



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 1472 OF 2018

[CONSOLIDATED WITH CAUSE NUMBER 1473 OF 2018]

BETWEEN

1. CHARLES MUEMA MUNUVE
2. MARY RONO..... CLAIMANTS

VERSUS

SAFARICOM PLC..... RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

M/S J.A. Guserwa & Company Advocates for the Claimants

Mohammed Muigai LLP, for the Respondent

PLEADINGS.

1. The Claimants worked for the Respondent, as Area Sales Managers. They were both summarily dismissed by the Respondent on 28th June 2018.
2. The 1st Claimant [Cause 1472/2018], was Area Sales Manager North Coast, earning a monthly gross salary of Kshs. 331,000, at the time of dismissal.
3. The 2nd Claimant [Cause 1473/2018], was Area Sales Manager, Rift Valley Region. She had been promoted to the position of Senior Manager Retail Operations, earning a monthly gross salary of Kshs. 528,000, by the time of dismissal.
4. They were dismissed on 2 similar grounds: that while carrying out their duties, they failed to adhere to the requirements of ensuring proper distribution, activation and monitoring of devices, resulting in failure to account for various devices; and two, failed to show due care, to ensure that Respondent’s assets were used for intended purposes, which resulted in the devices being used in competitor networks.
5. The Claimants state that they were not given fair hearing, and dismissal was without justifiable cause.
6. They pray for Judgment against the Respondent for: -

1st Claimant.

- a. 1-month salary in lieu of notice at Kshs. 331,001.

- b. Award in respect of attainment of 15 years at Kshs. 75,000.
- c. 12 months' salary in compensation for unfair termination at Kshs. 3,972,020.

Total...Kshs. 4,303,021.

- d. Declaration that dismissal was unfair and unlawful.
- e. Reinstatement.
- f. Salary arrears for the period the Claimant has been out of employment.
- g. Damages for discrimination and violation of employment rights.
- h. Exemplary damages for inhuman treatment and oppressive action.
- i. Maximum compensation for wrongful dismissal.
- j. In the alternative, payment of all lawful terminal dues owed to the Claimants.
- k. Costs with interest.

2nd Claimant.

- a. 1-month salary in lieu of notice at Kshs. 528,000.
- b. 12 months' salary in compensation for unfair dismissal at Kshs. 6,336,000.

Total...Kshs. 6,864,000.

[other prayers as in the 1st Claim, paragraph [d] to [k] above].

Response.

7. The Respondent filed similar Statements of Response in each Claim, on 19th June 2019. It is conceded that the Claimants were employed by the Respondent, as pleaded in their Claims. They were not diligent, loyal and committed throughout their employment.

8. The Respondent bought 90,000 Huawei Y 311 devices for about Kshs. 544.5 million. They were to be distributed to Dealers, Agents and Shops for free. Distribution was through Area Sales Managers. The Claimants were, Area Sales Managers. Their responsibilities included: collection and oversight of delivery and activation of the devices; monitoring and reporting on usage by Agents; and follow-up on lost and faulty devices.

9. There were elaborate mechanisms in place, to assist the Claimants in discharging their responsibilities. They included: inventory management; documentation in form of pick-lists and indemnity forms; and procedures on replacement of devices, as well as their reconciliation. They were trained on installation and use of electronic subscriber registration.

10. There was slow registration, and investigation carried out by the Respondent showed some devices were not being used on Respondent's network; some devices were being used by competitors; and others by individual customers, instead of Agents and Dealers.

11. The Claimants were responsible, and were therefore asked to account.

12. They did not have satisfactory explanations. They were taken through disciplinary processes and found culpable. They were summarily dismissed. The Respondent urges the Court to dismiss the Claims with costs.

Hearing timelines.

13. The Claims were consolidated by consent of the Parties, adopted as an order of the Court, on 2nd March 2020. Documents filed by the Parties were similarly admitted as their exhibits, on the same date.

14. The 1st Claimant was heard before Hon. Judge Byram Ongaya, on 2nd March 2020. Judge Ongaya was transferred from Nairobi to Mombasa, before completion of the hearing. The undersigned Judge who moved on transfer, in the opposite direction, heard the 2nd Claimant on 11th March 2021, and the Respondent's two Witnesses, Senior Manager Fraud Detection Emmanuel Ndibo, and Senior Manager Employee and Labour Relations Odhiambo Ooko, on 3rd June 2021, when hearing closed.

