



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS OF KENYA**

**AT NAIROBI**

**CAUSE NO. 561 OF 2019**

**JOHN JAOKO OTHINO.....CLAIMANT**

**VERSUS**

**INTRAEALTH INTERNATIONAL.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. On or about the 31<sup>st</sup> day of May 2012, the Respondent offered the Claimant employment as a procurement officer. At its seventh year the employer-employee relationship determined when the Claimant got dismissed from the employment. Aggrieved by the dismissal and holding that the same was wrongful and unlawful, he sued the Respondent through a statement of claim dated 27<sup>th</sup> August 2019, wherein he sought;

**I. That the Court do find the reasons and procedure for the termination of the Claimant's services was wrongful.**

**II. That the Court do find that the Respondent's action of deducting and refusal and or neglecting to pay the Claimant his 13.9 accrued leave days unlawful and untenable.**

**III. That the Court do find that the Respondent's action of demanding payment of the alleged loss of Kenya Shillings 442,600.00 unlawful and untenable.**

**IV. That as a result this Court do hereby order that the Respondent to pay the Claimant all his terminal dues and other accrued unpaid dues as computed below;**

**[a]. Accrued 13.9 leave days- Kshs. 180,290**

**[b]. One-month salary in lieu of notice- Kshs. 287,043.80**

**[c]. Damages due to wrongful termination 12 months' salary- Kshs. 3,444,535.76**

**[d]. General, Aggravated, Exemplary, and or special damages.**

**[e]. Issuance of a proper Certificate of Service.**

**[f]. Cost of this suit.**

**[h]. Interest on [a], [b], [c], [d], and [e]**

**[i]. Any other relief that this Honourable Court may deem fit and expedient to grant.**

2. In Response to the claim, the Respondent filed a response to the statement of claim dated 19<sup>th</sup> September, 2019, wherein the Claimant's claim and his entitlement to the reliefs sought were denied. The matter got destined for hearing on merit.

3. The matter came up for hearing on the 17<sup>th</sup> November 2021, when the parties were heard on their respective cases. Imperative to state that

at the hearing, the witness statements by the Claimant, and the Respondent's witness' were by consent adopted as part of their evidence in chief, and the documents that they had filed herein as the parties' respective documentary evidence.

4. At the close of their cases, the Court directed the parties to file their written submissions on the matter within specific timelines, directions which they obliged.

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

5. The Claimant testified that through an appointment letter dated 31<sup>st</sup> May, 2012, the Respondent offered him an employment opportunity as a Procurement Officer. The Contract of employment was effective 4<sup>th</sup> June, 2012. It was *inter alia* a term of the contract that he was to be under a probation for a period of 3[three] months, after which he could be confirmed subject to his performance.

6. Credit be to his performance, he was confirmed to employment on the 1<sup>st</sup> day of 2012, in the position of Senior Procurement Officer for the Respondent.

7. The Claimant contended that during his entire working period in the position, he conducted procurements in accordance with the rules and procedures that guided its procurements. That he personally participated in the development and review of some of the procurement rules and procedures for the Respondent.

8. He asserted further that he participated in the implementation of the rules and guidelines and also the rate card which was to guide employees when claiming accommodation costs before they left office for field projects.

9. According to the Claimant, the procurement process starts with a purchase requisition form, prepared by the user. The form then would be submitted to the budget holder for approval and then taken to finance department for budget confirmation. It is after the approval of the Purchase Requisition form, that the same would be submitted to his office for procurement processing.

10. He stated that then he would proceed to call for quotations/rates from suppliers depending on the procurement thresholds set at the time. After receiving the quotations as required, he would analyze and recommend a supplier that had given the most cost competitive rate. He would then forward the quotation/rates analysis and recommendation to the Director Finance and Administration for review and approval, and then to the Country Director for final approval.

11. However, for any procurement above US Dollars 10,000, he required to seek approval from the Director of Procurement in the United States of America.

12. After the necessary approvals, he would then proceed to write a Local Purchase Order which again would go through the same approval process before being released to the supplier.

13. He stated that after delivery of the required goods and services the person who sought the goods and or services was required to acknowledge, and then the supplier would submit an invoice to procurement department, thereafter the department would put together all reconciled supporting paperwork together with invoices and submit them to Finance Department for payment processing.

