerated the Claimant, the investigating officer [JO], at *minute 7* seems disappointed with the witness thus 'I think Nancy is misleading this committee. Did you write a statement?' The witness gave him an answer to this which in my view further fortified the Claimant's assertion of innocence. She said her statement to the investigators was all about receiving not procurement.
207. Before this Court, the Respondent's witness failed to put forth sufficient evidence to link the Claimant with the purchasing process of the Respondent. I take the view that even before the Committee, the evidence was lacking, looking at the minutes and more specifically the evidence of their star witness.
208. In fact, under in his evidence under cross examination, the Respondent's witnesses admitted that the Claimant only suggested that Kahuro B be considered since it was a women group, and a member of the Respondent.
209. By reason of this premises, I hold that this alleged reason that clearly formed basis for the dismissal was neither valid nor fair.
210. As stated hereinabove, the Respondent decided to bring on board the issue receiving of the lanterns at the floor of the disciplinary proceedings. I have found that notwithstanding this, the Claimant was convicted of an alleged misconduct in relation thereof. In my view, a ground for dismissal introduced in such a manner, cannot by any means be deemed a valid and fair reason pursuant to the provisions of section 45 of the Act.
211. I have considered further that the Claimant did admit before the Committee that she suggested that the lanterns be kept in the HR office. Further that explained to the committee that her suggestion was prompted by the fact that because at that same week they had lost some items from the store. The suggestion was informed by the need for the safety of the lanterns.
212. Before there committee there appears to have been no suggestion that the theft did not occur and that therefore the suggestion was without reasonableness, and justification. Before this court, there was not evidence too to suggest that. Where can there be fairness in a situation where an employee is castigated for trying to ensure safety of her employer's property? None can be seen.
213. The Claimant was accused of failure to account for the USD 747. There is no contest that the authority to spend the money was given by the Executive Director, for a reason. There is no doubt that the investigators had a chance to interview and take a statement from the accountant, one Javan Lewala [*at page 200 of the Respondent's documents*]. I have carefully considered the contents of the witness statement, it clearly shows that the funds were duly accounted for. The Claimant even surrendered a balance of Kshs.15,560
214. The investigator [RW.1] admitted under cross examination that indeed contrary to his position in his evidence in chief, his evidence to the committee was that the Claimant had returned the foretasted amount, that had remained unutilized.

215. With this I am not convinced that a reasonable employer would dismiss an employee on an allegation of failure to account for the funds.

216. It clearly emerged from the evidence of the Claimant's witnesses more specifically under cross examination that the Claimant had no authority to issue receipts. Issuing receipts and keeping receipt books was the sole responsibility of the accounts department. Reasonable employer would not dismiss an employee for failing to do a thing over which she clearly didn't have authority to.

217. Just as there was no evidence clearly linking the Claimant to the procurement of the seedlings and the solar lanterns, upon evaluation of the evidence presented on charge of procurement of the Jikos, I do not see any sufficient evidence that was before the Committee, or that has been placed before me, to suggest any link.

218. In sum, I find that the reasons that were advanced as reasons for the dismissal of the Claimant from employment lacked validity and fairness. The dismissal was therefore substantively unfair.

219. This I must state, looking at the evidence that was placed before the Disciplinary Committee, the happenings thereat, and the material placed before this Court, one sees the Respondent's workplace as one where cannot easily discern which employee was performing which tasks. A huge systemic lapse. Put in other words a grave deficiency in its operational policies and systems. The Respondent ought to take cognizance of the position that has been taken by Courts that anything a product of such deficiency should not be visited upon the employee. In the case **Lydia Moraa Obara vs-Tusker Mattresses**, this Court as much, and in **Grace Gacheri Muriithi vs- Kenya Litration Bureau [2012] eKLR**, it was held;

*“ It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributed to the deficiency in the employer's operational policies and systems.”*

#### **OF THE RELIEFS AVAILABLE TO THE CLAIMANT**

220. The Claimant seeks for a compensatory relief pursuant to the provisions of section 49[1][c], of the Employment Act. She states that owing to the fact that the dismissal was unfair and without any valid reason, the maximum compensation contemplated under the provision shall suffice. A twelve months' gross salary.

221. Having found the dismissal as being both substantively and procedurally unfair, and considering the circumstances of this matter, I am persuaded that the relief is grantable. I am cognizant of the fact that a grant of the relief is discretionary, dependent on the peculiar circumstances of each case. I have considered that, the Claimant worked for the Respondent for a period of more than twenty years, she was dismissed without a valid and fair reason[s], the Respondent heavily deviated from what the law required of it in matters dismissal process, and that the Claimant did not contribute in any manner towards the dismissal, and I am of the view that a grant of 7[seven] months gross salary will serve justice.

222. Having found that the dismissal was unfair, I am not persuaded by counsel for the Respondent's submissions that the notice pay should not be made by the Respondent on an account that when one is summarily dismissed, he or she is not entitled to notice pay. To agree with such reasoning in the face of a finding that the dismissal was unfair would be tantamount to aiding the Respondent benefit from his own defaults. I am not prepared to accord such an aid. The Claimant is entitled to one month's salary in lieu of notice.

223. The Claimant has sought for payment for the reminder of her contract. Jurisprudence within our jurisdiction is now firm, the relief is not grantable, and more especially when it might appear to be a double compensation owing to a compensation under section 49[1][c] of the Act. However, in my view, the jurisprudence needs to be relooked.

224. In the upshot Judgment is hereby entered for the Claimant against the Respondent in the following terms;

- (i) A declaration that the dismissal of the Claimant from her employment was procedurally and substantively unfair.
- (ii) Compensation pursuant to section 49 [1] [c] of the Employment Act, Kshs.477,750.
- (iii) Notice pay – Kshs.68,212
- (iv) Interest on [b] and [c] at court rates from the date of this Judgment till full payment.
- (v) Costs.

**DATED, SIGNED AND DELIVERD VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

**In Presence of**

**Mr. Njuguna for the Claimant.**

**No appearance for Respondent.**