15. The Claim was last mentioned on 17th June 2021, when Parties confirmed filing of their Closing Submissions, and the Claim reserved for Judgment on 14th October 2021. Judgment however, has been readied in advance of the reserved date, and the Court Registry directed to reschedule delivery through notices issued to the Parties, on the date indicated at the end of the Judgment.

1ST Claimant's evidence.

16. The 1st Claimant adopted as his evidence, his Witness Statement on record. He was employed by the Respondent in 2003. He was at the time of giving evidence, a banker.

17. He was initially employed as a Customer Care Representative based at Nairobi. He was moved to Nakuru, re-transferred to Nairobi, Machakos and Mombasa. He was North Coast Area Sales Manager at the time of summary dismissal in 2018, earning a monthly gross salary of Kshs. 331,001.

18. His performance was exemplary, earning him several promotions and commendations. His loyalty to the Respondent was unwavering, and the Respondent awarded him for his loyalty. He exhibited awards conferred on him by the Respondent.

19. In November 2016, the Respondent rolled out digital registration of SIM cards. To facilitate this, M-pesa Agents and Sub-Agents were to be equipped with a device, Huawei Y 311, distributed freely by the Respondent. Distribution was done through the Area Sales Managers, and their distribution teams.

20. Area Sales Managers would collect the devices from Respondent's Retail Centres, with lists confirming the collected devices.

21. They distributed the devices through respective cluster Trade Development Representatives [TDRs]. TDRs passed on the devices to the Agents and Sub-Agents. It was the role of TDRs to train the Agents and Sub-Agents, and issue them with Indemnity Forms, confirming receipt of the devices.

22. The 1st Claimant received an e-mail from respondent's Compliance Team, around January 2018, asking him to account for some devices which were not attached to M-pesa tills. He replied that he indeed received the devices, distributed them, and returned Indemnity Forms to the distribution team.

23. In April 2018, he received another e-mail from the Risk Department, asking him to account for a different set of 498 devices. He was given a day to account for these. He replied explaining that Indemnity Forms with respect to these, had been returned, but he was unable to monitor their usage, because the devices were in Nairobi, while he had left for Mombasa a year earlier.

24. On 23rd May 2018, the 1st Claimant received notice to attend disciplinary hearing. He attended hearing, and gave the explanation above. The Committee insisted that he had to account for all the devices or produce handover reports. There is no handover process at the Respondent, from one Area Sales Manager to another. His explanation was disregarded.

25. He was summarily dismissed on 28th June 2018 for failure to account for 237 devices, out of an initial number of 498 devices. He appealed internally against the decision on 6th July 2018. The decision was upheld.

26. Cross-examined, the 1st Claimant told the Court he held a first degree and diploma, on joining the Respondent. He joined in a relatively junior position, but was promoted gradually, through the years. He was trained, and recognized for good work. Transfers were not promotional. Dismissal was malicious. He had been Area Sales Manager for 3 years. He was appraised during that period. He was just entrusted the devices. The devices were for a purpose. They were to be distributed to the Regions, for digital SIM card registration. The 1st Claimant was advised about the importance of the exercise. It was a requirement of the regulatory authorities, to register SIM cards. He did not know about security reasons. What was expected of him, was to collect the devices, and distribute them to the TDRs. The Respondent intended to achieve 100% registration.

27. The 1st Claimant told the Court further, on cross-examination, that he did not know where the Respondent obtained the devices from. He was aware that the Respondent alleged to have purchased the devices for approximately Kshs. 500 million. He would not contest the purchase price. The devices were issued to Agents and Dealers for free. If they were lost, it would be a loss to the Respondent. There was an indemnity however. The Respondent averred at paragraph 10 of the Statement of Response, that there was slow uptake on electronic subscriber registration. The reasons according to the Respondent, were: there were devices not being applied on Respondent's network for registration; devices were being applied on competitor networks; and devices being mapped to individual customers, rather than Respondent's Agents and Dealers. The 1st Claimant explained that he had left Nairobi a year earlier, before the Respondent asked him to account for devices. If there were proper records, it would have been possible to pass on an inventory to the distribution team at the Head Office.

