



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CAUSE NO. 514 OF 2018**

**GENEVIEVE OYUGI.....CLAIMANT**

**VERSUS**

**DOEHLER EAST AFRICA LIMITED.....RESPONDENT**

**JUDGMENT**

1. By the statement of claim dated the 11<sup>th</sup> April 2018 and filed on the 12/4/2018, the Claimant instituted the instant suit against the Respondent, Doehler East Africa Ltd seeking the following reliefs;

**a. Compensation for loss of employment-12 months amounting to Ksh 1,560,000**

**b. Damages for discrimination, harassment and unfair labour practices amounting to Ksh 5,000,000**

**c. Costs of the suit.**

**d. Interests on (a) (d) and (e) above at commercial rates of 20% from March 2018**

**e. Any other and/or further relief that this Court may deem fit and just to grant in the circumstances.**

2. The Claimant filed together with statement claim a verifying affidavit dated 11<sup>th</sup> April 2018, filed list of witnesses dated 11<sup>th</sup> April 2018, her undated witness statement filed on the 12<sup>th</sup> April 2018, List of documents dated 11<sup>th</sup> April 2018 with bundle of documents exhibits 1-6. The Claimant filed her further undated witness statement on the 30<sup>th</sup> May 2018.

3. The Respondent filed response dated 10<sup>th</sup> May 2018, witness statement of Lilian Mwangi dated 14<sup>th</sup> May 2018, list of witnesses dated 14<sup>th</sup> May 2018, list of documents dated 14<sup>th</sup> May 2018, witness statement of Milicent Were dated 19<sup>th</sup> September 2018, further witness statement of Lilian Mwangi dated 17<sup>th</sup> September 2018, further list of documents dated 17<sup>th</sup> September 2018 with bundles exhibits 1-5.

4. The case was heard inter parties on the 29<sup>th</sup> July 2021 with the Claimant testifying on her own and the Respondent calling 2 witnesses. The Claimant was represented by Mr. Mundia instructed by the law firm of Koceyo & Company Advocates. Ms. Kyania instructed by the law firm of BM Musau & Co. Advocates LLP represented the Respondent. The Claimant's submissions with authorities are dated 11<sup>th</sup> August 2021. The submissions and list of authorities of the Respondent are dated 10<sup>th</sup> September 2021.

5. The matter was mentioned before the Deputy Registrar on the 13<sup>th</sup> September 2012 and the record indicates parties had filed their written submissions.

**Claimant's Case**

6. The Claimant gave sworn evidence and adopted the her undated statement filed in court on 12<sup>th</sup> April 2018 and her further undated statement filed on 30<sup>th</sup> May 2018 as her evidence in examination in chief. She also produced the documents in the list of documents dated 11<sup>th</sup> April 2018 exhibits 1-6 as her evidence in examination in chief.

7. During cross-examination, the Claimant stated that she was part of Customer Service team of the Respondent's company. The Claimant told the Court that her immediate supervisor harassed her. She told the court that she had no written document before the court on the allegation of harassment. The Claimant denied that she did not follow the instructions of the supervisor. The Claimant told the court she did not have any record of the alleged hostile environment with the Respondent as stated in her statement of claim. The witness was referred to her bundle of documents page 13 clause 9.5 of the her contract of employment where she was required to produce sick sheet if absent on Mondays or Fridays or a day preceding or after public holiday and to notify employer by 8.00A.M of absence on ground of illness. The Claimant was referred to paragraph 3 of her further witness statement which reads, '*that in all honesty these rules do not apply to the rest of the staff members as they walk in and out at whatever time they feel and absent themselves as many times without giving any reason or written letter from the doctor. I can say these rules were especially tighter on me as an individual.*' The Claimant admitted she had nothing to show that she was the only one required to comply with the sick sheet requirement. On the sick sheets she said sometimes she used her husband's medical cover. That she was expected to write to her immediate supervisor of the absence and did not have to copy anyone else. That she only wrote to her supervisor and did not copy to anyone else.

8. The Claimant told the court that she had no one to complain to as there were no formal structures. That one Bodi was the regional manager ranking higher than her immediate supervisor. That at the time of occurrence of the incident she did not report as there was no one else to report to. She testified that she was the only one reprimanded for wearing earphones in the office and denied that she did so to ignore her colleagues.