14. The Claimant stated that on or about the 19<sup>th</sup> February 2019, he was summoned by the Human Resource Manager of the Respondent, who handed him a notice to show cause letter on why disciplinary shouldn't be taken against him for causing financial loss to the Respondent by way overstating procurement costs between the months of 1<sup>st</sup> August 2016 to 30<sup>th</sup> November 2018, Kshs. 825,700.

15. He stated that in the said notice to show he was further accused of gross misconduct of engaging in negligent or improper conduct leading to damage of employer owned, employee owned, or client owned property.

16. He testified that on the 20<sup>th</sup> February 2019, he submitted a comprehensive letter of response on the alleged financial loss and gross misconduct. He attached all the supporting documents that were submitted by the hotels and used in the procurement. He asserted that he further submitted tabulated rates as were used and that showed there was no financial loss or any overstatement of costs as was alleged.

17. The Claimant testified on rate card, card whose development and implementation he participated in. It was designed to guide employees when claiming accommodation costs. It consisted of a list of hotels around the country [pre-qualified] and the costs of accommodation. It was to guide the Respondent as to what an employee should be given in advance and further that the amount given was sufficient. The rate card was not intended to be used where the organization held conferences as that would invite another requisition for that specific conference.

18. He asserted that the card was not a binding contract on any of those hotels that were listed thereon.

19. On the 13<sup>th</sup> of March, 2019, he received a letter from the Human Resource Manager, inviting him for a disciplinary hearing that was scheduled for the 20<sup>th</sup> March. 2019.

20. The Claimant stated that during the disciplinary hearing he pointed out that he conducted all the procurements as per the procedures that were in place, and further that it was the duty of the Hotel pre-qualification committee, to shortlist, negotiate and lock hotel rates. However, according to him, there were no financial losses. In the committee he was a secretary with no voting rights.

21. He stated that on the 29<sup>th</sup> March, 2019, he was dismissed from employment without a right of appeal on account of the alleged financial loss of Kshs.825,700 and gross misconduct. This through a termination letter of the even date.
22. On the 5<sup>th</sup> April 2019, when he was going through the clearing process, the Human Resource Manager informed him verbally and later handed over a letter indicating that the Respondent had realized that the alleged financial loss of Kshs.825,700 was incorrect and that the correct figure was Kshs.442,600. The Respondent had gone ahead and deducted the Kshs.442,600 from his entitlements. He tendered as evidence the latter dated 5<sup>th</sup> April, 2019, to demonstrate this.
23. He contended that during the disciplinary proceedings, in issue were 27 hotels, he responded to transactions and allegation, in respect of them, notwithstanding that the claims overlapped. However, the Respondent later on informed him that the Claims were now reduced from 27 to 10, but failed to indicate to him why the rest were dropped. The Respondent denied him an opportunity to appeal against this.
24. The Claimant stated that his contract was terminated for alleged loss of money in 10 instances, yet he was not given an opportunity to make representations or appeal as regards them, contrary to the spirit of the Employment Act.
25. It was alleged that the disciplinary board was biased in its decision and further failed to give him an opportunity to seek internal redress, review and or appeal of the decision.
26. The decision, to deduct his accrued leave days to settle the alleged loss of Kshs. 442,600 was illegal, arbitrary, and unlawful. There was no such loss. The Respondent without any justification refused to give him a certificate of service.
27. Lastly, he contended that at his termination his accrued leave days were 13.9, and his salary was Kshs. 287,043.80 per a month.
28. Cross examined by counsel for the Respondent, the Claimant stated that he participated in the review of some of the procurement procedures of the Respondent, however as a secretary to the committee. As such a secretary, he was aware that there were pre -qualified hotel and rates.
29. He asserted that there were no agreed-on rates that were to be followed at all given times. If there was such, there would be written agreements to that effect.
30. He reiterated that the disciplinary hearing took place on the 20<sup>th</sup> March 2019. That though he had a right to be accompanied by a colleague, he chose not to be.
31. In his further testimony, under cross examination, he stated that at no time did he charge a higher amount than the agreed rates. Referred to paragraph 49 of his bundle of documents, and more specifically a part of the disciplinary hearing minutes, the Claimant denied that he ever made an admission for the financial loss, his statement thereat cannot be interpreted to be an admission.
32. He asserted that one looking at the paper work would realize that he picked on the most competitive suppliers.
33. He did not appeal because he was not given the opportunity to. Referred to page 55 of the Respondent's bundle of documents, the Claimant stated that he did not personally receive the certificate thereat, but his advocate did.
34. He asserted that, he was only given a cheque dated 13<sup>th</sup> June 2019, for Kshs.122,321.50 through his advocate, after the advocate pressed for it. Otherwise his (Claimant's) prior efforts had failed to yield any fruits.
35. Under re-examination, the Claimant stated that the certificate of service was given to his advocate side by side with the cheque way after the termination.
36. He alleged that after termination the Respondent presented fresh charges to him. He was never given a chance to defend himself over the same at all.
37. On rates he asserted that there was no agreement between the hotels and the Respondent. Further, that the rates were to guide the staff on what impost they were to process when working outside Nairobi.

