



**Ouma v Astrazeneca Pharmaceuticals Limited (Cause 429 of 2017)  
[2022] KEELRC 1596 (KLR) (23 May 2022) (Judgment)**

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**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 429 OF 2017  
K OCHARO, J  
MAY 23, 2022**

**BETWEEN**

**EVERLYNE ACHIENG OUMA ..... CLAIMANT**

**AND**

**ASTRAZENECA PHARMACEUTICALS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through its letter of appointment dated September 1, 2016, the respondent employed the claimant as a Personal Assistant to Regional Head. The relationship [employer-employee] that was born out of this, got into headwinds within a month, leading to the end of thereof. Contending that the determination of her employment by the respondent was malicious and unfair, the claimant commenced the suit herein through a memorandum of claim dated March 1, 2017, seeking:
  - a. Twelve [12] months compensation for unfair termination, Kshs 1,308,132.00.
  - b. One month pay in lieu of notice.
  - c. All unpaid allowances.
  - d. Compensation for the interest on the aforesaid sums at the court rates from the date of termination.
  - e. Damages for the loss of career.
  - f. General and aggravated damages, including exemplary damages for discrimination, unfair treatment, unprocedural termination and libel.
  - g. Costs of the suit and interest thereon at court rates.
2. The respondent entered appearance to the summons that were issued herein, on the March 20, 2017, and subsequently filed a memorandum of defence on the April 6, 2017. In the memorandum of



defence, the respondent denied, that the claimant's claim had basis, and her entitlement to the reliefs she has sought.

3. At the close of pleadings, the matter got destined for hearing on merit. Both the claimant's and the respondent's cases were heard on the October 7, 2021. At the close of their respective cases, this court directed that they file written submissions.

### **The Claimant's Case**

4. Contemporaneously with the memorandum of claim, the claimant filed a detailed witness statement, and a list of documents dated March 1, 2017, list under which she filed various documents that she intended to place reliance on in further fortification of her case. At the hearing, she moved this court to adopt the contents of her witness statement as part of her evidence in chief, and admit the documents as her documentary evidence. They were so adopted and admitted without objection by the respondent.
5. The claimant stated that before joining the respondent company, she was working as an employee of Laborex Kenya, a sister company of the Respondent as a Personal Assistant to the Country manager, AstraZeneca Line of products. Her employment was under the terms and conditions of the letter of appointment dated April 13, 2015. Her remuneration was Kenya shillings ninety thousand [90,000] per a month and a unity allowance of Kenya shillings ten thousand [10,000].
6. The claimant further stated that in the course of her employment under the contract stated above, she was asked to resign her position, and was deployed / seconded to serve in AstraZeneca Pharmaceuticals as a Personal Assistant to the Regional Head – E.A. This was through a letter dated August 19, 2016. Consequent to the resignation, the respondent company appointed her through a letter of appointment dated September 1, 2016.
7. It was her case that her roles remained the same, however her salary was reviewed upwards to Kenya shillings ninety-eight thousand [98,000] per a month.
8. She stated that on the October 3, 2016, she was presented with two letters addressed to her. In the letters she was being accused that she had been involved in fraudulent activities regarding the respondent's petty cash, and gross negligence. Two accounts were highlighted as being at the centre of the fraudulent activities and petty cash mismanagement, to wit; payment for milk and payments that were made to Ostaria Del Chant Restaurant.
9. She further stated that through the letter, she was suspended from her employment pending the outcome of investigations. The suspension took effect on the same day. The letter slated a disciplinary hearing for Wednesday, October 12, 2016.
10. The claimant contended that on the October 5, 2016 while still on suspension, she requested the respondent to supply her with a number of documents which included all petty cash requisitions from the month of July right through to the last claim that she made in September. The said documents were to assist her explain to the disciplinary panel the flow of reimbursement of the money that she was being accused of not having properly accounted for. The Respondent didn't supply the documents to her.
11. On the October 12, 2016 she attended the disciplinary hearing. Thereat she submitted a formal written response which explained in detail the expenditure of the money that the respondent had accused her of mismanaging. She asserted that the respondent had accused her of fraud and gross negligence seeking an explanation for non-payment of the milk vendor for a 5-week period and for payment made Osteria Del Chant Restaurant of Ksh. 27,400.00 being made on July 21, 2016 and yet the claim to reimburse