9. Upon being referred to paragraph 8 of her 1<sup>st</sup> statement the Claimant said that she did not have evidence of request to have her computer fixed as alleged in the statement. The Claimant denied using her office computer to make employment application. The Claimant was referred to paragraph 60 of her further witness statement where she states that she used the company's Microsoft office to read through a job applications and that she sent the email from company email address to her personal email address and not directly to potential employer. The Claimant confirmed that her employer had options to change medical insurance provider from time to time and that the employer could access the medical records.

10. The Claimant confirmed having been issued with notice of disciplinary hearing. That she did not explain herself during the disciplinary hearing and left immediately after the meeting and did not come back on the same day. She confirmed having been issued with a letter of termination. She did also confirm that she was paid her terminal dues. She confirmed that she was presently working. That after leaving the Respondent Company she has secured semi-permanent jobs.

11. Upon re-examination she said that they were placed at centralised place at the office as the customer service team. That initially everyone was sitting at same place at the customer service. That she recalled she moved on two occasions when her machines were not working. That she also moved when the line for customer service was not working and went to the sales team office. That training was not constant and only happened during changes. That she did not move when training was ongoing. That she informed the supervisor who was sitting next to her.

12. The Claimant told the court there was no prohibition of employee having more than one medical cover and that she also used her husband's medical cover once her dental cover was exhausted.

13. On question of reporting of harassment to her immediate supervisor, the Claimant said that she raised concern with colleagues and that during that time she reported to Lilian who was heading their office. That Lilian advised her to look for another job. That she informed Lilian verbally. That she did not refuse to follow instructions. She said that one was supposed to produce medical report whilst away for 2 consecutive days. That she did reports on all the days she was away. That on one occasion she was late she reported and worked late.

14. She said she wore earphones to help concentrate and that there was nothing wrong with looking for a job. That she did not look for a job while at the work place. That there was a limit on the medical cover. That there was no prohibition to employee having more than one medical cover.

15. That on the 20/3/2018 she found a letter on her desk summoning her for hearing the same day at 9.00 am. That she did not have ample time to prepare for the hearing. That it was difficult to get back-up because the rest of customer service had side-lined her and Lilian who could have been her witness left for an outside work. That after the disciplinary hearing she was told to leave, so she collected her belongings and left. That the credentials to access her machine were suspended immediately and she was issued with a termination letter on the same day. That she has not been able to get a permanent job after leaving the Respondent.

### **Respondent's Case**

16. **RW1** Lilian Mwangi gave sworn testimony. RW1 told the court that she is the current head of sales and also the Company director for Respondent. She adopted her statement dated 14<sup>th</sup> may 2018 and her further witness statement dated 17<sup>th</sup> September 2018 as her evidence in examination in chief and produced 14<sup>th</sup> may 2018 as defence exhibit A numbers 1-22 further list of documents dated 17<sup>th</sup> September as defence exhibit B numbers 1-5 as evidence for the Respondent in examination in chief.

17. Upon cross-examination RW1 making reference to Paragraph 6 of the Respondent's reply to the memorandum of claim said that it was true that the Claimant was severally reprimanded for similar conduct through email correspondence of 15<sup>th</sup> November 2016 at page 18 of the defence exhibit A. The mistake was that she had taken indemnity. Goods being brought into the country free of charge are still imports and rules have to be followed. That offence at disciplinary hearing per letter inviting her at page 31 of the defence exhibit A. RW1 told the court that the Claimant stormed out of the disciplinary meeting. RW1 could not confirm whether the Claimant received the disciplinary notice. That it was an hour notice to respond. RW1 said that the time was sufficient because it was apparent the issue was ongoing. The letter advised her to be accompanied by fellow colleague. She said that was sufficient time to get one to accompany her. That there were people in the office including herself. That the disciplinary issue was that the Claimant issued indemnity which exposed the Respondent to financial loss. The Company paid for the indemnity consequently. That in any import transition a bill of lading is issued, the customer service agent must ensure the bill of lading content is done correctly. That as per international standards once a bill of lading is done it cannot be changed.

In the instant case it was not done correctly and the Claimant failed to take the opportunity to correct the draft bill of lading. That the same was then given to customer who confirmed correctness of their own details in the bill of lading. The product details are technical and only customer service can ascertain. The final bill of lading is issued by the shipping line on instructions of customer service. That as per the Respondent's structure their Germany office receives bill of lading, in this case the bill of lading was sent to the Claimant to confirm correctness. That the Claimant was not working alone.