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

38. Irene Wambaya, the Respondent's Regional Human Resource Business Partner testified as its sole witness. The witness stated that the Claimant's employment with the Respondent was terminated on the 29<sup>th</sup> March 2019 on the grounds of causing financial loss and for gross misconduct. The termination was procedurally fair in that;

[a]. On the 19<sup>th</sup> February ,2019 the Respondent issued the Claimant with a Notice to Show Cause letter.

[b]. The Claimant responded to the Notice to Show Cause letter on the 20<sup>th</sup> February, 2019.

[c]. That the Respondent Considered the Claimant's response and thereby invited the Claimant for a disciplinary hearing that was slated for the 20<sup>th</sup> March,2019.

[d]. The Claimant attended the disciplinary hearing and was given an option of calling his fellow employee but declined to exercise the right.

[e]. The Claimant was given an opportunity to be heard.

[f]. He did not challenge the disciplinary proceedings or did not express an intention to appeal.

39. She contended that the Respondent received a letter from the Claimant's Advocate, letter to which it responded through, its letter dated 19<sup>th</sup> June 2019.

40. The Respondent issued a Certificate of Service to the Claimant in compliance with the law. The Claimant was paid all his dues amounting to Kshs. 122,321.50, through a Citi Bank cheque number 428639 on the 13<sup>th</sup> June, 2019.

41. In her brief testimony, in Court, she testified that all started with an audit which revealed that the Respondent was being committed through LPOs to amounts which were higher than what it ought to have been, if the supplier list was fully followed. The Respondent spent more than it would have therefore on various dates.

42. The report, as a result of the audit indicted the Claimant since he was the person in charge of procurement, it was his duty to ensure that the Respondent's procurement regulations were adhered to. The Respondent's procurement process involved many officers but ensuring due process fell on him as the senior most.

43. She stated that through the response to the Notice to Show Cause letter, the Claimant satisfactorily answered to some of the charges, while for others he didn't.

44. The delay in issuing him with the Certificate of Service was as a result of the fact that the Claimant was not available to pick it. Payment for his accrued leave days was effected on the 19<sup>th</sup> June 2019.

45. On being cross examined by the Counsel for the Claimant, the witness confirmed that the Notice to Show cause spoke to a sum of Kshs.825,000, while the letter after the termination, Kshs. 447,000. The figures came down.

46. The witness acknowledged that, the letter dated 5<sup>th</sup> April, 2019 by the Country director addressed to the Claimant came after the termination, referred to a follow up discussion between the director and the witness on the overstated transactions of Kshs. 442,600. The letter demanded that he refunds the same. The witness alleged that the Claimant didn't respond to this letter.

47. The witness stated that the termination letter did not express the right to appeal to the Claimant. The Respondent's organizational Human Resource policy, provides for the right of Appeal.

48. The witness confirmed that the Claimant had applied for a different Job but the Respondent employed for another, that she was aware that he was not a trained procurement officer.

49. The Claimant stated that the Respondent didn't have any specific agreements with the hotels in the list that was in issue. The list was obtained through phone calls and emails.

50. The witness confirmed that in most cases they would partner with County Governments for their activities, however the prices for the activities could not change simply because a county Government was involved.