- was done a month later on August 18, 2016. The claimant asserted that in her defence she in detail explained and demonstrated to the panel how the amounts were paid and the dates thereof.
12. The claimant stated that she was express to the panel that she was not in a position to explain to them why the highlighted receipts i.e. receipts number 1008, 1009 and 1010 were issued serially following each other as they were issued by Ostaria Del Chant, as she did not have access to their office files and not in charge of their account books.
  13. The claimant contended that she had paid all the money that was owed to Ostaria Del Chant Restaurant, and kept a record in relation thereto properly, then forwarded the same to the respondent's Finance team. However, correspondingly, the restaurant did not properly update their record to reflect the payments, this with an effect for a non-settled position being reflected on their books. She went further to state that this issue was raised by the respondent's Finance Team through the office manager, Eunice Muriithi via an email dated September 15, 2016 exonerated her from any negligence in the performance of her duties. The Restaurant's Finance Team had through an email dated September 15, 2016, confirmed that they had not updated their record.
  14. The claimant asserted that the supply of the milk had been terminated by the milk vendor on the morning of September 7, 2016 due to outstanding milk payment invoices. Ordinarily the vendor was supposed to pick his money from the respondent's office. She communicated to the milk vendor Mr Kamau and made a commitment to pay the outstanding amount via mobile money transfer [Mpesa] after reconciling the accounts, the amount outstanding was Kshs. 13,750.00. On the September 8, 2016, she submitted a payment requisition to the office manager which was duly approved on the same day. She gave this explanation to the panel.
  15. The claimant asserted that during the hearing the respondent's Regional Head, Adam Lambert who had accused her of mismanagement of the petty cash was present in the meeting together with Irene Kimuri who issued the termination letter, as an observer. Further that she requested the panel to allow her have witness[es] accompanying her but the request was declined. This notwithstanding, the respondent had its Finance officer and a receptionist as its witnesses.
  16. She contended that in the course of the hearing, the respondent's Regional Head hauled insults at her calling her a "thief" who had stolen money from the respondent. This was unnecessary and unjustified since she had provided a detailed account on how the money had been expended.
  17. On the October 17, 2016, she received a letter from the respondent, terminating her services. The letter indicated that the Disciplinary Panel chairman had found her guilty of fraud regarding company money.
  18. The claimant contended that the decision to terminate her employment was predetermined, and that the reasons that were given for the termination were unfounded, false, erroneous, unreasonable and actuated by malice. Owing to the termination process, her professional credit got undermined.
  19. In her oral testimony in court, in supplement to her evidence in chief as was contained in her witness statement, the claimant stated that in the month of September 2016, she had a meeting with the Regional Head, aimed at discussing her objectives. In the course of the meeting something cropped up, things that were happening in the office. Considering this to be gossip, she avoided answering questions that were put to her on the subject. This is how her relationship with the Regional Head started going south.
  20. She asserted that the respondent did not allow her an opportunity to call a witness as it maintained that the disciplinary process was an internal affair.



21. On the payment for the milk, and Osteria services, she explained that she would only make payments if the suppliers had availed receipts. The milk vendor had not, for some time. The requisitions were to be approved by her two supervisors before payments would be made.
22. As at the time of joining the respondent there were outstanding bills that needed to be settled. However, there are those that did not have supporting documents. This prompted her to ask for vouchers.
23. She gave an account on the petty cash and the statements were reconciling.
24. She asserted that according to the standard operating procedures of the respondent, if she was not performing her duties well, she expected the line manager to communicate so through a warning letter. She never received any warning letter.
25. The claimant contended that she came to hear that when she left her position was taken by a certain lay from Laborex [K] Limited. In her evidence under cross examination, the witness re-asserted that things started going south after her meeting with the Regional Head.
26. She further stated that the milk vendor had not been paid for 5 weeks because he had not tendered receipts for the supply. She however, acknowledged that in her witness statement she had only stated that the money was not paid because the vendor had not gone to the Respondent's offices to pick the money.
27. The milk vendor stopped supplying milk on account of the fact that he had not been paid. However, when she called him, he indicated to her that he had been told not to continue supplying. On September 7, 2016, the milk was not delivered. On the September 8, 2016, she paid him Kshs 13,750 through her personal Mpesa line. This was with the approval of the Office manager. Making payment through her Mpesa line was an accepted mode.
28. Though receipt No 18148 appeared in two different requisitions, it was clear that it was used only for a single payment. Receipt No 1008 for Kshs 27,000 was used to pay the hotelier. The receipts are receipts that were given by the supplier. They were handwritten and that is how they used to be.
29. The suspension letter explained to her, her rights at the disciplinary hearing.
30. At termination her salary and outstanding leave days were paid.
31. In her evidence in re-examination, the witness stated that when she called the milk vendor, on the 7<sup>th</sup> he told her that he had been stopped from delivering the milk. She contended that when she joined the respondent company there was no policy in place for payments. At induction, she was told that payments would only be made after the supplier[s] tender receipts.
32. On double requisition, she asserted that she made a mistake and that is why she requested for the voucher to demonstrate the flow. However, the statements were reconciled.
33. Invoices and deliveries were issued but the respondent's Accounts Department demanded for receipts. This was the 1<sup>st</sup> time they were so demanded.
34. The claimant asserted that she was not given a chance to call a witness[es] from without the respondent's entity. The claimant had done an email to Irene indicating that she preferred to have witnesses from outside the organization. She had wanted to call the vendors.
35. The person who was taking the minutes was contracted by the respondent. It would not be expected of him therefore to have captured the insults. The minutes of the disciplinary hearing were not availed