18. RW1 told the court that the Claimant was uncooperative and hostile to her work mates to extent of having earphones on in an attempt to isolate herself from verbal communications to discussion with her colleagues. That she did not have documents to prove she was uncooperative at the workplace. That it is not illegal to use earphone at the workplace. That it is true the Claimant had moved twice from her usual sitting position. The places she moved to had other employees of the Respondent. That in the office the one is expected to sit where her team sits.

19. RW1 told the court that she was not aware if the Claimant's computer was broken or stalled. That the Claimant was supposed to raise the issue with ICT or the immediate boss. She is not aware if the Claimant had raised the issue with the boss. That it is not illegal to sue another machine but must sit with team. That it is not in the contract but it is a requirement to sit with team

20. RW1 told the court that the employee is required to produce medical certificate for lateness for 2 consecutive days on sickness ground and on absence a day preceding or after a weekend or public holiday. RW1 admitted she has not produced evidence of the Claimant being late for 2 consecutive days. That the employee ought to inform the manager of lateness by 8.00 am. That she had once reported at 8.36 am and 9.43 am. She reported she had left her phone and would be late. On the 5<sup>th</sup> March 2018 at 3.09 she stated she would be late for work.

21. RW1 told the court that the short notice of disciplinary was informed by the urgency and sensitivity of the matter. The urgency and sensitivity of the matter did not waive the right to fair hearing. That the Claimant spoke at the hearing before storming out. Upon being referred to paragraph 32 of the statement the witness stated that what the Claimant had said was not enough to say she made representations to justify her actions. That she had attached a police Occurance book number of the police case filed against the Claimant. That the Respondent did not pursue the case. Upon being referred to Paragraph 4 of further statement dated the 17<sup>th</sup> September 2018 she said the Respondent has not pressed any fraudulent charges against the Claimant.

22. On re-exam RW1 stated that the customer service had responsibility to ensure that all the documents pertaining to Bill of Lading were correct and delivered to customer timely. That in case of challenge there is a system in place where you raise a ticket or through colleague or the line manager. That once ticket is raised it is up to the IT to follow up in case of delay. That the Respondent has 3 main departments and to ensure continuous learning teams sit together for the consultations of team members. That the Claimant was given letter and advised to get another colleague but she chose to come alone. That she had the option to call another person if the person she preferred was not available as this was about her job. That at the hearing how the Respondent responded to questions and attituded insinuated that is how things are done. She did not accept mistake and stormed out of a meeting attended by the line manager and a boss from Germany.

23. That the indemnity issued by the Claimant was a serious issue as after the Claimant left Respondent 2457 payment in dollars is converted to Euros of 2470. As a customer service employee, she ought to have been clear on the Country requirements for imports. The role supports the Germany team and ought to be conversant with Kenyan import process. That the Claimant made assumptions without consulting. That the main issue of absenteeism was because of absence on Mondays, Fridays or after Public holiday, if sick one must produce side sheet. That during the periods she was sick there was utilization of the medical cover but on other days there was none. That at the customer service team they have a team leader customer service one Nancy. Nancy had two punctual bosses Buck and another. That they were available and Claimant could have reported to them. That there was an email from Buck asking the Claimant why she was late. Above customer service there is a Regional Director sitting in Germany and there was CEO to Board. That she has evidence that the responsibility on the correctness of Bill of Lading lies with customer service (Refers to the email of 12<sup>th</sup> March 2018 at 14.57. That the customer also corrected the Claimant.

24. RW1 told the court that the Claimant ought to have raised the issue of short notice for disciplinary hearing when she appeared and further did not explain herself. She stormed out. The indemnity document is issued by area head of sales or Directors in Germany. Upon request for indemnity letter she should have informed the line manager to issue the letter. That it is her evidence the Claimant did not have authority.

25. RW2 Millicent Ochieng Were was sworn in and said that she was part of customer service by the time the Claimant left employment. She adopted her witness statement dated the 19<sup>th</sup> September 2018 as her evidence in Chief.