51. The hotels would give their quotations then negotiations follow via emails and phone calls. The witness confirmed that for all those where the negotiations were via email, the Respondent's CEO, and Finance department were copied. None of these officers raised any concerns. The hotels were paid as per what they quoted, not higher. The quotations on the prequalification were the highest the procurement department would raise.

52. The witness stated that though the Respondent alleges that the Claimant violated the code of conduct, the code was not presented to Court for its consideration. The termination letter does not cite with specificity, the section of the code that was breached.

53. The witness acknowledged that at the disciplinary hearing, the Claimant, did express to the panel that there was a gap in relation to the rates by the hotels. There was no agreement to bind them to specific rates, so that they are impeded from varying rates time to time.

54. The purchase requisition forms were to be approved by various officers, the Country Director, Budget Manager and Head of Finance. Anybody approving the requisition will first look at the rates. Each approval officer had a specific duty. The payments were done by the Finance department.

55. The witness stated that every supplier was deviating from the rates. The source of overstatement was lack of control at source.

56. The witness alleged that the reasons for the change of the figures from the ones that were set forth in the Show Cause letter, to the lower figure of Kshs.442,600, were given to the Claimant. She however acknowledged that this sum did not feature in the disciplinary proceedings and that the decision arriving at the same did not flow therefrom.

57. At the point of procurement, it is the pre-qualification committee which fixed the rates. If there was to be change on the rates fixed by the committee, the procurement officer was obliged to seek approval from the Country Director.
58. She asserted that all through, it was believed that the rates that were being used were those on the list.
59. The witness stated that the change of the figures came in after a close scrutiny of his response whereby it was realized that some of the transactions that were factored in in the Kshs. 825,000 fell outside the validity period of the list. They were transactions that happened before.
60. She admitted that the Claimant was not asked specifically to answer to the figure 442,600. It is not specified when, and in which meeting, the sum was arrived at.
61. At the hearing, the Claimant asked the Respondent to assist him sharpen his negotiation skills.
62. Court seeking clarification from her, the witness stated that at the material time, the Respondent had a procurement policy in place. However, the Respondent didn't avail it to court.
63. At all material times, the Claimant copied emails to the CEO and Finance department on negotiation's, thereby bringing it to their attention that there was a variation and therefore the need for the negotiations. The negotiations emails were in away informing them, and seeking their authority.
64. There was not document that bound the Claimant not to exceed the figures in the list under whatever circumstance.

### **THE CLAIMANT'S SUBMISSIONS**

65. The Claimant's Counsel identified the following issues for determination;
- (i) whether the decision to terminate the claimant employment contract was an un-procedural, illegal, arbitrary and unlawful.
  - (ii) Whether the respondent and the respondent's disciplinary board was biased in its hearings and decisions to terminate the claimant's employment.
  - (iii) Whether the Respondent failed to give the claimant an opportunity to seek internal redress, review and or appeal of the decision to unlawful/arbitrary termination of his employment contrary to the express provisions of Employment Act of 2007.
  - (iv) Whether the decision to deduct from the claimants of his accrued leave days to settle the alleged loss of Kenya Shillings 442,600 was illegal, arbitrary and unlawful.
  - (v) Whether the Respondent's action to bluntly declined and or refused to issue to the claimant a proper Certificate of Service contravened Section 51 of the Employment Act of 2007.
  - (vi) Whether the Respondent's contravened the Employment Act by declining to give notice of termination and salary in Lieu of Notice contrary to the Employment Act of 2007 as no offence had been committed under section 44 of the Employment Act.
66. It was submitted that Section 47[5] of the Employment Act, placed a duty upon the Claimant to establish that the termination of his employment was unfair, and on the Respondent to establish that the decision to terminate was Justified under the provisions of Section 44 of the Employment Act.
67. Further that the Claimant was dismissed pursuant to the provisions of section 44 [c] and[g], which provide;
- “[c] an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, have performed carefully and properly; and*
- [g] an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer's property.”*
68. The Respondent did not establish that the Claimant committed any offence. He did not make the payments to the hotels, the payments were being made directly by the Head of Finance, the approvals of the costs were not being made by him rather by the Director. The rates were negotiated by the management not him, as such the claim should succeed. To buttress this point, the holding in the case of **Charles Sande Nagatso v Security Group Kenya Limited [2016]eKLR** was cited;

