REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 566 OF 2019 CONSOLIDATED WITH

CAUSE NOs. 563 OF 2019, 564 OF 2019 & 565 OF 2019

1. WILLY RONO

2. JACKSON GITHAIGA NDIRITU

3. SAMMY KILONZO MBAU

4. JOHNSON KAGIRI..CLAIMANTS

VERSUS

L'OREAL EAST AFRICA LIMITED...RESPONDENT

JUDGMENT

1. The Claimants herein, to wit, Mr. Willy Rono, Mr. Jackson Githaiga Ndiritu, Mr. Sammy Kilonzo Mbau and Mr. Johnson Kagiri named as the 1st, 2nd, 3rd and 4th Claimants in this suit filed individual and separate Claims against the Respondent on 23rd August 2019. In a nutshell, the Claimants aver that the Respondent unlawfully, unprocedurally and unfairly dismissed them from employment. In order to obviate the need to have 4 separate hearings on the same issues, these 4 cases were consolidated for purposes of hearing and were thus heard together pursuant to directions of this Honourable Court.

2. By way of background, the Claimants aver that they were employed by the Respondent on diverse dates between the years 2010 and 2016 pursuant to formal contracts of employment and that their terms of service were also governed by the Respondent's Disciplinary Policy, Travel Policy and Code of Ethics. They each aver that they were exemplary employees as their performance, commitment, diligence and dedication to their duties in the Respondent Company earned them various salary increments and promotions during the employment period. The Claimants aver that they each received a Notice to show cause. The 1st, 2nd and 3rd Claimants averred that their show causes were in regards to allegations of forging hotel receipts and ETR attached to the expense sheets while the 4th Claimant's notice was in regards to allegation of gross misappropriation of imprest advance. The Claimants aver that they expressly responded to the Notices explaining themselves against the allegations and were subsequently notified to appear before a disciplinary committee on 15th April 2019 and 23rd April 2019. They averred that they attended their disciplinary hearings as scheduled and were subsequently summarily dismissed by the Respondent on 10th May 2019 for gross misconduct and violation of employer's code of ethics. They further aver that on 12th May 2019, the Respondent sent defamatory email to various distributors who had worked closely with the Claimants and maligned their character and personae. They contend that their termination was predetermined because according to the Respondent's structure for 2019 vis-à-vis that for 2017, the Respondent intended to reduce company costs by terminating the service of certain employees within the Commercial Division. The Claimants aver that the Respondent's panel which conducted their disciplinary hearing was neither independent nor impartial as their line managers (for the 1st, 2nd and 3rd Claimants) and supervisor (for the 4th Claimant) were not represented and they were also not accorded the opportunity to appear with a fellow employee. Further, that they were never furnished with the investigation report which informed the Respondent's decision to summarily dismiss them and that the Respondent also failed to accord them the opportunity to cross examine witnesses. The Claimants averred that the minutes of their disciplinary hearing do not reflect the account of their responses during the said hearing and that they were denied their right to appeal and/or for a second hearing. They averred that they did not have any disciplinary records during their employment tenure with the Respondent and that in any event a verbal/written warning would have sufficed. They further aver that they have suffered great economic loss, damage and prejudice as a result of the unlawful termination of their contracts.

3. The 3rd Claimant, Sammy Kilonzo Mbau averred that he has a loan facility with Standard Chartered Bank which loan the Respondent is aware of and that he is unable to pay the said loan as and when it falls due because of the illegal/unlawful termination of his employment contract. He further avers that he had relocated to Mombasa on the Respondent's request so as to fulfil his employment obligations and incurred costs in the relocation exercise. The Claimants pray that judgment be entered against the Respondent for: a declaration that their summary dismissal by the Respondent was unlawful, unprocedural and unfair within the meaning of Section 45 of the Employment Act (Cap

226); the Respondent be ordered to pay the Claimants terminal benefits as set out in each of their Claims; Interest on the payments at court rates from date of filing suit until payment in full; costs of their suits; and any other relief that this Honourable Court may deem fit and just to grant. The 1st, 2nd and 4th Claimants further seek for a written apology letter from the Respondent for the defamation.