26. On cross-examination she said that she is not currently with the Respondent. That she is presently not working. That she could confirm they were in continuous training by either the Claimant or Nancy. That Nancy and the Claimant went to Germany hence they were the trainers. That they would discuss and resolve issues as a team. That the training was continuous as it is in between work. That she is not able to tell whether she missed out on any training when she was absent. She confirmed paragraph 11 of the witness statement and said they had continuous discussions of their team regarding their work. That they were only 4 in the team. That she does not have record of those who attended the training and important discussions under paragraph 11 of her statement. That the Claimant posted files in a WhatsApp group which made the line manager to leave. That the Claimant created tensions in the group. That she had earphones which caused a communication issue with teams and she had to be prompted to respond and remove the earphones.

That the Claimant banged door when people were at the office. That she did not have evidence of recorded instances of banging the door. Claimant forwarded draft bill of lading to return customer service. Final bill of lading is by the shipping line. Upon being referred to paragraph 16 she said she is not aware of the Claimant's details on the absence as everyone reported to the manager. That it was the duty of customer service to verify correctness of bill of lading and that this was part of the job description. That she had not filled the job description but it is part of their everyday work.

Upon being referred to paragraph 18 of her statement, the witness said that the Claimant forwarded a bill of lading to a customer and she believed that the customer confirmed that she has the evidence that the Claimant failed to refer to team leader and Germany team. Upon being referred to Pg 18 of the Respondent exhibit A she said that the Claimant was not working alone and that the email of 1<sup>st</sup> November

from Temiz to the Claimant. That the customer service cannot work independently, it is always a team.

Upon being referred to Paragraph 23 of her statement she said that the Claimant was not supposed to copy to her indemnity approval. That the email of 21<sup>st</sup> March 2018 an amendment for weight on Bill of lading. That the emails are not about the letter she signed on indemnity.

Upon being referred to Paragraph 24 the witness said that she is referring to the indemnity letter at the point she signed the letter. That she does not know if the Claimant consulted on the indemnity letter.

27. On Re-exam she said that she left the Respondent Company in December 2019. That she got another job offer. She said that training is continuous and that there are times they would have time set aside for training. That when she says continuous, she meant that there were time schedules for the training. She said that when the Claimant left to sit in another dept she was left out of discussions causing inconvenience to the team. That they suspected the Claimant had loud music with the earphones on and sometimes Nancy would call her but she would not hear. Other people had earphones but could hear. That there was an email of customer confirming their obligation in Bill of lading (email of 12<sup>th</sup> March 2018) Exhibit B Doc No 3) It also shows obligation of the customer team and that is what she was to verify by herself and not as a team. That indemnity is one of the things that customer service cannot handle without consulting the line manager. That you can do direct or email communication with the manager. That the Claimant ought to have consulted the line manager who should have signed the indemnity letter.

### **Issues for Determination**

28. The Claimant in written submissions raised the following as issues for determination:-

- a. Whether the Claimant's dismissal was unlawful and unfair for want of valid reasons and fair procedure?
- b. Whether the Claimant's claim ought to be upheld.?

The Respondent in submissions raised the issues to be:-

- a. Whether the claimant's termination from employment was fair and lawful
- b. Whether the Claimant was subjected to discrimination , harassment and unfair labour practices
- c. Whether the claimant is entitled to the reliefs sought
- d. Who bears the cost of the claim?

After carefully analyzing the parties' list of issues, the parties' written submissions and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether there were valid and justifiable reasons for termination?
- ii. Whether the procedure for the Claimant's termination was lawful and fair?
- iii. Whether Claimant is entitled to reliefs sought.

### **i. Whether there were valid and justifiable reasons for termination**

29. The letter of termination dated 20<sup>th</sup> March 2018 (exhibit 1 of the Claimant's bundle of documents) gives the reasons for termination as follows:-

***'1. Issuance of incorrect order to Messrs CMA CGM in terms of the right quantity of cargo to ship. You failed to report the mistake to your direct supervisor or line manager and in attempt to secretly correct the mistake you wrote and signed letter to Messrs CMA CGM with full knowledge that you did not have authority to sign letters on behalf of the company.***

***2. On 14<sup>th</sup> March 2018 you secretly issued without authority, an indemnity to Messrs CMA CGM, its underwriters , subsidiaries agencies, sub-agencies all their directors and employees against any liability, loss or damage on condition that they comply with your instructions to correct the mistake you had made your earlier order(in 1above). You further gave Messrs CMA CGM an undertaking that the company would not bring any claim no issue any proceedings for wrongful delivery of cargo by Messrs CMA CGM. This in essence exposes Doehler to wrongful delivery of cargo'.***

The above were the reasons stated for termination of the Claimant from employment with the Respondent and are in tandem to the notice of disciplinary hearing (exhibit 3 at page 6 of the Claimant's bundle of documents.