28. The 1st Claimant told the Court that in his Statement to Respondent's Risk Management Department, at page 48 of Respondent's Documents, he acknowledged it was his responsibility *inter alia*, to ensure issued devices were active and in use; receive records from TDRs, of any O.B. reports on lost devices; and forwarding the reports, accompanied by indemnity forms to the Head Office. Each loss would be captured through an abstract.

29. The Claimant prepared Status Report dated 27th May 2018, exhibited in his Supplementary Documents, dated 27th November 2019. Paragraph 3 indicates 85 phones were lost. There were 40 abstracts available, which were forwarded to the Head Office. The 1st Claimant explained his Report to be a work in progress.

30. He was denied a fair hearing. There was a notification which merely advised that there would be a disciplinary hearing. Allegations including value of the devices, were stated. The Claimant states at paragraph 9 of his Statement of Claim, that notice did not issue.

31. He was allowed the company of a colleague. He attended hearing. His contract incorporated a clause on termination. He told the Committee that if a mistake did occur, he was ready to learn from it. It could be a mistake that devices were not applied for the intended purpose. The 1st Claimant was told at the hearing that the Respondent lost money. He was not the only Manager taken through a disciplinary process. Some were reinstated. There were advertisements for other roles, when the disciplinary process was pending.

32. Redirected, the 1st Claimant told the Court that his job was advertised before he appealed against summary dismissal. Appeal was predetermined. If he made a mistake, the 1st Claimant said he was willing to learn from it. He did not admit making a mistake. He was not responsible for loss of Kshs. 500 million to the Respondent. He was not given tools to monitor device use. He served for 15 years. He had a clean record. Police Abstracts were to be collected by TDRs. Dismissal was malicious.

2nd Claimants evidence.

33. The 2nd Claimant likewise adopted her Witness Statement as her evidence. She is involved in small projects presently. She is professionally a Retailer.

34. She was employed by the Respondent in February 2005 as a Call Centre Representative. She rose through the ranks to the position of Regional Retail Operations Manager, Rift Valley.

35. She was like the 1st Claimant, while in the position of Area Sales Manager, entrusted the role of distributing Respondent's devices to Agents and Dealers in her Region. She carried out the duty as instructed. She kept a record of the devices delivered. She took Inventory and Indemnity Forms. Indemnity covered the Employer, in event of loss or damage. Her employment record was clean. She had received several trophies from the Respondent for exemplary service. She displayed some of the trophies before the Court at the hearing. She was the Outstanding Regional Manager for the year 2017.

36. She received e-mail from the Respondent on 8th May 2018, asking her to account for some devices. She gave an account. 2 days later, she was summoned to Respondent's offices at Nakuru by Internal Audit Department.

37. She explained that she had received 960 Huawei Y 311 devices between May 2017 and September 2017 for digital subscriber registration. She distributed all devices, through TDRs.

38. The 2nd Claimant received summons for disciplinary hearing, dated 23rd May 2018. She was heard. On 23rd June 2018, she was summarily dismissed.

39. There was no letter to show cause. She accounted for every device. She was not told what was not understood in her accounting. She complied with the conditions set by the Respondent on distribution. Devices were to be supplied to M-pesa Agents for registration. The Respondent had a record of its Agents. She unsuccessfully appealed against the decision to summarily dismiss her. Some of her colleagues, faced with similar accusations were reinstated. She told the Court that her main prayer is, reinstatement.

40. Cross-examined, the 2nd Claimant confirmed that she had several promotions on merit. She was trained by the Respondent. She had several merit awards to her name. The Respondent did not discriminate in granting awards.

41. The disciplinary process was the first one she was facing throughout her service. She became Area Sales Manager in April 2017. She was not trained for the role.

42. She was entrusted devices for digital subscriber registration. Registration was required by the regulatory authorities. It was an important exercise.

43. There were costs involved, in acquisition of the devices. The devices remained the property of the Respondent, even after distribution. The 2nd Claimant was to ensure their activation. Her role included inventory management, delivery and returns. She was involved in distribution, not monitoring. There was a subscriber manual. She was not aware that the Respondent was concerned about slow uptake on registration. She learnt from her dismissal letter that the devices were being used by competitor networks. She learnt that they were being applied for other purposes. She did not know what would be the effect of these, upon the Respondent.

44. She was not aware of investigations carried out by the Respondent. She received e-mail, listing anomalies. It was a serious matter. She replied to all questions. Her laptop was confiscated by the Respondent, before she could retrieve the responses she gave to the Respondent.