4. The Respondent filed its Memorandum of Defence in each of the Claims in September 2020 averring that the Claimants breached ethical, policy and contractual obligations by irregularly accounting their travel and expenses receipts for trips undertaken on diverse dates in the year 2018, in a suspected ploy to defraud the Respondent of its resources. It avers that the Claimants particularly breached Clauses 2.12.2, 8 and 10.2 of the employment contract and the Respondent’s code of ethics and travel policy. It avers that the Respondent’s Internal Control and Compliance Manager during a routine visit to the Respondent’s HR Manager’s office glanced upon a claims report relating to an employee by the name Dominic Maina. That the said compliance manager skimmed through the receipts supporting the claims reports and noticed that the ETR attached to one of the receipts was irregular as it was issued days after the expense had been incurred. That his further audit of the claims report of the said employee determined that there were various anomalies with unwarranted monies paid to the Claimants and which discovery led to the Respondent auditing all expense reports submitted by all employees. The Respondent averred that it then discovered that several employees including the Claimants had submitted suspicious irregular ETRs and receipts from multiple establishments in different counties, in support of their previous expense reports for which they sought reimbursement. It further avers that based on the Claimants’ responses to their Show Cause Letters and the report by its Internal Control and Compliance Manager, it undertook a forensic investigation through its Security Manager for purposes of verifying the legitimacy of submitted receipts and ETRs for 8 employees. That the Security Manager’s investigations confirmed that the said ETRs and receipts relied upon by the Claimants were irregular and/or forged. The Respondent avers that the Claimants were notified of their right to representation at the disciplinary hearing through the invitation letters and whether or not they chose to exercise that right cannot be a liability placed on the Respondent. The Respondent averred that the Claimants admitted at their disciplinary hearing that the receipts attached on the various claim forms were not genuine and even identified the person who was forging the receipts and ETRs and that they also apologised for their misgivings. That their said admission and revelation are in the minutes of the disciplinary hearing attached to the Claimants’ claims and that together with lack of reasonable justification for such violation led to the Respondent summarily dismissing the Claimants. It averred that the Claimants’ line managers’ attendance at the disciplinary hearing was not mandatory and that a reading of the Respondent’s grievance and disciplinary policy clearly states that the line manager should only ensure that the employee can fully understand what is being said at all stages of the disciplinary procedure. Further, that the Claimants never challenged the constitution of the disciplinary panel before, during or after the disciplinary hearing and neither did they request, complain or require that their line managers be present. The Respondent also avers that it was under no obligation to issue the investigation report to the Claimants in the absence of such a request from the Claimants and considering they had admitted to presenting forged receipts. The Respondent averred that reviewing the report would have served no purpose because they were already aware of its contents and further, that a disciplinary hearing is not a court of law where witnesses are required to give evidence and to be cross examined. That in any case they did not request that any specific witnesses be availed at the hearing for purposes of cross examination. It also denies that the Claimants appealed their summary dismissal and contends that the warning system only applies to termination and not summary dismissal as per its grievance and disciplinary policy. The Respondent avers that the Claimants were paid their final dues after clearing with the Respondent and wonders why the Claimants proceeded to file suits after such voluntary and unequivocal admission. It contends that the Claimants are not entitled to notice pay and compensation as they were lawfully summarily dismissed as per the law. The Respondent averred that in case the Claimants are referring to a claim for service pay, they are not entitled to the same because they were contributing members of NSSF and were also members of the Respondent's pension scheme as per their payslips. It further denies the allegations of defamation averring that it merely notified its customers that the Claimants were no longer its employees and that the same is reasonable due diligence which does not amount to defamation. That the allegation of defamation is further ambiguous as the Claimants have not pleaded the words/phrases allegedly uttered and deemed defamatory and that the Claimants are not entitled to any written apology from the Respondent because no defamation has been proven. It further avers that it takes offence because the Claimants breached its right to privacy by publishing confidential documents belonging to the Respondent and which was also in breach of Clause 14.1 of the employment contract. It further avers that the Claimants are not entitled to costs of the suit and interest because they have no valid cause of action and have dragged the Respondent to court in a suit that lacks merit and that the same is tantamount to an abuse of the court process. The Respondent prays that the Court finds the Claimants’ termination lawful and fair and upholds the Respondent's decision to terminate the Claimants and that the Court further dismisses the suits with costs to the Respondent.