Section 45 of the Employment Act allows an employer to terminate employee's contract of employment on valid reasons based on performance, capacity and compatibility. Further section 43(1) of the Act requires the employer to prove the reason or reasons for the termination and where the employer fails to do so , the termination shall be deemed to be unfair within the meaning of section 45 . Section

43(2) states that the reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

Are the reasons stated in the termination letter and in the notice of disciplinary hearing valid and justified?

The burden of prove is on the employer to prove there were valid reasons for the termination. The Respondent submits there were valid reasons for the termination as per the letter of termination. That pursuant to the action of the Claimant the Respondent said it received a claim for US\$3,041 from the customer because of the indemnity issued by the Claimant on 3<sup>rd</sup> September 2018 (exhibit) affirming the seriousness of the conduct by the claimant. RW1 testified to the effect that the Claimant issued indemnity letter without authority and without consulting the line manager and that the indemnity letter was only to be issued by head of sales or directors in Germany. RW2 was a former employee who was part of the customer sales team. She had worked with the Claimant. She told the court that it was the duty of customer service to verify correctness of the bill of lading. That it was part of the job description but had not produced the job description in court. She told the court, that the Claimant ought to have consulted the line manager who issues the indemnity. The Claimant adopted her witness statement dated 12<sup>th</sup> April 2018 as are evidence in examination chief. In paragraph 5 she states ‘ *the Respondent profiled me and isolated me in normal office transaction wherein a bill of lading was shipped with incorrect details on weight, whereas the error in the entry of the incorrect weight was made at the port of loading in Germany , I together with other staff both locally and from the Respondent parent company in Germany were all involved in the correction of the error. The whole matter was later personalised by my immediate supervisor Nancy Omondi and singled out me to the exclusion of all other staff who were involved in the correction of the mistake*’. In paragraph 6 of the claim, the Claimant states , ‘*that I did not originate the Bill of lading which is in standard format of the Respondent and my role was to only indicate the errors appearing on the documents and forwarded it to the head-office for further action before it could be dispatched to the shipping line. There is neither illegality in my actions now(sic) was it unprocedural since the exercise occurred in my normal course of work and involved one of my duties.*’

The Claimant in further undated statement paragraph 35 she explains her role to effect she had no role in inputting the details to the proforma invoices in the B/L and the error was done by someone else in the shipping line. In paragraph 36 of her further undated statement the Claimant states in part, ‘*I signed the indemnity letter in full knowledge of KAM Lilian Mwangi Logistics employee, employee Jascha Schule and customer service Rahab who printed letter on the letter head since we do not hold copies of Doehler letter head in our office in Kenya*’

The court finds that the above is an admission of the allegations in the letter to show cause for the following reasons:-

The statements by the Claimant are in tandem with the evidence led by the Respondent that the Claimant signed the indemnity letter without authority. Paragraph 4,5,6 and 7 of the witness statement of RW1 Lilian Mwangi to effect that the Claimant was not authorised to write the indemnity letter and created unofficial letter head. The Claimant did not seek authority of her team leader. She was not authorised to sign the indemnity letter. RW1 was the key account manager who the Claimant alleges to have signed the letter with her knowledge. There was no evidence placed before the court that those officers mentioned in paragraph 36 had full knowledge that the Claimant was signing a forged indemnity letter for lack of better words. I say forged because the Claimant admits she did not have access to the official letter head of the Respondent. The Claimant’s attempt to shift the blame to other staff under the email correspondence on the bill of lading (Claimant’s bundle of documents marked B3 and emails at pages 23-25) is not justified as she signed the indemnity letter alone knowing very well it was on a forged letter head and further knowing she had no authority. The Claimant did not seek authority from the authorised persons to sign the indemnity letter. The court will always uphold the employer’s internal policies and practices if consistent with the law. The Claimant acted in violation of the internal policies and practice as far as the indemnity letter is concerned.