to her immediately. She had to push the respondent to release the same to her through demands by her counsel.

36. How the proceedings were conducted discouraged her from appealing, it made her lose confidence in the respondent's processes.

### **The Respondent's Case**

37. The respondent availed Irene Kaimuri [RW1] to testify in support of its defence against the claimant's case. The witness urged court to adopt her witness statement as her evidence in Chief and admit the documents that have been filed under the list of documents dated April 5, 2017 as the respondent's documentary evidence.
38. The witness presented herself as the Human resource Business Partner East and Southern African Region of the respondent. she stated that the claimant came into the employment of the respondent on the September 1, 2016 as the Personal Assistant to the Regional Head – EA for a monthly basic salary of Kshs 98,361 plus an expense allowance of Kshs 10,650.
39. The witness stated that on or about the October 3, 2016, there was a complaint against the claimant that she had been involved in fraudulent acts regarding the respondent's money [petty cash]. Subsequently, on the October 3, 2016, the claimant was sent on suspension pending investigations into the allegations.
40. The witness stated that on the same day, October 3, 2016, the respondent wrote to and invited the claimant to show cause why a disciplinary action should not be taken against her. The Claimant was required to attend a disciplinary enquiry on the 1October 2, 2016.
41. The accusations against the claimant were misappropriation of company money [petty cash] and negligence in the performance of her duties, thus;
- a. Milk payment: the vendor for office milk had not been paid despite the petty cash having been replenished five [5] times during the 5-week period that was in question. The Claimant sought to rectify the situation when the issue was raised and used an unapproved method of payment.
  - b. Osteria payment: The payment for Osteria of Kshs 27,400 was made on July 21, 2016, however the claim for reimbursement was made on August 18, 2016, almost 9 months later. The claimant had used a delivery note to make a claim for reimbursement twice on different dates and further produced receipts that serially followed each other vastly different dates of payments.
42. The witness alleged that the claimant had full knowledge on how the respondent's petty cash was manged and her actions of irregular payment requisitions and making payments immediately after Finance Head raised concerns was a clear demonstration of an intention to defraud the respondent and negligence in the performance of her duties, thus exposing the respondent to a financial risk.
43. The witness asserted that through the letter dated October 3, 2016, the respondent explained to the claimant her various rights before, during and after the disciplinary hearing. Further that the claimant had a right to challenge any evidence and call witnesses during the disciplinary enquiry.
44. The witness acknowledged that upon receipt of the show cause letter, the claimant requested for documents relating to the office milk and the Osteria which were the subject matter of the show cause. She contended that the documents were forwarded the documents to her.