45. She recorded a Statement while under investigation, conceding that some devices were stolen. She wrote an e-mail, referring to letter to show cause. She was invited to disciplinary hearing. She did not recall how many devices she accounted for.

46. It is not correct that there were 225 unaccounted for devices. She mentioned that 120 additional devices had not been accounted for. The 2nd Claimant was paid terminal dues.

47. Redirected, she told the Court she never saw the training manual, before coming to Court. It was addressed to Agents, not Area Sales Managers. The devices had serial numbers. The Respondent could monitor. She did not have information about theft of the devices. She was

not called by any Investigator to state her role. She did not receive any Investigation Report. She was accompanied by a colleague to the disciplinary session.

Respondent's evidence.

48. Emmanuel Ndibo adopted his Witness Statement. He restated that the Respondent rolled out distribution plan for 90,000 Huawei Y311 devices to its Dealers, Agents and Shops. The devices cost about Kshs. 544.5 million. They were distributed for free.

49. They were to be applied in registration of subscribers, in compliance with the policy of the regulatory authorities. The devices would be used in taking subscriber's personal identification documents as well as photographs. The Claimants were, Area Sales Managers, tasked with collection, oversight, delivery and activation of the devices; monitoring and reporting on the usage by the recipients; and follow-up of lost devices.

50. The Respondent ensured that the Claimants were properly trained for discharge of their roles. There was slow uptake in subscriber registration which necessitated investigations, carried out by Respondent's Ethics and Compliance Department. It was found out that devices were not being applied on Respondent's network; they were being used in competitor networks; and mapped to individuals, rather than to Respondent's Agents and Dealers.

51. The Claimants were required to account. They ignored the requirement and/or gave unsatisfactory explanations. They recorded statements to assist in the investigations.

52. Ndibo confirmed that each Claimant was assigned specific number of devices; there were devices, not accounted for; and the Respondent was exposed to financial loss. The Claimants were taken through disciplinary processes.

53. Cross-examined, Ndibo stated that not 90,000 devices were listed at page 39 of the Statement of Response. The 1st Claimant was assigned 2,092 devices, and the 2nd Claimant 960 devices. They were assigned from the year 2016 on a continuous basis. They were not given at once. They signed for every batch. The devices were for onward transmission to registered Agents. The Claimants were responsible. The Agents signed indemnity forms, which were issued by the Respondent. Ndibo did not have a list for devices assigned in 2017. In 2018, the 2nd Claimant was in Rift Valley

54. They were trained in distribution of the devices. Training started with the Area Sales Managers. They in turn trained the Agents. There was no separate training manual. Ndibo did not exhibit in Court, the Investigation Report. It was an Internal Report. The content, not the actual Report, was shared with the Claimants. The Respondent received indemnity forms from the Claimants. The loss the Respondent was exposed to, was for 2016. Investigation was in 2018. The Respondent had capacity to monitor the devices. It could block them. The Claimants did not have this capacity.

55. Redirected, Ndibo told the Court that Area Sales Managers had 3 key responsibilities, as stated above. 2nd Claimant did not account for 135 devices. The Claimants had the capacity to account.

56. Odhiambo Ooko told the Court that after investigation concluded, the Claimants were invited to disciplinary hearing. They were given full opportunity to state their respective cases. The Respondent was satisfied that the Claimants performed their work negligently and improperly. It was decided they are summarily dismissed. They were advised of their right of appeal. They were heard on appeal, and the initial decision summarily dismissing them, affirmed.

57. Cross-examined, Odhiambo told the Court that the 1st Claimant was employed in 2003, and the 2nd Claimant in 2005. They both performed well. They were rewarded for the specific periods. Odhiambo did not recall if the Claimants were availed the Investigation Report. They were issued letters to show cause. These were omitted from the Respondent's Documents. There was response to the letters to show cause, from the Claimants. There were no typed minutes of the disciplinary hearings. The Respondent presented electronic recording, but without transcripts. The Claimants were issued letters of dismissal and advised on their right of appeal, lasting 14 days. The Respondent did not advertise their roles, before the right of appeal was exhausted. Page 15 of the 2nd Claimant's supplementary record shows the role of Area Sales Manager was advertised by the Respondent, on 4th July 2018.