*“Section 44 [4][a] and [g] of the Employment Act Laws of Kenya states as follows..... [c] an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property...[g] deals with committal of a criminal offence. It is therefore incumbent that the Respondent proves these reasons exist.”*

69. Counsel stated that for the Court to determine whether the termination was fair, it should invoke the “the band of reasonable

responses” approach that was articulated in the dictum of Lord Denning in the case of **British Leyland UK Ltd v Swift [1981] IRLR 91**, thus;

*“The conduct test: Was it responsible for the employers to dismiss him” If no responsible employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.*

70. It was argued that the Claimant was accused of loss of money yet all the requisitions were made and approved by the management, his role was only to seek for quotes and present the most competitive. Prices vary on seasons and availability, thus the negotiated prices by the management. Secondly there was no agreement or contracts for the hotels. Lastly the negotiations were done not in secrecy but rather involved all departments. It is not therefore for the Respondent to accuse the Claimant of neglecting his job.

71. Counsel submitted that, contrary to the procedure laid down by The Respondent communicated the new charges after termination the termination. The Claimant was not given an opportunity to defend himself on the charges. This rendered the termination unfair. Reliance was placed on the decision in, **Kenya Revenue Authority v Reuel Waithaka Gitahi & 2 others [2019] eKLR**.

72. It was further submitted that the Claimant was not given a chance to appeal. This amounted to unfair labour practice. The case of **Daniel Muchiri v Red Cross Society [2014] eKLR**, where it was held that not allowing an employee to respond to accusations and or appeal amounts to stealing a match against the employee.

73. On the reliefs sought, it was submitted that the Respondent having not established that there was any justification to summarily dismiss the Claimant, the latter is entitled to one month’s salary in lieu of notice pursuant to section 36 of the Employment Act.

74. The circumstances of this matter are that the attract a compensatory relief pursuant to the provisions of section 49 of the Employment Act, to an extent of 12 months’ gross salary, and general damages. The Court of Appeal Holding in **Kenya Broadcasting Corporation v Geoffrey Wako [2019] eKLR**.

#### **THE RESPONDENT’S SUBMISSIONS**

75. Counsel for the Respondent, submitted that the issues for determination were agree on by the parties and Agreed issues for determination dated 27<sup>th</sup> January 2021 filed. The issues are as brought out in the submissions by the Claimant.

76. On whether the Respondent complied with the provisions of the Employment Act ,2007 in terminating the employment of the Claimant, it was submitted that in order for a termination to meet the threshold set by law, presence of two components must be established, fair procedure and substantive justification. Section 45[2] speaks to this component. The case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** was relied on in support of the submission.

77. It was argued that the evidence by the Respondent’s witness was elaborate, and indicative that the procedural aspects provided for under section 41 of the Employment Act, were adhered to. On I what procedural fairness entails, Counsel urged the Court to be persuaded by the holding in **Alphonse Machanga Mwachanga v Operation 680 Limited [2013]eKLR**.

78. On the second issue, it was stated that the Claimant admitted the charge of financial loss and gross misconduct during the Disciplinary hearing, when he stated;

*“Given the matter at hand, whether or not there is a loss or not, I own up to the charge of overstatements/loss.*

79. That by admitting the charge of overstatements/loss, the Claimant demonstrated having acted negligently and improperly discharged his duties which resulted into the Respondent suffering losses.

80. On the issue of the right to appeal, Counsel for the Respondent submitted that true, the Respondent’s witness admitted that the Claimant was not given a right to appeal. That this was informed by the fact that the Claimant had admitted his gross misconduct. Further that there is no requirement in law that mandates employers to have an appeal mechanism against disciplinary decisions.

81. Regarding the alleged deduction of accrued leave pay, the Respondents counsel submitted that under section 17 of the Employment that is an act the Respondent was entitled to. However, the Claimant was paid, as reflected by the evidence of the Respondent’s witness.

82. As regards appropriateness and justification of the summary dismissal Counsel urged the Court to invoke the band of reasonable responses approach and find that any reasonable employer would dismiss the Claimant in the circumstances of the matter.