45. She acknowledged that the claimant did request to be allowed to call as her witnesses, persons who were not working for the respondent. The respondent declined clarifying to her that she was only allowed to call employees of the respondent as witnesses during the disciplinary hearing, through an email of October 11, 2016.
46. The witness stated that a disciplinary hearing was held on the October 12, 2016, during which the claimant was given an opportunity to explain and or justify her misconduct. It was decided that the claimant be summarily dismissed. She was notified of the decision on the October 17, 2016, through a termination letter of the even date.
47. The witness asserted that the claimant's actions of intent to misappropriate the respondent's fund and negligence in carrying out her duties amounted to gross misconduct and attracted the sanction of a summary dismissal.
48. The dismissal was in accord with the provisions of the employment and the respondent's policy and procedure on discipline.
49. In her oral testimony in court the witness stated that the respondent's policy and procedure provided for the right to call witness[es] and that it did not limit the kind of witnesses that an employee would call.
50. According to the witness, all the respondent's disciplinary hearings were chaired by an external person, with a view of ensuring fairness and objectivity.
51. As regards payments for the milk, the witness stated that there were five receipts that had not been paid and the claimant admitted that.
52. In her evidence under cross examination, the witness testified that the claimant in her duty was in charge of office administration, paying vendors and maintaining the calendar for the Regional manager. Job description of an employee is definitely part of a contract of employment.
53. In her view as a Human Resource Management expert, a failure by an employee to exercise her right of appeal using the internal mechanisms is not a bar to the employee pursuing enforcement of her or his rights in a court of law.
54. According to the policy and procedure, part 10 when an employee is accused of negligence or non-performance, the 1<sup>st</sup> step by the respondent should be to issue a warning letter to the employee concerned.
55. The witness asserted that the allegations against the claimant concerned fraud. Investigations were carried out. However, there was no full report on the fraud.
56. The witness acknowledged that the claimant requested for documents for July 2016 – September 2016. That she forwarded the documents under cover of her email. On the October 6, 2016, the claimant wrote another email indicating that the documents had not been forwarded. The witness responded same day. She never received any confirmation from the claimant that the documents had been received.
57. Asked who the complainant was, the witness stated that it was Paul Adam but at the disciplinary hearing it was the Finance lead and Paul became the initiator. Finance lead was Eunice Mureithi.
58. The witness alleged that in there are clear policy timelines for payments of suppliers set out in the policy document [expense policy]. She admitted that the same was not placed before the court by the respondent.



59. There was no policy in place that prohibited payment through Mpesa.
60. The chairman in the course of the proceedings reminded the claimant that she had a right to call witnesses. The policy and procedure manual did not categorise the kind of witnesses that either the claimant or the complainant would call.
61. In her evidence under re-examination, the witness stated that there were two charges against the claimant, fraud of company money and gross negligence. According to the respondent's policy and procedures [HR], fraud or attempted fraud could lead to summary dismissal. Clause 17 thereof also provided that gross negligence would attract summary dismissal.

### **Analysis and Determination**

62. From the pleadings, evidence and material placed before this court, the following issues emerge as the issues for determination in this matter:
  - a. Whether the summary dismissal of the claimant from her employment was procedurally fair.
  - b. Whether the summary dismissal was substantively fair.
  - c. Whether the claimant is entitled to the reliefs sought.
  - d. Who should bear the costs of this matter?

### **Of Procedural Fairness**

63. Section 41 of the *Employment Act* provides the statutory structures for procedural fairness in matters termination of an employee's contract of employment or summary dismissal of an employee. It is now trite law that the procedure set out in this stated provision is mandatory and any default in adherence to the same leads to the termination or summary dismissal to be considered unfair in terms of section 45 [2] of the *Employment Act*.
64. In the case of *Pius Machafu Isinde v 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 obligation on the employers in matters summary dismissal for breach of contract 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] among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

[Emphasis mine].
65. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR the court addressing itself on the procedural fairness aspect as envisioned under section 41 of the *Employment Act* held:

“33. Section 41 of the *Employment Act* is coached in mandatory terms where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such flawed process without a hearing as such



a termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”