58. About 18 Employees were involved. About 4 were re-employed. The Respondent is a big company. Any job can be advertised. If the Claimants succeeded on appeal, they could always go back to work. Redirected, Odhiambo told the Court that 4 Employees were successful on appeal and were recalled.

Submissions.

59. **The Claimants submit** that they were not issued letters to show cause, before being subjected to disciplinary hearing. Respondent's 1st Witness confirmed that the Respondent has the capacity to trace all its devices. It could block them. The Claimants did not have this capacity. They had no control over the devices, once they delivered them to the Agents. The devices were distributed with indemnity forms, cushioning the Respondent from any loss. There was no financial loss, suffered by the Respondent. It was open to the Respondent to enforce the indemnity cover. Consequently, there was no valid reason or reasons, to justify termination, under Sections 43 and 45 of the Employment Act 2007.

60. It is submitted further for the Claimants that the electronic recordings of the disciplinary and appeal proceedings, are flawed. They were not submitted with transcripts or electronic certificates showing origins and contents. They were not played before the Court, and are of no evidential value.

61. The Claimants submit that they wish to be granted the primary remedy of reinstatement, in priority to other remedies. They seek alternatively for terminal benefits and compensation. They submit that 4 of their colleagues, whose contracts were terminated on similar grounds, were reinstated [they submit also that 11 other Employees were reinstated]. They rely on 4 decisions where the remedy of reinstatement was granted: -

§ *County Assembly of Kisumu & 2 others v. Kisumu County Service Board & 6 others, C.A. No. 17 & 18 of 2015.*

§ *George Kingi Bamba v. National Police Service Commission, C.A. No. 149 OF 2017.*

§ *George Mburugu Ikiara v. National Police Service Commission, Petition No. 248 of 2019.*

§ *Salome Lilian Etenyi v. Kenya Ports Authority, Cause No. 402 of 2015.*

62. **The Respondent submits** that the Claimants were well aware of their roles as Area Sales Managers. They were to regularly check if the devices distributed through them, were activated and in proper use. They requested and were allowed time to account for all the devices. They did not account. They discharged their roles negligently and improperly. There was valid reason or reasons justifying termination under Sections 43 and 44 of the Employment Act.

63. The Respondent relies on the following decisions: -

§ *Kenya Revenue Authority v. Reuwel Waithaka Gitahi & 2 others [2019] e-KLR* – where it was held that under Section 43 of the Employment Act, an Employer is not required to undertake a forensic examination of facts; all that is required, is for the Employer to prove reasons it genuinely believed to exist, causing it to terminate the Employee's services.

§ *Naima Khamis v. Oxford University Press [E.A.] Limited [2017] e-KLR* – which held that procedure is unfair where the Employer fails to accord the Employee the laid down procedure as per contract, or fails to accord the Employee the opportunity to be heard.

§ *Kenya Airways Limited v. Aviation & Allied Kenya Workers Union Kenya & 3 others [2014] e-KLR* – reinstatement should be granted on exceptional circumstances.

64. The issues as identified by the Parties, are as traditionally is in disputes involving unfair termination, whether: -

§ **Termination was founded on justifiable reason, or reasons under Sections 43 and 45 of the Employment Act.**

§ **Termination was procedurally fair, under Sections 41 and 45 of the Employment Act.**

§ **Remedies pleaded, are merited.**

The Court Finds: -

65. It is common ground that the Claimants were employed by the Respondent, in the years 2003 and 2005 respectively. They were promoted through the ranks and years, holding the positions of Area Sales Manager and Senior Manager Retail Operations respectively, as at the time they were summarily dismissed, on 28th June 2018. The 1st Claimant earned an all-inclusive monthly salary of Kshs. 331,000, while the 2nd Claimant earned Kshs. 528,000, as at the time of summary dismissal.

66. The reasons for the summary dismissal decision are captured in the letter dated 28th June 2018, which issued in standard form, to both Claimants. It was alleged that while carrying out their duties, the Claimants failed to adhere to the requirements of ensuring proper distribution, activation and monitoring of devices, as expected, which resulted in some of the assigned devices being unaccounted for; and further, that the Claimants failed to ensure that Respondent's assets were used for the intended purpose, resulting in the devices being used as personal phones and used in competitor networks.

67. The letter of summary dismissal alleges that the Claimants were involved in a specific employment offence, under Section 44 [4] [c] of the Employment Act – negligent and improper performance of duty which, they were mandated to perform properly and carefully.