5. The four Claimants testified before Court with each producing their statements and documents as their evidence and they each further recognised the receipts produced in the Respondent’s bundle. Three of the Claimants admitted during cross examination of having been informed of their right to be represented at the disciplinary hearing but asserted that since the communication was that the witness would not be able to answer questions, they could not bring a witness who could not talk. They all further confirmed that they were only paid for the 10 days worked in May but were never paid money towards their terminal dues. Mr. Jackson Githaiga Ndiritu (Claimant in Cause 564 of 2019) also stated in cross-examination that he was called by HR to sign the minutes after the meeting but was not allowed to read nor given any opportunity to raise issues on the minutes. He stated in re-examination that it was not in their travel policy to enquire about KRA Pin. Mr. Sammy Kilonzo Mbau (Claimant in Cause 565 of 2019) also stated in cross-examination that he was not given a chance to defend himself in the disciplinary meeting and that no documents were given to him despite him severally asking for the same during the disciplinary hearing. He stated in re-examination that his travel expenses were capped at Kshs. 4,000/- and none of his receipts had issues and further, that the hearing was not conducted in a fair manner as his line manager was supposed to be there. Mr. Willy Rono (Claimant in Cause 563 of 2019) also stated in cross-examination that he went to the office and was told to sign the minutes and leave and that he did not therefore get to read them. He denied being notified on the accompaniment of staff and further denied knowing the Pin Checkers stating that they were brought after. He stated in re-examination that what transpired in the disciplinary meeting was hostile and his immediate line manager was not there and that it was unlawful and unfair. He further denied admitting to any forgery in respect to NISC. Mr. Johnson Kagiri (Claimant in Cause 566 of 2019) also stated in cross-examination that the travel policy bars the claiming of expenses incurred by a partner and that he did not attach any receipts in relation to a partner. That he did explain that he had spent a night at Savanah before leaving for Busia and when he returned, he went to the Victoria Hotel and then returned to get an ETR on Sunday. That at the disciplinary hearing he queried why his boss was not in the meeting but which issue was never captured in the minutes. That he was also told to sign the minutes and leave. He stated in re-examination that the company had the policy to refuse to refund and that he never had any issue of refunds for the 9 years of service. That he was not able to respond adequately as he was not keeping receipts and that he never saw the receipts for the show cause.

6. The Respondent’s witness, Grace Mbiu who was the Internal Compliance Manager at the time, produced her statement and Respondent’s documents as evidence in Court. She testified that she attended the disciplinary hearing for the Claimants and none of them complained that they had not been furnished with documents or that they were not heard. She confirmed that the Pin Checkers were issued after dismissal and that Willy Rono admitted that the receipts were not genuine; Sammy Mbau admitted that he ensured receipts were for 4,000/-; Johnson

Kagiri had submitted expenses incurred by his wife; and Jackson Githaiga had discrepancies on his expense sheet. She stated that the Respondent believed that the reasons genuinely existed at the time of summarily dismissing the Claimants and asserted that they paid the Claimants their terminal benefits. She testified under cross-examination that they used the KRA Pin Checker to confirm the ETRs and that the same did not avail any positive results. She admitted that they did not attach the Pin Checker results or the call logs of the calls made at the hotels and confirmed that the security manager's report was made before her report. She further admitted that the report by Esther Kagema was not used for Jackson Githaiga's disciplinary hearing and that they did not give the Claimants the investigation report. She also stated that the issue of the line manager being present was a HR matter. In re-examination she stated that they attached the evidence in the notices to show cause which were issued to the Claimants and that they responded making reference to the said receipts. She asserted that there was no policy to furnish the employees with documents not sought.

7. The Claimants submitted that their summary dismissal by the Respondent was unlawful, unprocedural and unfair within the meaning of Section 45 of the Employment Act 2007. They relied on the case of **Anthony Mkala Chitavi *v* Malindi Water & Sewerage Co. Ltd [2013] eKLR** where the Court expounded on procedural fairness and stated that:

> "*And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.*
>
> *The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.*
>
> *Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.*
>
> *Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.*"