83. On the reliefs, it was submitted that the Claimant having failed to establish any limb of his claim, he is not entitled to any relief.

#### **ANALYSIS AND DETERMINATION**

84. From the onset, I find it necessary to state that the Parties have over split the issues proposed for determination unnecessarily. Consequently, the Court has to re-fashion the issues into four broad issues, thus;

[a] Whether the summary dismissal of the Claimant from employment was procedurally fair.

[b]. Whether the summary dismissal of the Claimant was substantively fair.

[c] Whether the Claimant is entitled to the reliefs sought.

[d]. Who should bear the costs of this suit.

### **WHETHER THE DISMISSAL WAS PROCEDURALLY FAIR**

85. Section 45 of the Employment Act decrees that no employer shall terminate the employment of an employee unfairly. Section 45[2][c] provides the foundation for adoption of a fair procedure in matters termination of an employee's contract of service or dismissal of an employee from employment and the consequence of a failure to adhere to procedural fairness. What procedural fairness entails is encompassed under the provision of Section 41 of the Act.

86. It is now trite law that the procedure provided for under section 41 of the Act is mandatory, it must be followed by an employer who intends to terminate an employee's employment or summarily dismiss an employee. Procedural unfairness shall occur if there is some flaw in the process leading to the decision. Put in another way, if there is non-adherence to the procedure. The termination or dismissal shall be deemed unfair.

87. As held by the Court of Appeal in the case of **Postal Corporation of Kenya v K. Tanui [2019] eKLR** four elements must be discernable for the procedure to pass muster; an explanation of the grounds of termination in a language understood by the employee; the reason for which the employer is considering termination; entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made; hearing and considering any representations made by the employee and the person chosen by the employee. In my view this element can be collapsed into three broad components, the information, hearing and consideration, components.

88. I have carefully considered the evidence that was placed before me by the parties on the process leading to the dismissal, and have no difficulty in finding that there was adherence to the procedure provided for under section 41 of the Employment Act. In so holding, I have considered that the Claimant was issued with a notice to show cause letter with details of the accusations that were being levelled against him; he was invited to respond to the letter, which he did; he was invited to attend the disciplinary hearing, and he attended; he was accorded an opportunity to exercise his statutory right to accompaniment; the panel considered his representations before making the decision to summarily dismiss him.

89. It was not contentious that through a letter dated 5<sup>th</sup> April 2019, addressed to the Claimant, letter which referred to the disciplinary proceedings, his dismissal and some follow-up discussions, the Respondent demanded a refund of Kshs.442,600, which the latter held was the overstated amount in respect of procurements. The Respondent's witness did admit that the letter was issued, and that the amount that was now being demanded was far much lower than the amount that was the subject matter of the disciplinary proceedings.

90. Counsel for the Claimant considered this as procedural unfairness, and submitted that the Claimant was not given an opportunity to defend himself against a charge relating to Kshs. 442,600 before the decision to terminate. In the case of **Joyce Mukolwe v Mustek East Africa Limited [2021]eKLR**, this Court held;

*“In considering the procedural fairness of termination or summary dismissal of an employee the period under consideration has to be one from the time the employer conceives the intention to terminate or dismiss, to the preparation and issuance of the termination letter, or conveyance of the decision to terminate or dismiss.”*

From the scanty material placed before this Court, I discern that the figure of Kshs.442,600 was arrived at after the dismissal. It is not an event that occurred within the period contemplated in the above stated holding. The issue raised is not trivial, however it cannot go to explain procedural unfairness but substantive unfairness as shall shortly hereafter come out.

91. In the upshot, I find that the summary dismissal was procedurally fair.

### **WHETHER THE SUMMARY DISMISSAL**

#### **WAS SUBSTANTIVELY FAIR**

92. Section 43 of the Employment Act throws a burden on 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 pursuant to the provisions of section 45 thereof.