Consequently, the court finds the reasons given by the employer in the termination letter to be valid and justifiable.

## **ii. Whether the procedure for the Claimant’s termination was lawful and fair?**

Even when there are valid and justifiable reason for the termination the employee is entitled to be heard before the termination. Procedural fairness is a mandatory requirement.

The Employment Act section 41 (2) provides the threshold of procedural fairness as follows:-

***‘(1) subject to section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language he understands , the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***Notwithstanding any other provision of this part, an employer shall before terminating the employment of employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representation’s which the employee may on the grounds of misconduct or poor performance, and the person, if any , chosen by the employee within subsection (1)make’.***

The ***Court of Appeal in Postal Corporation of Kenya v Andrew K. Tanui (2019)*** where the court pronounced itself on procedural fairness as herein under:-

***‘...four elements must thus be discernable for the procedure to pass muster:***

- i. An explanation of the grounds of termination in a language understood by the employee;***
- ii. The reason for which the employer is considering termination***

**iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and**

**iv. Hearing and considering any representations made by the employee and the person chosen by the employee...'**

The Claimant told the court that she reported to work on the 20<sup>th</sup> March 2018 as usual and found a letter around 8.30 am summoning her to a disciplinary process same day at 9.a.m she told the court she did not have ample time to prepare for the hearing. That it was difficult to get back-up because the rest of the customer service had side-lined her and Lilian who could be her witness was leaving for work outside. That after disciplinary process she was told to leave and she collected her things and left. That the letter for termination was issued the same day.

The Respondent produced record of the meeting Exhibit 2 at page 32 of the Respondent's bundle of documents. The document is titled Record of Meeting with Genevieve Oyugi. The record is prove that the disciplinary meeting happened and it is recorded that the Claimant made their representations. The only issue with the process is the timing. The Claimant states she was not given ample time to prepare including time to secure an employee to accompany her to the process. The Respondent's defence is that the Claimant was expected at the office at 8.am and an hour was enough to prepare for the hearing. Further that she did not raise issue of shift notice at hearing. RW1 during cross examination told the court the 1 hour was sufficient because it was apparent issue which was ongoing. That the customer service team was in the office and hence available employees to accompany her to the meeting.

Was one hour sufficient for the Claimant to prepare and attend the hearing? The Claimant submits that the Claimant attended the hearing and was not given a chance to defend herself as the purported hearing descended to arena where the panellists had a predetermined mind. No evidence was led on this and the same is not reflected in the minutes. Indeed the Claimant told the court she was not given ample time to prepare and after the hearing she left and was issued termination letter same day. The issue is whether the Claimant was given sufficient time to prepare for hearing. The court has considered the following cases cited by the Claimant on procedural fairness:- **Shankar Saklan v DHL Global Forwarding (K) Ltd , industrial cause No. 562 of 2012, David Wanjau Muhoro v Ol Pejeta Ranching Ltd (2014) eKLR**

The submissions on poor performance by the Claimant are not relevant as the reasons for termination as stated in the termination letter were upheld. The reasons were on a particular breach of policy and practice.

None of the parties cited authority on the timing yet it was the main issue for determination as to whether the disciplinary process was fair. There was a notice inviting the claimant to be accompanied by employee of choice, there was a hearing in which Claimant attended alone and made representation and there is a record. The only gap is the short notice of 1 hour which the Claimant attributes to her failure to secure an employee of choice to accompany her.

30. The Court finds that the employer erred and failed in the procedural test as fair hearing includes sufficient time to prepare for the hearing. One hour cannot be said to be sufficient time to prepare for hearing which includes securing an employee of choice to accompany the Claimant to the process. The fact that the employee did not protest the shift notice does not sanitise the process.

The court finds that the termination procedure of the Claimant's employment was not fair for lack of sufficient notice.

### **iii. Is the Claimant entitled to reliefs sought?**

31. On Compensation for loss of employment the claimant sought the maximum compensation for 12 months. The Respondent complied with all other procedural steps and indeed the Claimant was aware of the nature of claim facing her as it was an active issue. The only issue was the insufficient notice. The court considering all the circumstances of the case and especially the short period of service of 3 years, the conduct of the Claimant which led to her termination, the age of the Claimant and the fact that she has subsequently worked for other employers and having informed the court that she is still doing customer care jobs, the fact she was paid all her terminal dues, I find an award of 3 months' salary compensation as sufficient.