66. In my view, fair procedure contemplated under the provision encompasses three components; the notification component – the employer must indicate to the employee that he or she intends to terminate the employee’s employment on specific grounds/reasons; Hearing component – the employer shall give the employee an opportunity to defend himself or herself against the contemplated action by the employer and the grounds upon which the contemplation is anchored. The hearing should be in the presence of a union representative [if the employee is a member of a union] or a colleague [if the employee is not a member of any union], in defence the employee must be allowed to call witnesses in support of the defence; Consideration component; the employer is enjoined to consider the employee’s representation and that of his accompanying colleague, and or the witness before making a decision.
67. The process will be cosmetic if the employer were to hear the employee and his or her witness then fail to consider the issues raised by them. The decision must therefore be a considered one.
68. The statutory procedure provided for under section 41 of the Employment Act must not be read and considered in isolation from the provisions of the Constitution of Kenya, 2010, articles 41, 47 and 50, the provisions of the Fair Administrative Action Act, and the principles of natural justice. It is under this breath that it must be stated, that the accompaniment right under section 41 of the Employment Act, should not be confused with the right for an employee to call a witness[es] under the provisions of article 50 of the Constitution – right to fair hearing.
69. The respondent contended that in the notice to show cause letter, it intimated to the claimant her right to call a witness[es] during the disciplinary hearing. The show cause letter posted inter alia;
- “ ..... You have the right to call any witness and lead any evidence you wish to, to prove your innocence. If you intend calling employees of the company as witness, you must make the necessary arrangement with Human Resources Business Partner, at least 24 hours prior to the hearing .....”
70. Under clause 7.3 the policy and procedure: disciplinary provided:
- “Employee rights
- To be represented at the enquiry by a fellow employee of her or his choice.To be given 5 days’ notice.To an interpreter, should she or he require this.To state his / her case and to question witnesses.To call witnesses and present evidence to help his / her case.To appeal the findings.
7. 4 ..... Witnesses may be called in by both the complainant and accused. They are called in only for elements of the enquiry where they are required to give testimony.”
71. The claimant contended that she indicated her desire to call witnesses in her defence against the allegations that had been levelled against her. She wanted to call the vendors / suppliers, this in exercise of her right under the policy and procedure. The respondent in its pleadings, and the respondent’s witness in her testimony acknowledged that indeed the claimant did ask to be allowed to call the witness[es].



72. It was the claimant's case that the respondent declined to allow her an opportunity to call the witnesses. The respondent attempted to justify the refusal to accord her the chance, stating that the disciplinary process was an internal process and therefore they would not allow external witnesses to participate.
73. I have carefully considered the stipulations of the respondent's policy and procedures; disciplinary and more specifically on an employee's right to witnesses, and conclude that they do not categorise the witnesses that an employee may call into external and internal or in any manner at all. They do not limit an employee to calling a particular category of witnesses. Under cross examination, the respondent's witness admitted and rightly so that there cannot be discerned any categorization from the respondent's policy and procedure – disciplinary.
74. Different disciplinary cases, would in their peculiar circumstances require different types of witnesses to testify in fortification of an employee's defence against the accusations against her or him. To attempt to limit an employee to calling a certain type of witnesses, shall be tantamount to limiting that employee's right to a fair trial under article 50 of the Constitution.
75. Should an employer decide to have such a provision limiting the employee to calling a certain class of witnesses, such a provision shall be unconstitutional as it would be in offence of the provisions of article 41 and 50 of the Constitution of Kenya, 2010. It shall too be affronting what section 41 of the Employment Act contemplates.
76. Looking at the circumstances of the accusations that were laid against the claimant, coupled with the fact that contrary to its own policy and procedure, the respondent did not conduct investigations as I shall shortly hereinafter bring forth, it won't be off mark for this court to conclude that in fact, the calling of the vendors / suppliers was necessary to aid, a fair and just determination of the disciplinary matter.
77. In the upshot, I cannot hesitate to conclude that the refusal by the Respondent to allow the claimant to call the witnesses she intended to, was unreasonable, unjustified and unconstitutional.
78. Clause 7.2 of the policy and procedure provided:
- “The relevant manager or someone appointed by the company is required to conduct an investigation to establish whether a disciplinary enquiry is necessary, ie, if there is any validity in the allegations, there is sufficient evidence to prove the charges and the charges are serious enough to warrant formal action.”
79. Through in its letter dated October 3, 2016, the respondent indicated that the claimant was being sent off on suspension pending investigations. A reading of above stated clause reveals explicitly that disciplinary proceedings against an employee of the respondent would only be commenced and undertaken only upon investigations and a conclusion therefrom that there was validity in the allegations and sufficient evidence to prove the charges and that the charges are serious enough to warrant formal action, there is no doubt that the investigations were never undertaken.
80. It is surprising that notwithstanding this procedural provision, the respondent proceeded to issue the claimant with a show cause letter with a date for a disciplinary enquiry. The respondent portrayed itself as an employer who was in a rush to discipline an employee even when the facts to form basis for such had not been established. The rush was not explained. The failure leaves one to infer malice and bad faith on its part.



81. Counsel for the respondent submitted that the claimant was given a chance to defend herself but did not make any submissions on the respondent's failure to, allow the claimant call witnesses of her own choice and, have investigations precede the disciplinary proceedings.
82. In the upshot, I find that the summary dismissal was procedurally unfair.