93. Section 45[2] of the Act places a further burden on the Employer, to prove that the reason[s] for the termination was valid and fair. Employers are no longer free to dismiss with impunity those whom they judge worthy of dismissal. The right to dismiss is tempered by the right of the individual not to be unfairly dismissed and the balance between the two is to be struck by the Court. Having said this, the question that then sets in is, how does the Court determine whether or not the reason[s] were fair. Considerable judicial attention has been given regarding the test to be applied by courts in so determining. In **British Leyland Uk Limited vs- Swift [1981] 1RLR 91 at 93** Denning MR, enunciated the test, thus;

*“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.*

94. In **Evans Kamadi Misango vs Barclays Bank of Kenya Limited [2015]eKLR**, the Court expressed itself thus;

*“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 the employee. The HULSBURY’S LAWS OF ENGLAND [4<sup>TH</sup> EDITION] at page 482 expounds this principle as follows;*

*“In adjudicating on 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 wider 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 band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair but if it falls outside the band, it is unfair.”*

95. I have carefully considered the dismissal letter by the Respondent dated March 29, 2019 which in part reads;

*“..... That at the said disciplinary hearing, you admitted to the charge of financial loss and gross misconduct. Your actions amounted to gross misconduct in accordance with section 44[4] [c] and [g] of the Employment Act.....”*

And the view I get here is to the effect that the dismissal was as a result of his “plea of guilty” to the alleged gross misconduct. According to Counsel for the Respondent this conclusion by the Respondent flowed from a statement that the Claimant made at the disciplinary hearing, thus,

*“Given the matter at hand, whether there is loss or not, I own up to the charge of overstatement/loss.”*

I find the statement equivocal. It amounted not to an unambiguous admission. No reasonable employer would base summary dismissal of an employer on such a statement.

96. The Court has given a serious consideration of the proceedings at the disciplinary hearing, the evidence by the Claimant, and that of the Respondent’s witness more especially under cross examination. What emerges is the fact that there were systemic gaps in the Respondent’s procurement processes and more specifically those that related to rates that the pre-qualified hotels would apply at any given time. There were no agreements in place to bind hotels on the rates that they were to employ for instance within a specified period, e.g. a financial year. That by reason of this, the hotels didn’t stick to the figures that were obtaining on the procurement list, reason why often there would be negotiations on phone or through emails, from time to time.

97. In her evidence in cross examination, the Respondent’s witness admitted that the situation was as put hereinabove. Further that whenever a supplier deviated from the rates on the list, negotiations would ensue. The witness asserted that in a situation where the supplier[s] was deviating from the rates on the procurement list, and negotiations set in, at all material times, the Claimant kept the CEO and the Finance Department informed. The emails were copied to them. Further this was away of seeking authority to commit the Respondent on a rate outside the list. One wonders the place of a gross misconduct on the part of the Claimant, in these circumstances.

98. There was an elaborate process of approvals not by one person but more than two of the procurement documents for any goods or services. The Claimant only initiated the process and received quotations from the suppliers. That at the various stages each of the officers through whom the documents passed in course of the approval process, had a specific role to play as regards the documents. The only reason that attracted the sanction against the Claimant in these circumstances was that he was the senior most in the procurement department. Considering the elaborate process that the witness testified on, I am of the view that this reason makes no sense, with due respect. The Respondent didn’t act with justice and equity here.

99. I am of a firm view that a reasonable employer would not visit the admitted systemic gaps or consequences thereof on the Claimant in the circumstances of the matter, but seek to fix the gaps.

100. Section 44[4] provides for actions and inactions of an employee that may amount to gross misconduct so as to justify his or her summary dismissal. However, it is not enough for an employer to state that an employee committed one or more of those actions obtaining in the list under the provision. The employer must establish with cogent evidence that there actually existed the misconduct, and that the same was so grave that it intimates the employee’s abandonment of an intention to remain in employment.

101. In **Laws vs- London Chronicle Limited [1959] 2ALL L.R 285** the English Court of Appeal, expressed itself on this, thus;

*“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 the general law of contract will be applicable, it follows that if a 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.”*

102. The Court has considered the material placed before it by the Respondent, I fear it does not clearly demonstrate how the Claimant was

responsible for the alleged loss and not the other officers who were involved as admitted, in the procurement process, or the Finance Department Officers who were responsible to make payments to the suppliers, and only after they had taken into consideration the approvals mentioned hereinabove and the pre-qualification list. It was duty upon the Respondent to prove that the conduct alleged of the Claimant existed and that it was such as the employment relationship could no longer subsist. By reason of lack of clear evidence linking the Claimant to the alleged loss, and what I have said hereinabove regarding the systemic gaps, I find that the burden was not discharged.