68. Both Claimants appealed the summary dismissal decision to the Respondent's CEO; were heard; and Appeals rejected.

Justifiable reason/s.

69. The Respondent rolled out electronic registration of subscribers. Registration was a requirement by the regulatory authorities. It was deemed important and in advancement of national security, to have subscriber personal details, identification documents and photographs.

70. To achieve this objective, the Respondent invested in 90,000 Huawei Y311 devices, at a cost of about Kshs. 544.5 million. These were to be deployed countrywide. The Claimants, alongside other Area Sales Managers, were expected to collect the devices from the Respondent's Retail Shops; oversee delivery and activation of the devices; monitor and report on usage of the devices once distributed; and follow-up on lost and faulty devices. Distribution was carried out in phases, between 2016 and 2018.

71. The Respondent had in place a Subscriber Registration Device Management Process. It was the responsibility of the Area Sales Managers/Claimants, to collect the devices, deliver the devices, and ensure they were activated and ready to work. It was also their responsibility under the Management Process, to ensure the training of the Dealers and Agents. Upon activation of the devices, the Claimants would issue the Dealers and Agents with indemnity forms, containing the terms and conditions of use.

72. The Claimants fulfilled their obligations with respect to collection of the devices from the respective collection points. They are not faulted for not signing against the pick lists at the points of collection. They discharged their roles in processing indemnity forms, and dispatching the forms to the Dealer Support Teams at the Head Office for reconciliation. They both testified that they delivered the devices, and made full returns to the Head Office, in form of the indemnity forms.

73. The accusations against the Claimants appear mainly to concern the period after delivery of the devices to the Agents and Dealers. This period relates to activation and monitoring of the devices. Investigation carried out by the Respondent disclosed that the devices, were not assisting in moving forward the process of subscriber registration, as had been intended by the Respondent. It was the view of the Respondent that not all the distributed devices were being used in Respondent's network, for subscriber registration; some were in use in competitor networks; and others were mapped to individuals.

74. The Court understands this to have been largely, a problem of monitoring use of the devices, after they were distributed among the Dealers and the Agents.

75. The 1st Claimant when requested by the Respondent to account, explained that he had been transferred from Nairobi to Mombasa, a year before he was called upon to explain. It is not in dispute that he had been moved to Mombasa from Nairobi, a year before he was being called to account. Distributed devices were in Nairobi. He could not monitor their use, being in Mombasa. He no longer had supervisory control over the Agents and Dealers in Nairobi.

76. The same scenario applied to the 2nd Claimant. She was the Area Sales Manager Rift Valley Region, at the time she distributed the devices. She processed the indemnity forms, and made returns to the Head Office. Subscriber registration was piloted in October 2016. The 2nd phase was rolled out in January 2017. The 2nd Claimant was promoted to Senior Manager Retail Operations, on 8th September 2017. A new Area Sales Manager replaced her.

77. They were both being asked to account for the devices in May 2018, 2 years after registration was started, and while they had been moved from their initial areas of management. Was it possible to monitor use, and engage Dealers and Agents, while outside the initial areas of management? Was it technically possible to do the monitoring, even if the Claimants remained within their initial areas of management? The 1st Claimant prepared a status report dated 27th May 2018, which appears incomplete, and which he explained, was a work in progress. It is noted this report was prepared while the 1st Claimant was already at the North Coast, not in Nairobi.

78. The Claimants were not required to prepare handover reports at the time they were moved. The Subscriber Registration Device Management Process, generated by the Respondent to guide implementation, did not make provision for what would happen, where an Area Sales Manager was transferred or promoted, moving away from the initial areas of management. The 1st Claimant testified that the Respondent did not make provision for handover, but that the disciplinary committee insisted he avails a handover report, or produces unaccounted for devices, a year after he was moved away from Nairobi. Similarly, the 2nd Claimant was being asked to reconcile her records with the Area Sales Manager who took over from her, about a year after she was promoted.

79. It is absurd that even as the 1st Claimant was being accused of mismanaging subscriber registration while at Nairobi, his team at North Coast, where he had been assigned a similar role, was awarded a national trophy by the Respondent, for the highest device activation.

80. Frankly, the Respondent was demanding too much of the Claimants, by expecting them to account for devices through monitoring, while they had left these devices behind, upon promotion and transfer by the Respondent, and while no tools of monitoring the devices, were at any time, placed in the hands of the Claimants.