### **Whether The Dismissal Was Substantively Fair**

83. Section 43, 45 and 47 [5] of the [Employment Act](#) speak to substantive fairness in matters termination of an employee's contract of employment. The provisions impose various obligations upon an employer to discharge whenever there is a dispute concerning termination of an employee's employment, otherwise the termination shall be considered unfair. Thus, to prove: reasons for the termination; that the reasons were valid and fair; that the termination was justified, respectively.
84. In considering whether the summary dismissal was fair and valid, counsel for the respondent urged this court to adopt the approach that was brought forth in the case of [CFC Stanbic Bank Limited v Danson Mwashoko Mwakuwona](#) [2015] eKLR, thus:

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

85. Counsel was therefore submitting that test the court should apply is the “reasonable employer test.” That was enunciated as follows by Denning MR, in [British Leyland UK Limited v Swift](#) [1981] IRLR 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 the reasonable employer might have reasonably dismissed him, the dismissal was fair.”

86. Addressing this test in the case of [Lilian Muchungi v Green Belt Movement](#) [2022] eKLR this court held:

“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's holding in [Sidumo v Prestonburg Plantinum Mines](#) [2007] 12 BLLR log7 thus:

“There is nothing in the constitutional and statutory scheme that suggest that in determining 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 precincts of the LRA cannot be sustained.”

87. 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 the approach that can deliver justice. It considers the employee’s perspective too.

88. I appreciate the importance of stare decisis. I am of a humble view that in the Court of Appeal matter cited by counsel for the respondent, the court was not invited to consider how well the test – reasonable employer test, sits with the provisions of the Employment Act which is constitutionally and equity spirited, the provisions of the Constitution and more specifically articles 41, 47 and 50 of the Employment Act and the Fair Administrative Action Act. All of which would appeal to an approach which considers both perspectives, ie, the employer and the employee.

89. In NBI ELRC No 462 of 2017 Dominic Otieno Ooko v Northern Rangelands Company Limited, this court stated:

“106. Giving a determination, this kind of approach will attract a balanced dispensation of justice as opposed to the “reasonable employer test” that equates rational conduct by an employer with fairness. The approach considers the employer’s perspective too.”

90. 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 [2] of the Act enjoins the employer to demonstrate that the reason[s] for the termination or summary dismissal were fair and valid.

91. As indicated hereinabove clause 7.2 of the respondent’s policy and procedure; disciplinary provided for “formal discipline” and under the head a sub-item – investigations, thus;

“The relevant manager or someone appointed by the company is required to conduct an investigation to establish a disciplinary enquiry is necessary, ie, if there is any validity in the allegations, there is sufficient evidence to prove the charges and that the charges are serious enough to warrant formal action.”

92. There can be no doubt that under the respondent’s own policy and procedure:

- i. Any disciplinary enquiry would only be undertaken against an employee after an investigation conducted pursuant to the forestated clause established the necessity thereof.
- ii. Any allegations levelled against an employee can be a subject of a disciplinary process and for action, only if the investigation process established its validity.
- iii. Any allegation against an employee of the respondent would be made a ground of a disciplinary disciplinary process and or action only if the investigation process ascertained the ground/ allegation to be of a sufficient degree to warrant formal action. I am of the view that this speaks to fairness.