### **On Damages for discrimination, harassment and unfair labour practices amounting to Ksh 5,000,000/-.**

32. S C Srivastava in his book at page 163 titled '**Industrial Relations and Labour Laws, 6<sup>th</sup> Edition** states, '*The charge of unfair labour practices should be specifically levelled so that the employer is able to meet it. It should also be proven by clear evidence. It is undoubtedly correct that sometimes, the facts may speak for themselves and it may be possible to infer that the employer was acting unfairly but there should be some evidence which should indicate an improper motive so as to enable the court to arrive at a finding of unfair labour practice.*' The court adopts the above definition position to apply on this case on the claim for unfair practices, harassment and discrimination. The existing jurisprudence from all superior courts in Kenya supports this position that any claim on discrimination albeit also unfair practice must be pleaded precisely to enable the respondent meet the case.

No evidence was led on the alleged discrimination under any of the grounds under article 27 of the Constitution. There was no evidence placed before the court on discrimination, harassment and unfair practice during the employment of the Claimant by the Respondent. The claimant alleged she was harassed by immediate boss. The claimant told the court during cross examination her immediate supervisor harassed her, that she did not have any written document before the court on the harassment, she denies that she did not follow instructions of the immediate supervisor, that she did not have any document on the hostile environment by employer or evidence before the court and that she did not officially report to any of the other bosses and no evidence was produced of any record to support these allegations. The Claimant was referred to her contract of employment on the sick leave requirement and her paragraph 3 of her further witness statement filed on 30<sup>th</sup> may 2018 to effect the rules applied more strictly to her. The Claimant admitted that she did not have evidence that she was the only one required to comply with the sick sheet requirements. The Claimant stated she had no one else to complain to at time of incident yet there were bosses based in Germany who she could access on email as evidenced by email correspondence on other issues. The Claimant admitted she did not have evidence of allegations on paragraph 8 of her 1<sup>st</sup> statement to have her computer fixed. The Claimant stated she was the only one reprimanded for wearing earphones in the office. RW2 ex colleague of the Claimant told the court that they suspected she was playing

loud music as she sometimes could not respond to issues at the meeting meaning she could not hear. The Claimant admitted she sat in another department instead of her team.

The Claimant's case further is that the fact she received her termination letter same day of the hearing the employer had predetermined the outcome. The court does not find any weight in that allegation as there is no minimum time prescribed for decision making.

It was apparent to the court that the Claimant was insubordinate to her boss and not a team player. The claim for harassment was not proved and all what the court can see was an insubordinate employee who did not respect her employer's time on reporting to work, sitting space and compliance with the policies and her terms of employment. The Claimant did not call a witness to support her allegations or produce any iota of evidence to support her allegations. On the claim of being exposed to unfair practice, the court did not find any ill motive or unfair practice against the Claimant by the Respondent outside the procedural fairness on termination which has been addressed and compensated for. The court finds that all allegations against the employer concern internal management policies and practices enforcement against the employee. The court finds nothing else untoward in the conduct of the employer outside the unprocedural fairness in the termination addressed earlier. This head of the claim is without basis and is dismissed.

33. Costs of the suit. The Claimant is awarded costs of the suit.

34. On Interest. The Claimant sought Interests on (a) (d) and (e) above at commercial rates of 20% from March 2018. The Claimant has not justified the interest rate. The court awards interest rate on the award amount at court rate from the date hereof.

### **CONCLUSION AND DISPOSITION**

Having found that the termination was procedurally unfair for insufficient notice to prepare for the hearing, I accordingly enter judgment as follows:-

**1. Compensatory damages for 3 months wages based on last salary of Kshs. 130,000 to be Kshs.390,000/-**

**The award is subject to statutory deduction.**

**2. Interest on the award above at court rate from the date hereof.**

**3. Costs of this suit shall be borne by the Respondent.**

**WRITTEN AND DATED THE 9TH DAY OF NOVEMBER, 2021 AT BUNGOMA**

.....

**J.W. KELI**

**JUDGE**

**DELIVERED AND DATED THIS 9TH DAY OF NOVEMBER, 2021 AT NAIROBI**

.....

**JUDGE**

**In the presence of.....**