81. Investigator Ndibo, was candid. He told the Court that the Claimants did not have the capacity to monitor use of the devices. The Respondent had that capacity. It could block the devices. The 2nd Claimant told the Court that the Dealers and Agents are registered with the Respondent. The Respondent could easily enquire about the devices from their recipients. Why would the Respondent insist that Employees it had moved, without requiring them to provide handover reports at the time they were moved, monitor and account for devices no longer under the Employees' control? Ndibo did not even have a list of devices, assigned to the Claimants in 2017. The list he had, would be with respect to devices issued in 2016, the piloting phase. Was it reasonable to call on the Claimants to account in 2018? Where is the list for 2017?

82. The Respondent does not appear to have adequately prepared for electronic subscriber registration. The regulations from the Government, upon which the Respondent was required to act, came into force in August 2015. The Respondent recognized early that there was a challenge in implementation of the new regulations. It undertook to enable its trainers to disseminate information on the project to its Dealers, Agents and Shops. The Court record does not have material on actual training of the Area Sales Managers, but shows that they were to train the Agents and Dealers. An outline of training programme contained in the documents filed by the 1st Claimant, states that the Area Sales Managers were to be trained at once, at the Head Office, on a given date. They in turn would train Retailers and TDRs on two select days. While it is clear that the exercise was important to the Government's security policies, and considerable resources went into implementation of the exercise, was implementation preceded by adequate training of those charged with executing the project?

83. The Court does not think, having considered the facts and the decision supplied by the Respondent, **Kenya Revenue Authority v. Reuwel Waitaha Gitahi & 2 others [2019] e-KLR**, that the decision to summarily dismiss the Claimants was reasonable. The Respondent did not act within a band or range of reasonable responses. Reasonableness entails that an Employer is fair; transparent; takes into account all

factors; being able to justify the decision; having clear standards of communication; and being proportionate. The Court does not think that the Respondent demonstrated these qualities of a reasonable Employer, in dealing with the Claimants.

84. Termination was not based on valid reason or reasons, under Sections 43 and 45 of the Employment Act, and was on this score, unfair.

Procedure.

85. The record does not disclose significant missteps, in the procedure adopted by the Respondent, leading to summary dismissal of the Claimants. It is not disputed that they were heard by the disciplinary committee and on appeal.

86. The tape recorded proceedings were admitted consensually by the Parties, alongside other exhibits. It is not right for the Claimants to raise objection through their Submissions, about certification, while they have already consented to admission of all exhibits. If they wished to dispute production, they ought not to have consented to production.

87. The proceedings confirm that the Claimants were heard at the primary and secondary phases. The decision to summarily dismiss them, was affirmed on appeal.

88. It is also clear from the Claimants' pleadings, that they were issued letters to show cause, prior to the disciplinary proceedings. It is not correct as stated in their evidence, that they were denied the benefit of letters to show cause why, they should not be disciplined. They plead that they responded to each of the allegations in the letters to show cause. How is it then, that they turn around and tell the Court they were not issued letters to show cause?

89. The Claimants were taken through the process of investigation and recorded statements with Respondent's Risk Management Department; the 2nd Claimant also referred to her engagement with Respondent's Internal Audit Office; they were issued letters to show cause; they responded; they were invited to disciplinary hearing; they were heard; decisions were reached to summarily dismiss them; the decisions were communicated to them, and their right of appeal explained; they appealed; they were heard; and their appeals declined.

90. They were not availed the full Investigation Report by Ndibo, but had extracts, and were advised on the contents. They were aware of the charges against them. They did not go to the disciplinary hearing unaware of the circumstances and the charges. They were not ambushed. They were well-acquainted, with the facts and the issues in dispute. They did not cite any one issue, raised on the floor of the disciplinary hearing, that caught them by surprise, compromising their procedural protections. The Court does not think they were significantly prejudiced, by not having the full Report from Ndibo.

91. It is correct that the Respondent advertised for the position of Area Sales Managers while the Claimants' appeals were underway. The Respondent was dealing with a large number of Area Sales Managers, alleged to have mismanaged electronic subscriber registration. It was within its managerial discretion to prepare for the future without some of the Area Sales Managers, by initiating a process of recruitment. It was part of its succession planning. The 2nd Claimant had at the time in any event, moved from the position of Area Sales Manager. The Respondent is a big corporation, capable of creating job vacancies without let or hindrance, and would know how to place the Claimants, in the event they were successful on appeal. Odhiambo explained this. Procedure cannot be faulted on the ground that the Respondent put out job advertisements, while the Claimants' appeals had not been exhausted.