93. There is no doubt that the suspension against the claimant was an investigatory suspension. The letter read in part.
- “We hereby confirm that, with effect from today October 3, 2016 you have been suspended on full pay, pending the outcome of an investigation into the alleged fraud of company money [petty cash] and gross negligence in the performance of your duties...”
94. The respondent’s witness stated that were no final investigations that even conducted pursuant to the clause hereinabove mentioned. She did not tender before this court any material to suggest that there were partial investigations or at all. Terms of human resource policies and procedures at workplaces are never there for ornamental purposes. They spur orderliness at the place of work, and consistence in actions both by the employer and the employees thereat.
95. The terms of an organization’s human resource policy and procedures, or manual becomes part of the contract of employment and any non-adherence to the same by either the employer or the employee, equates a breach of a term or condition of the contract.
96. The respondent had a well set out mechanism for determining validity and fairness of reasons for disciplinary action against its employees. In the instant matter, for unexplained reasons the respondent did not engage the mechanism. In my view the failure to subject the allegations that were being levelled against the claimant to the mechanism [investigatory] from the onset deprived the reasons for the summary dismissal validity and fairness.
97. Too the aforesaid failure to have the sieving of the allegations in accordance with the policy and procedure mechanism mentioned above, deprived of from the onset justifiability of the grounds that were made the subject matter of the disciplinary process, and the reasons for the termination therefore.
98. In the case of *Enock Nyakundi Onchwari v The National Authority for Campaign Against Alcohol & Drug Abuse* – NBI ELRC 2036 of 2017, this court expressed itself thus:
- “197. The respondent did not act with probable cause since it did not reasonably investigate the accusations – see Mennisota Court of Appeal decision in *Wiring v Kinny Shoes Corp* 448 NW 2 d 536 [minn Ct App 1989].”
99. The material placed before this court by the respondent isn’t clear whether the summary dismissal of the claimant was attracted by a misappropriation of the respondent’s funds or on premise of that she had an intention to defraud the respondent of its money. The respondent’s material reveals the two aspects being used interchangeably. In my view, it is either she misappropriated the funds or had an intention to, it cannot be both. This situation of unsureness only aids to demonstrate that there was no valid reason for the dismissal.
100. The claimant’s evidence that the accounts reconciled and that the supplier, Osteria wrote a letter indicating their default in not updating the payments that had been received, leaving the respondent’s account with them on the debit was not addressed or in any manner challenged by the respondent’s witness.
101. The claimant asserted that through an email of September 15, 2016, the respondent’s team exonerated her from any wrong doing, and that Mpesa was an accepted mode of paying suppliers was equally unchallenged. Indeed, in her evidence under cross examination, the respondent’s witness admitted that the respondent didn’t have any payment policy that barred the mode of payment.
102. In upshot and on this count, I find that the summary dismissal was substantively unfair.



## Of the Reliefs.

103. Having found that the summary dismissal was unfair, I now turn to consider the reliefs the claimant is entitled to. The claimant sought *inter alia* a twelve [12] months' compensation for unfair termination, section 49 [1] [c] of the *Act*, bestows upon court the authority to grant a compensatory award for an employee who has successfully assailed unfairness in a termination of his or her employment. The grant is discretionary dependent on the peculiar circumstances of each case.
104. In this matter I have considered; the unchallenged circumstances under which the claimant left her earlier employer; the substantive and unprocedural unfairness that were present in the dismissal of the claimant from employment, the unexplained non-adherence of the respondent to its own policy and procedures; and the claimant's length of time she was in the employment of the respondent after leaving Laborex [K] Limited, and find that the claimant is entitled to the compensatory award such to an extent of 9 [Nine] months gross salary, Kshs 975,246.
105. The claimant further sought for one month's salary in lieu of notice. Having found that the summary dismissal was substantively unjustified and procedurally unfair, I find the claimant entitled to one month's pay in lieu of notice, and therefore, Kshs 98,361.00.
106. The claimant further sought for "all unpaid allowances." The claim under this head suffered destituteness in particularity. I agree with counsel for the respondent's submissions. The claimant did not present any evidence before this court from which I can discern what the unpaid allowances are. The claim is declined.
107. Looking at the material placed before this court, the claim for damages for loss of career has not been supported by any evidence and or justification. The same is for failing, and I so find.
108. Lastly, the claimant sought for general and aggravated damages, including exemplary damages, for discrimination, unfair treatment, unprocedural termination and libel. Without much ado I hereby state that the claimant did not at all lead evidence to establish discrimination, unfair treatment and libel. Courts make awards on basis of evidence laid before them, not on submissions alone for submissions are never evidence of parties. I am not persuaded therefore that I can make any award under the head.
109. I take this opportunity to thank counsel for the parties for their well-researched lengthy submissions. I considered them duly, and any failure by this court to bring them out in this judgment in the detailed manner they were, is no show that they were not helpful. They were indeed, and may the parties take comfort so.
110. In the upshot, I enter judgment in favour of the claimant in the following terms:
  - a. Compensation pursuant to section 49 [1] [c] of the *Employment Act*, Kshs 925,246.
  - b. One month's salary in lieu of notice, Kshs 98,361,00.
  - c. Interest on [a] and [b] above at court rates from the date of this Judgment till full payment.
  - d. A declaration that the summary dismissal was unfair.
  - e. Costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2022.**

.....

**OCHARO KEBIRA**



**JUDGE**

**Delivered in presence of:**

Mr Muoki for the Respondent.

Ms Onyango for the Claimant.

**Order**

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

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

.....

**OCHARO KEBIRA**

**JUDGE**