103. It all started with an audit, audit which heavily indicted the Claimant, the Respondent's witness asserted. It is upon the audit revelations that he was called upon to show cause on an alleged loss of Kshs. 825,000. The Claimant made an answer on these figures. According to him, he demonstrated duly that there was no overstatement or loss. Subsequent to his response, the Claimant was served with an invitation to disciplinary hearing. It read in part, thus;

*“We are in receipt of your response dated February 20, 2019 to the issues raised in the Notice to Show cause letter dated February 19,2019.*

*We have carefully studied and evaluated your response and hereby invite you for a disciplinary hearing session on March 20,2019 at the IntraHealth Office boardroom at 9.00 am.....”*

104. From this, reasonably and safely one would conclude that the Claimant got into the disciplinary hearing to defend himself on a charge of loss/overstatement of Kshs.825,000. Indeed, looking at the disciplinary minutes, nothing obtains therein to demonstrate that the charge changed at any time in the course of the proceedings, to a lesser figure.

105. There is no dispute that after the disciplinary hearing and the dismissal, the Claimant was in receipt of a letter by the Country Director, demanding of him to refund Kshs. 442,600 being the alleged lost sum. When the Respondent's witness was cross examined on this amount and the letter, she stated that after thorough scrutiny, it dawned on the Respondent that the loss was not as the Claimant was charged with. She did not at all explain to court when the scrutiny was done and by who, was it before conclusion of the hearing or not? What prompted the fresh consideration? Why didn't it occur to auditors that the alleged overstatements/loss were grossly higher than it actually was meant to be? Why wasn't the Claimant invited to make a representation on the new figures?

106. In my view, this does not point in favour of presence of trust, good faith, confidence and candidness on the part of the Respondent. Yet these are the key drivers of an employment relationship. Clearly the Claimant was charged of erroneous audit findings, the Respondent knew this, decided not to bring it to the attention of the Claimant, and notwithstanding this, summarily dismissed him on a charge that they knew was erroneous. All these leads to an inevitable conclusion that the summary dismissal was on reason[s] that were not fair and valid.

107. In the upshot, the Court comes to an unescapable conclusion that the summary dismissal was without substantive justification.

#### **OF THE RELIEFS**

108. The Claimant did seek *inter alia* accrued leave day's compensation. It is not in contention that payment in respect thereof was made during the pendency of this matter. Nothing shall be awarded under the head therefore.

109. Having found that the summary dismissal was without substantive justification, I am inclined to award the Claimant, one month's salary in lieu of notice in accord with the contract of employment. To deny notice pay, to an employee who has successfully assailed a summary dismissal on account of want of substantive justification, shall amount to allowing the employer benefit from his wrong doing. The Claimant is hereby awarded one month's salary in lieu of notice.

110. Considering the circumstances surrounding the summary dismissal including lack of substantive fairness, that the systemic lapses of the Respondent's processes was visited on an employee, the Claimant, and the length of period that he was in the employment of the Respondent, I hold that the Claimant is entitled to compensation pursuant to the provisions of section 49[1][c] of the Employment Act,2007, and to the extent of 5 [five] months gross salary.

111. The Court is not persuaded that the Claimant is entitled to an award of either general or aggravated damages. No evidence was led to justify the Claim.

112. In the upshot, judgement is hereby entered for the Claimant in the following terms;

- I. A declaration that the dismissal was substantively
- II. One month's salary in lieu of notice..... Kshs.287, 043.80.
- III. Compensation pursuant to section 49[1][c] of the Employment, Act.....Kshs.1,435,219.90.
- IV. Interest on [ii] and [iii], above at Court rates from the time of filing this suit till full payment.
- V. Costs of this suit.

**READ AND DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF APRIL, 2022.**

**OCHARO KEBIRA**

**JUDGE**

**IN PRESENCE OF**

**MR. ODIPO FOR THE CLAIMANT.**

**MR. KIPKORIR FOR THE RESPONDENT.**