92. Some of the affected Area Sales Managers were reinstated by the Respondent on appeal. The Court does not have reason to conclude that the Claimants were, in light of this, discriminated. The facts applicable to those Area Sales Managers are not before this Court. The Court would not know what charges exactly they were faced with; what their grounds of appeal were; and what the Respondent found on appeal.

93. Termination met the standards of fairness, under Sections 41 and 45 of the Employment Act.

Remedies.

94. ***Termination as concluded above was flawed for want of valid reason or reasons, and is declared to have been unfair.***

95. There is no legal or factual foundation, warranting grant of damages, separate from a compensatory award for unfair termination, for discrimination and violation of employment rights.

96. The Claimants principally seek to be reinstated. The 1st Claimant testified that he is currently in banking. The 2nd Claimant told the Court she is working in 'small projects.' The Court understands this to mean that the Claimants have moved on. They are in income-generating work. The Respondent similarly appears to have moved on, having advertised, and probably filled the slots left vacant by the Claimants. There is no wisdom in the view of the Court, in unsettling the equilibrium, 3 years after the Parties disengaged, by granting the orders of reinstatement. The prayer for back-salaries is joined to the prayer for reinstatement. It cannot be allowed without reinstatement.

97. An order of compensation, under Section 49 of the Employment Act, and Section 12 [3] [v] of the Employment and Labour Relations Court Act, is the most appropriate remedy.

98. In assessing the quantity, it is observed that the Claimants had respectively, worked for 15 and 13 years uninterruptedly. They started off in junior positions and toiled their way up. They were in senior management positions, by the time of summary dismissal. Their records were clean. They were serial award-winners. The Respondent routinely promoted and garlanded them, for their performances. The 1st Claimant was still being recognized by the Respondent nationally, around the time of dismissal, for leading his team at the North Coast, in device activation. He topped the country, while overseeing North Coast, even as he was being investigated and disciplined, for mismanaging a

similar docket, a year back at Nairobi. This evidence is clear in his undisputed statement to the Risk Management Team. The 2nd Claimant carried her glittering trophies to Court, while giving evidence. She was the Outstanding Regional Manager for 2017. This was part of the period of the device distribution enquiry. She was accused of mismanaging a process which unfurled, at the time she was regarded the Outstanding Regional Manager, by the Respondent. The Respondent does not dispute that these were relatively long-serving Employees, with exemplary records. Their contracts were permanent and pensionable. They expected to see their contracts through to the end. They did not author the circumstances leading to summary dismissal. It has been considered also, that they were paid and accepted terminal benefits. They have since moved on, and are earning income, from alternative engagements. They mitigated their loss of employment.

99. *The 1st Claimant is granted compensation for unfair termination, equivalent of his 8 months' gross salary at Kshs. 2,648,000, and the 2nd Claimant granted compensation for unfair termination, equivalent of her 7 months' gross salary, at Kshs. 3,696,000.*

100. *The 1st Claimant is granted 1-month salary in lieu of notice at Kshs. 331,000, and 2nd Claimant granted 1-month salary in lieu of notice at Kshs. 528,000.*

101. The 1st Claimant has not established his prayer for Kshs. 75,000 award, on attainment of 15 years of service.

102. *Costs to the Claimants.*

103. *Interest granted at court rates, from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED: -

a. It is declared that, termination was not based on valid reason or reasons, and was to that extent unfair.

b. The Respondent shall pay to the 1st Claimant, equivalent of 8 months' gross salary in compensation for unfair termination at Kshs. 2,648,000 and notice at Kshs. 331,000 – total Kshs. 2,979,000.

c. The Respondent shall pay to the 2nd Claimant, equivalent of 7 months' gross salary in compensation for unfair termination at Kshs. 3,696,000 and notice at Kshs. 528,000- total Kshs. 4,224,000.

d. Costs to the Claimants.

e. Interest allowed at court rates, from the date of Judgment, till payment is made in full.

Dated, signed and released to the Parties electronically, at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 20th day of September 2021.

James Rika

Judge