8. The Claimants submitted that no investigation report or any other evidence was attached to their show cause letters to enable them respond to the same and that they thus attended their disciplinary hearing without knowing what to expect or how to defend themselves. Further, that the notices inviting them each for a disciplinary hearing breached the requirements of Section 41(2) of the Employment Act which gives an employee the right to have representations made on their behalf by anyone chosen by the said employee. They cited the case of **Peter Kamau Mwaura & Another *v* National Bank of Kenya [2020] eKLR** where Makau J. referred to the case of **Mary Mutanu Mwendwa *v* Ayuda [2013] eKLR** where the Court held that the Employment Act has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present. They submitted that the Court further relied on the case of **Kenya Union of Commercial Food and Allied Workers *v* Meru North Farmers Sacco Limited [2013] eKLR** where it was held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right. The Claimants submitted that neither the Claimants' line managers nor any other senior colleagues from the Commercial department of the Respondent formed part of the disciplinary panel yet it was a requirement in clause 4 of the Respondent's Disciplinary policy at page 1 that: *"At all stages of the disciplinary procedure, the line manager should ensure that the employee can fully understand what is being said……….the responsible line manager will make clear to the employee the incident in question and why it is unacceptable."* The Claimants submitted that evidently the Respondent breached its own Disciplinary Policy by not ensuring that due process was followed. The Claimants submitted that the Respondent also breached its Code of Ethics by not ensuring a fair process and that it admitted in paragraphs 41 and 42 of its Defence to not having served the Claimants with any documentary evidence at any stage of the disciplinary process. They cited the case of **Ol Pejeta Ranching Limited *v* David Wanjau Muhoro [2017] eKLR** where Waki, M'Inoti and Makhandia JJA held that the fact the respondent had no knowledge of the audit findings meant he had no chance to advance his defence and in the circumstances, it cannot therefore be said that the termination process was fair. They further submit that the burden of proof lay with the Respondent to prove the alleged forgery and to serve the Claimants with such evidence to enable them defend themselves. They submitted that in the case of **Judicial Service Commission *v* Gladys Boss Shollei [2014] eKLR** the Court held *inter alia* that disciplinary proceedings between an employer and an employee are civil in nature and the standard of proof as in other civil proceedings is on a balance of probability, with the burden of proof being on the party who alleges. They submit that they were never accorded time to read through the minutes of their disciplinary hearing to confirm the contents of the same. They invite the Court to compare their responses to the show cause notices against the purported minutes of the disciplinary hearing drafted by the Respondent, which do not indicate who prepared, signed and stamped the same and urge the Court to disregard the alleged minutes of the disciplinary hearing. They further submit that Section 45(5)(a) of the Employment Act 2007 mandates the Court to look at how the decision to terminate an Employee was carried out by an Employer. They submitted that it is clear that the actions of the Respondent in their case aimed at humiliating them because having worked for the Respondent for many years, fairness and courtesy should have been accorded to them in the manner their dismissal was communicated instead of sending an email.

9. The Claimants further question the authenticity of the Fraud Report as it was not dated and that the Respondent's witness was further unsure of the general timeline she prepared the said report in her testimony in Court. The Claimant submitted that it could have in any event been compiled after their dismissal or as a reaction to the suits since the same was never served upon them throughout the disciplinary process. It is the Claimants' submission that the Respondent has not proven the allegation of fraud levelled against them on a balance of probabilities as it failed to attach to its pleadings the alleged forged receipts and ETRs with official letters from the specific hotels confirming the forgery. That the Respondent's witness in her capacity as the Internal Control and Compliance Manager further failed to avail to this Court the audited accounts or any bank statements or records of the Respondent Company evidencing payment of the alleged fraudulent transactions to the Claimants. The Claimants submitted that the allegations contained in the Notice to Show cause do not align with the findings of the Fraud Report authored by the defence witness. The Claimants further submitted that the Respondent's Security Preliminary Report failed to meet the threshold stipulated at page 1 clause 3 of the Respondent's Disciplinary Policy as follows:

"…It is of utmost importance that the facts in a case are determined beyond reasonable doubt and that the employee is given the opportunity

to state his/her case to whoever is investigating the matter……In case of a serious nature, it is important to take statements from witnesses as quickly as possible. Statements should be signed by the individual recording it, the individual making it and a witness"

10. The Claimants submitted that the balance of proof for allegations such as the subject before Court was therefore beyond reasonable doubt, as per the Respondent's Disciplinary Policy but which threshold the Respondent has failed to meet. They submitted that the Respondent contravened Section 45(2)(a)(ii) of the Employment Act 2007 which provides that a termination of employment by an employer is unfair if the employer fails to prove that it is based on the operational requirements of the employer. On the issue of travel expenses, they submitted that neither their employment contracts nor the Respondent's Travel Policy in general required them to submit hotel receipts with Electronic Tax Register (ETRs) or to further verify the validity of the ETR or KRA PIN's of the various hotels they visited while carrying out their employment obligations to the Respondent. The Claimants' submitted that the Respondent has failed to prove to this Court the reasons for their termination as required of it under Sections 43 and 47(5) of the Employment Act 2007 and they cite the Court of Appeal case of **Pius Machafu Isindu *v* Lavington Security Guards Limited [2017] eKLR** in support of this submission. The Claimants further submitted that they have proved their summary dismissal was irregular, unlawful and unfair as the Respondent had no probable cause to summarily dismiss them and are therefore entitled to the reliefs sought. They urge this Court to find the dismissals irregular, unlawful and unfair and accordingly award them damages for unfair and unlawful summary dismissal and other reliefs as prayed in their statements of claim. The Claimants rely on the case of **D.K Njagi Marete *v* Teachers Service Commission [2013] eKLR Industrial Cause No. 379 of 2009** where Rika J. relied on the case of **Southern Highlands Tobacco *v* McQueen [1960] EA 490** where the Court held that: "*A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss."*

11. The Respondent submitted that Willy Rono and Sammy Kilonzo annexed minutes of the disciplinary hearing wherein they admitted to submitting receipts that were not genuine in support of their expense sheets. The Respondent submitted that the said Claimants have relied on the said minutes in support of their claim and further produced them as evidence during trial. That this Court has previously dismissed suits based on admission of gross misconduct such as in the cases of **David Otieno Qgada *v* Bidco Africa Limited [2020] eKLR** and **Bonface Simiyu Makoe *v* Kongoni River Farm (Star Division) [2020] eKLR**. The Respondent urged this Court ought to adopt the same approach and dismiss the 1st Claimant's suit with costs to the Respondent. The Respondent submitted that the 4th Claimant, Johnson Kagiri particularly failed to heed instructions issued to him as embodied in the Respondent's policies and that he is not entitled to declaration that he was unfairly terminated because the summary dismissal was substantially and procedurally fair. The Respondent submitted that the 4th Claimant was paid his terminal benefits as admitted by him and that he is not entitled to loss of future earnings because this is not a remedy under any regime of employment law in Kenya and that it is trite law that anticipatory awards are not payable in employment disputes. Further, that the 4th Claimant is not entitled to damages for defamation because he has not established this defamation and is consequently not entitled to any written apology from the Respondent. The Respondent submits that it genuinely believes the four Claimants engaged in misconduct in terms of Section 43(2) of the Employment Act and relies on the decision of the Court in **Kenya Power & Lighting Company Limited *v* Aggrey Lukorito Wasike [2017] eKLR** in support of this submission. The Respondent submitted that the Claimants also fundamentally breached the obligations under their contracts of employment and that it was necessary to conduct disciplinary proceedings as envisaged under Section 44 (3) of the Employment Act. It submitted that the four Claimants were informed of their right of representation at the disciplinary hearing but attended the hearing without representation and also did not raise any issue about representation, composition of the disciplinary panel and issuance of any material to enable them to prepare for the hearing. The Respondent further submits that the documents filed by the Claimants after summary dismissal have no evidentiary value.

12. The Claimants were terminated on account of alleged misconduct at the workplace. The Respondent issued each of the Claimants with show cause letters. The show cause letters gave the Claimants 4 or so days to respond and the Claimants responded in some cases beyond the time indicated. For instance, the show cause letter dated 4th April 2019 for Mr. Sammy Mbau was to be responded to by 8th April 2019 but his response was dated 11th April 2019. This means he had more than adequate time to craft a response. His letter was one contrite of heart and he indicated he wanted guidance for future mitigation and to prevent such anomalies. He sought guidance on how to mitigate and prevent such issues from occurring. In the letters inviting the Claimants to the disciplinary hearing the Respondent stated thus: *You have the right to be accompanied by a witness/colleague who has not formed part of the investigation. Your companion will not be able to answer questions on your behalf. Please inform us the name of your witness if any.*

> *You are advised that the Disciplinary Policy allows for the hearing to proceed in your absence. Therefore, failure to attend without a satisfactory explanation may result in the hearing taking place in your absence.*
>
> *Once a decision has been made regarding the allegations of misconduct you will be informed of the outcome in writing.*

13. The Claimants were thereafter issued with summary dismissal letters. The content of the letters is self-explanatory and accords with the letters of show cause, the responses considered and the outcome given – summary dismissal. Despite seeking relief for defamation, no particulars were provided. The alleged defamatory email read thus: *Dear all, This is to inform you that we had some of our channel managers leaving employment after some issues arose. Those affected are:* (and lists some 8 employees including the Claimants. Nothing in the email shows defamation and the Claimants therefore have not proved the same. In each of the Claimants' termination letters, the Respondent indicated that final dues would be paid. Each Claimant received payment and none has proved that they were not paid. Their terminations were text-book perfect with the safeguards under Section 41 adhered to. Section 41 of the Employment Act does not contemplate a witness attending and answering questions on behalf of the employee, the Respondent's policy accords with the law. The policy that was in place allowed for line managers to be aware of the discipline cause and the same dies not make the line manager a necessary attendee at the disciplinary cause of the employee. The policy however liberally read cannot connote such provision. In the final analysis I find the suits by the Claimants to be completely devoid of merit and fit for only one thing – dismissal. Each suit is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE