



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1984 OF 2015**

**JUDITH BRENDA ONYANGO .....CLAIMANT**

**VERSUS**

**SANLAM GENERAL INSURANCE LIMITED(formerly**

**GATEWAY INSURANCE COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit on 6.11.2015 alleging that she was unfairly and wrongfully dismissed from employment by the respondent by the letter dated 14.11.2015. She therefore sought the following reliefs:-

- (a) The Court reviews the decision to dismiss the claimant from the employment of the respondent
- (b) General damages for loss of salary, allowance and career by reason of wrongful dismissal equivalent to 12 months salary.
- (c) Salary for the 14 days worked in September
- (d) Damages in lieu of one month notice
- (e) Salary for the 27 days used to offset the compulsory leave
- (f) Service pay (for the 5 years worked)
- (g) Costs of this suit and
- (h) Interest on (b) - (g) above till payment in full.

2. The Respondent filed defence on 30.3.2016 admitting that she dismissed the Claimants from employment but denied that the dismissal was wrongful. She averred that the dismissal was for a valid reason and the Claimant was accorded a fair hearing before the dismissal. She further averred that she paid the Claimant all her dues after the dismissal and contended that she is not entitled to the reliefs sought. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on diverse dates in 2019 when both parties tendered evidence and thereafter filed written submissions.

**Claimant's case**

4. The Claimant testified as CW1. She stated that she was employed by the Respondent as Head of Claims Department earning Kshs. 250,00/- per month. On 31.7.2015 she was sent on compulsory leave for 10 days to pave the way for investigations into alleged negligence in performance of her duties. The particulars of the alleged negligence were however not disclosed. She did handing over as required and the Respondent changed the security code and her office locks. She was not allowed to contact any member of staff during the period of the compulsory leave to avoid interfering with investigations.

5. She further testified that on 13.8. 2015, she was served with a letter accusing her of improper performance of duties and neglect of responsibility in respect of three civil cases which were handled by external lawyers. The cases were **Mombasa CMCC. 4165 of 2004 Lawrence Chorongo v Vincent Kiyo Mangi and Another. Gatundu RMCC. 203 of 2008 Margaret Wanjiku Maina v Navans Garage and Keroka SPCC 40 of 2013 Everlyne Nyamoita v Elais Ahmed**. The letters further asked her to show cause why disciplinary action should not be taken against her.

6. She further testified that her request to access the said files in the office was denied at first but later she was allowed two hours. She managed to respond to the show cause letter explaining what she knew about the said cases because the show cause letter did not set out any particulars of negligence. She contended she was later invited to a hearing before a disciplinary committee and defended herself but without any prior charge sheet being served on her. After the hearing she was dismissed and appealed but the appeal was never heard. She therefore contended that the procedure followed in dismissing her was unfair because according to her, she was not accorded a fair hearing.
7. As regards the reasons for the dismissal, she contended that she performed her duties diligently and denied the alleged negligence whose particulars were not stated. She explained that after judgment was entered in Keroka PMCC 40 f 2013, the external advocate obtained stay of execution for 45 days and notified the respondent. However the judgement debt was not paid in time but delayed for 5 months due to lack of funds and also due to the process of taking over of the respondent by Pan Africa Insurance Company.
8. As regards Gatundu RMCC 203 of 2008, she contended that the issue of liability was negotiated after failing to secure a witness for the defence. As a result a judgment was entered on 15.9.2014 for Kshs. 544000 down from Kshs. 966,6000 demanded by the plaintiff. Stay was also granted after judgment but again there was delay in payment because the CEO delayed to give his approval in time for the payment. According to the claimant, the respondent's policy was that all payment's above Kshs. 3000000 required approval from the CEO. The approval was given on 26.11.2014 but due to cash flow constraints, the money was not paid until 10.3.2015.
9. As regards Momabsa CMCC 4145 of 2004, the claimant explained that it was a declaratory suit seeking to enforce a decree of Kshs. 603,545 plus interest which totalled to Kshs.,747.30. According to her the respondent did not have any defence on merits because the plaintiff had served a statutory notice on the respondent and the insured had a valid cover at the time of the material accident. As such, she wrote an opinion for an out of court settlement to avoid further interest and the respondent accepted the opinion. As a result, she negotiated settlement at Kshs. 1,300,000 all inclusive and save the company Kshs. 689,747 plus costs of Kshs. 280,000. She then advised the Finance Department that the money deposited as security in the joint names of the respondent's advocate and the plaintiff's advocate be used to pay the negotiated sum and the balance be released to the respondent. However, she later learned that the respondent had fees dispute with her external lawyer who refused to release the security money to the plaintiff and held the same as lien until his fees was paid. She contended that, she was not notified by the Finance Department about the lien by the counsel until the time she responded to the show cause letter.
10. The claimant maintained innocence and denied that she acted negligently. According to her, she acted diligently and even went to the extent of saving the company money in negotiating favourable settlements. She contended that the company was undergoing transition following a take over by Pan African Company and the policy was that payments were to be approved by an external Director who was not sitting in Gateway office, and who was also to follow up for approval from the CEO.
11. She further contended that she was a member of the Management Committee which meet weekly to discuss the challenges of the company in meeting her financial obligations. She contended that the same members of the management committee were also in the disciplinary committee to hear her case. She contended that her dismissal was unfair and prayed for the reliefs set out in her claim.
12. On cross-examination, she admitted that the letter sending her to compulsory leave cited negligence of duty as the reason for leave. She further admitted that the show cause letter dated 13.8.2015 accused her of negligence of responsibilities and improper performance of duty but denied that the letters made any specific allegations for her to respond. She further admitted that she was served with a notice dated 27.8.2015 to attend disciplinary hearing but contended that the letter did not frame any charges against her but only referred to her response to the show cause letter.
13. She further admitted that the disciplinary hearing discussed the said three cases which led to her compulsory leave but contended that new issues which were not in the show cause letter were introduced during the hearing. She further contended that the three (3) files were not brought at the hearing.
14. She admitted that she instructed counsel to record consent judgment on liability at 85:15% in Gatundu RMCC 203 of 2008 because it was not possible to secure a defence witness. In her view, without any evidence from the defence, the trial court would have entered judgment on liability at 100% against the respondent. She maintained that delay by the external Director to approve payment led to execution and further costs to auctioneers. She reiterated that she kept on alerting the management of the danger of execution during the management meetings.
15. As regards Keroka SRMCC 40 f 2013, she admitted that the external counsel advised that liability should be contested. She further admitted that the private investigator opined that the third party was largely to blame for the accident. However, she contended that the external counsel later advised that a consent on liability was necessary due to unavailability of defence witness.
16. As regards Mombasa CMCC 4165 of 2004, she reiterated that there was money deposited as security for the amount she negotiated and denied knowledge that the respondent had fees dispute with her external lawyer. She further contended that she was not to blame for the delays in settling the judgment debt. She contended that at the time when the auctioneers came, she was away on leave and her Assistant, Linda was in charge.
17. She admitted that the dismissal letter accused her of fundamental breach of her contract of service and negligent performance of duty and it also offered terminal benefits to her. She further admitted that she was paid the pension and half salary upto the date of dismissal.

#### **Defence case**

18. Ms. Sharon Mwasi, Legal Officer for the respondent testified as RW1. She confirmed that the claimant was employed by the respondent vide the letter dated 21.4.2010 as Deputy Legal Officer and rose through the ranks to become the Head of Claims dealing with both legal and material damages claims. According to her the claimant's duties included receiving summons and pleadings for suits brought against the

respondent personally; oversee the handling of the suits, in the respondent's interest; liaise with the insured persons and external legal counsel to ensure that suits are appropriately defended or otherwise effectively managed; and ensure timely compliance with court orders by the respondent.

19. RW1 further testified that in July 2015, the respondent noted that the claimant had not managed a number of suits appropriately as a result of which the respondent had suffered financial injury and her reputation as an insurer lowered. The respondent then decided to conduct a comprehensive review of the then existing suit to ascertain whether they were being managed in her interest in the absence of the claimant who was sent on compulsory leave by the letter dated 31.7.2015 for 10 days.

20. The review was done between 1.8.2015 to 12.8.2015 and on 13.8.2015 a letter was addressed to the claimant to show cause why disciplinary hearing should not be taken against her for improper performance of her duties or neglect of her responsibilities in three suits. According to her the claimant was availed access to the files stated in the show cause letter, and an opportunity to respond to the

letter.

21. She contended further that the claimant responded to the show cause letter by the letter dated 19.8.2015 and after considering the same, the respondent invited the claimant to a disciplinary hearing on 2.9.2015 by the letter dated 27.8.2015. The invitation letter allegedly indicated that the disciplinary hearing would centre around the issues that had been raised in the show cause letter and subsequent discussions on improper management of claim and suits and neglect of her responsibilities. The letter also gave her the right to be accompanied by fellow employee during the hearing.

22. RW1 testified that during the hearing, the claimant was questioned about how she handled specific matters. She contended that in **Gatundu RMCC 203 Margaret Wanjiku Maina vs Navan's Garage & Another**, a consent on liability was recorded at 85:15 and judgment on quantum subsequently entered for Kshs. 544,850. However, according to her the claimant failed to follow up payment of the decreed sum or to emphasize to the respondent on the threat of execution, and as a result execution was done five (5) months after the judgment leading to auctioneers fees of Kshs. 61,904.

23. RW1 further testified that the claimant instructed external advocate to record consent on liability in Keroka 301 of 2010, 303 of 2010 and 40 of 2013 on grounds that defence witness could be secured and subsequently, execution was done in all the three (3) suits leading to auctioneer's fees. She faulted the claimant for failing to use witness summons to secure attendance of the defence witness, including the driver, conductor or police investigator, private investigator or the insured. According to RW1, as a result of the claimant's conduct, the respondent was forced to pay the plaintiff' Kshs. 919,833 excluding fees to the lawyers.

24. As regards Mombasa CMCC 4165 of 2004, RW1 contended that the respondent suffered loss of money and reputation due to the claimant's costly errors. According to her, the claimant erred by appointing Gachanja & Co. Advocates to replace the firm of Muriu Mungai & Co. Advocates on 17.2.2015 and by instructing the new firm to record consent for payment of Kshs 1300,000 to the plaintiff from the sum held as security in the joint names of the plaintiff's counsel and Mungai Muriu & Company Advocates(former external counsel) According to her, the claimant acted negligently by issuing the said instructions without consulting the former advocates who were the signatories of the security deposit account and thereafter failed to address the problem for over two months leading to execution and Kshs. 203,297 costs to the auctioneer.

25. RW1 testified that on the basis of the said matters, the Disciplinary Committee concluded that the claimant had fundamentally breached her obligations under her contract of service, and had neglected to perform her duties as required under her contract of employment to the respondent's detriment. Consequently, by the letter dated 14.9.2015, the claimant was dismissed. Thereafter she was paid her dues and was also issued with a certificate of service. She therefore prayed for the suit to be dismissed with costs.

26. On cross-examination RW1 admitted that she joined the respondent in December 2016 after the claimant had left the respondent. She further admitted that she did not know what transpired during the executive committee meetings concerning the material cases herein. She admitted also that she had no records to controvert the fact that the respondent had financial problems during the period 2014 to 2015.

27. She confirmed that the show cause letter listed three (3) cases namely Mombasa CMCC 4165 of 2004, Gatundu RMCC 203 of 2008 and Keroka SPMCC 40 f 2013. She further confirmed that the letter dated 27.8.2015 inviting the claimant to disciplinary hearing did not indicate any particulars of negligence in the alleged mishandling of the said three cases. She admitted that the external counsel wrote several letters to the Claims Manager, Attention Lydia Njuguna advising on the way forward on the Gatundu RMCC 203 of 2008, and not the claimant.

28. She admitted that the show cause letter did not require the claimant to respond on Keroka 301 and 303 of 2010 but only Keroka SPMCC 40 of 2013. She contended without any proof that the policy of the company is to fight on to the end even if it means filing written submissions.

29. Referring to summary of the minutes of the disciplinary hearing RW1 admitted that the three (3) cases cited in the show cause letter did not appear in the findings of committee. She however contended that the reasons for termination cited in the separation letter was negligence just as stated in the show cause letter.

30. Finally she admitted that the claimant appealed against the dismissal and the appeal was determined. However, she failed to produce any minutes of the hearing of the appeal or any correspondence to prove that the outcome of the appeal was communicated to the claimant.

## Claimant's submissions

31. The Claimant submitted that the termination of her employment was procedurally unfair. She contended that she was not given charge sheet or informed of the specific charges she was facing at the disciplinary hearing and as such she was subjected to disadvantage and unfair process. For emphasis she relied on **County Assembly of Kisumu and 2 others vs Kisumu County Assembly Service Board & 6 others [2015]eKLR**, and **Ole Pejeta Ranching Limited v David Wanjau Muhoho [2017]eKLR** where the Court of Appeal held that it is unfair process to subject an employee to disciplinary hearing without informing him of the specific charges he is facing.

32. She further submitted that new matters which were not raised in the show cause letter, were introduced at the hearing. According to her the said new matters were the ones used to draw adverse conclusions against her while the matters covered by the show cause letter were not relied upon to find her guilty of negligence. She therefore urged that introducing new matters at the hearing and proceeding to dismiss her for the same breached her right to fair hearing. For emphasis she relied on **National Cereals and Produce Board v John Kirui Tongorei [2017] eKLR** and **MC Arighani Ltd v Mohammed Noor[2015]eKLR** where the Court of Appeal held that it amounts to denial of right to fair hearing for employee to introduce new matters at the disciplinary hearing or in the termination letter.

33. Finally, on the issue of procedure, the claimant submitted that her appeal against the dismissal was never heard or considered and a decision communicated to her. She contended that the right to fair hearing in disciplinary process subsist until the employee exhausts all the remedies available to him/her under the employers Human Resource Policy Manual. For emphasis, she relied on **Mary Chemweno Kiptui v Kenya Pipeline Company Limited[2014]eKLR** where the court held that it is an established best practice to allow an employee to appeal against a termination.

34. In addition to the foregoing procedural issue, the claimant submitted that the respondent did not have a valid reason for dismissing her from employment. She contended that the alleged negligence levelled against her arose from her handling of three (3) where the respondent was proclaimed by auctioneers for failure to settle judgment against her insured persons in time. However, she contended that the said proclamation was not due to her negligence but because of delay by the Managing Director in approving the payments and also due to cash flow constraints which prevented the Finance Department from settling claims on time.

35. She contended that her evidence that she was a member of the management committee whose membership included the CEO, Head of Finance and Human Resource Manager has not controverted. She further contended that her evidence that the executive committee held weekly meetings and discussed several management issues including cash flow and delays in settlement of claims has also not been controverted by the respondent. She relied on **Safarilink Aviation Limited v Trident Aviation Kenya Limited & Another [2015] eKLR** where the court held that failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true.

36. She contended further that it was dishonest for the respondent to terminate her services on alleged negligence when indeed she was not the cause of the delay to settle claims. She relied on **Grace Gacheri Muriithi v Kenya Literature Bureau[2012]eKLR** where the court held that it is unfair labour practice for employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies.

37. In addition, the claimant submitted that the reason for dismissal has not been justified by the respondent as required under Section 45 (2) of the Employment Act. She further submitted that the decision to dismiss the claimant was premeditated because the CEO had advised her to resign but she declined. In conclusion she prayed for the reliefs sought in the suit.

## Respondent's submission

38. The respondent submitted that she dismissed the claimant in accordance with fair procedure. First, she submitted that the compulsory leave was justified to pave the way for investigations and denied that it signalled that a decision had been made to terminate her employment. She further contended that the claimant did not prove that her office locks and security code were changed as a sign that she would be dismissed.

39. Second, the respondent submitted that the show cause letter was justified after conducting investigations from 31.7.2015, to enable the claimant explain why disciplinary proceedings should not be commenced against her. She contended that the claimant was granted access to the office and the files in issue and proceeded to make a detailed response to the show cause letter. She contended further that the complaint by the claimant that she was denied access to the file or denied adequate time to peruse the files is false and an afterthought because she never raised the same during the disciplinary process.

40. As regards the disciplinary hearing, she submitted that the claimant was accorded a fair hearing. She denied that the claimant had prior meeting with the Acting CEO who was asked to resign and made it clear that her exit was inevitable. According to the respondent the claimant has not proved by evidence when and where the meeting with the CEO was held or whether the CEO was making his own opinion or expressing the position of the company.

41. The respondent submitted that by the letter dated 27.8.2015, she invited the claimant to disciplinary hearing and advised her to bring along a fellow employee to sit with her at the hearing as a witness but she attended without any colleague. The respondent contended that the claimant did not indicate to the disciplinary committee that she had a witness but was prevented to secure attendance by the employer through intimidations.

42. The respondent submitted further that the claimant was notified of the charges before attending the disciplinary hearing. She contended that the claimant has admitted in paragraph 7, 11 and 13 of her claim she understood that the charges she was facing because they were set

out in the show cause letter dated 13.8.2015. The respondent wondered why the claimant did not request for the particulars of the charges if she did not know them and how she was able to make such a detailed response to the show cause letter and participate effectively in the disciplinary hearing without knowledge of the allegations against her. According to the respondent the said allegation was not only gruesome but also an afterthought.

43. As regards the alleged new issues being introduced at the hearing, and not forming part of the issues raised in the show cause letter, the respondent submitted that the claimant has not pleaded on the same. She contended that the claimant only raised that complaint in her written submissions when she alleged that her dismissal was on the basis of entirely new issues not raised in the show cause letter. For emphasis, the respondent relied on **Galaxy Paints Company Limited vs Falcon Guards Ltd[2000]eKLR** where the Court of Appeal held that issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended the trial court can only render judgment only in the issues arising from their pleadings or as framed by the parties. According to the respondent, the claimant's allegation by way of submissions that her dismissal was on account of matters neither set out in the show cause letter nor canvassed in the disciplinary hearing is not one that arises for determination by this court.

44. The foregoing objection notwithstanding, the respondent submitted that the claimant was not dismissed on grounds different from the ones set out in the show cause letter. She contended that the claimant acknowledged in her response to the show cause letter and during the disciplinary hearing that **Keroka SPMC No. 40 of 2013** was one in a series of other matters arising from the same accident and involved one insured person. She therefore maintained that no new matters were introduced at the disciplinary hearing. She therefore urged the court to treat with contempt the claimant's allegation that a fair procedure was not followed before her dismissal.

45. As regards the reasons for the dismissal, the respondent submitted that reasons cited in the termination letter were valid and fair. She contended that the claimant acted negligently because she failed to take action to ensure prompt payment of decreed sums even where numerous reminders had been sent by external counsel; instructed external counsel to enter consents on liability even where there was substantial evidence of non-liability; failed to take measure available within the law to obtain the attendance of witnesses to defend the company's position; failed to apprise herself of the status of a case and as a result issued instructions to external counsel that could not be acted upon, leading to breach of court orders.

46. The respondent contended that the claimant's instructions for consent judgments was not justified and not prudent especially in the circumstances of cash flow constraints as acknowledged by the claimant. According to the respondent, the claimant's conduct led to financial loss and reputational injury to her as a company and concluded that her dismissal was justified because the said conduct amounted to breach of duty and negligence.

47. Finally, the respondent submitted that the claimant is not entitled to the reliefs sought because, first, the decision to dismiss her was substantively and procedurally fair. Second, the claimant secured a similar job with APA Insurance Company and as such there is no evidence of loss of career. As regards the claim for leave, the respondent submitted that the claimant was only entitled to 21 days and she was paid Kshs. 98,095/- on account of leave. She therefore denied that 27 leave days were deducted from her earned leave to cover the compulsory leave before the separation.

#### **Issues for determination**

48. There is no dispute that the claimant was employed by the respondent as pleaded in the claim until 14.9.2015 when she was summarily dismissed by the respondent for gross misconduct under section 44(3) and 44(4) (c) of the Employment Act. The issues for determination are:

- (a) Whether fair procedure was followed
- (b) Whether the dismissal was grounded on valid and fair reason.
- (c) Whether the claimant is entitled to the reliefs sought.

#### **Procedure Followed**

49. The claimant contended that her dismissal was done without following a fair procedure and her dismissal was predetermined because the Acting CEO asked her to resign even before being heard by the disciplinary committee; that the show cause letter dated 13.8.2015 and the letter dated 27.8.2015 summoning her to disciplinary hearing did not set out particulars of the charge of negligence levelled against her; that she was denied access to the office and sufficient time to peruse the concerned files to make effective response to the show cause letter; that she was denied permission to talk to any employee and as such she was prevented from calling any as a witness during the disciplinary hearing; that new matters which were not raised in the show cause letter were introduced at the disciplinary hearing and were used as the basis for the dismissal while the three (3) cases cited in the show cause letter were not; that the committee failed to record all the proceedings at the hearing and finally that her appeal against the dismissal was never heard.

50. The respondent denied all the foregoing allegations of procedural unfairness and averred that the claimant admitted in her pleadings that she was aware of the offences levelled against her and went ahead to render a detailed response to the show cause letter and even participated in the disciplinary proceedings without requesting for any particulars of the charges. She further averred that the claimant was availed access to the office and the relevant files and further also allowed to attend the hearing with a fellow employee and consequently, deemed the alleged denial of access to the office and files as an afterthought. She further denied the alleged meeting between the claimant and the acting CEO where the claimant was asked to resign and averred that no evidence was tendered to prove the alleged meeting and the request for resignation

51. I have carefully considered the evidence and the submissions presented by the parties. The letter dated 31.7.2015 sent the claimant on

compulsory leave to pave the way for investigations on allegations of negligence in her responsibilities. By the letter dated 13.8.2015, the claimant was informed that the respondent had reason to believe that she had improperly performed her duties and neglected her responsibilities leading to professional and financial damages to the company. The letter specified three (3) civil cases where the claimant displayed such negligence and invited her to show cause why disciplinary action should not be taken against her. The cases were **Mombasa CMCC. 4165 for 2004, Gatundu RMCC. 203 of 2008 and Keroka SPMC 40 of 2013.**

52. Although the claimant alleged challenges of accessing the office and the cited files for purposes of replying to the show cause letter, she eventually got the files and made a response to the show cause letter within the required time. Thereafter she was invited to a disciplinary hearing before a committee and allowed to be accompanied by a fellow employee as witness.

53. Section 41 of the Employment Act provided that before terminating the services of an employee on ground of misconduct or poor performance, the employer must first explain the reasons to the employee in a language he/she understands and in the presence of another employee of his/her choice. Thereafter the employee and his/her companion are entitled to air their representations in defence which must be considered before the termination is decided.

54. In this case the court is satisfied that the said mandatory procedure was followed before the dismissal of the claimant was decided. She was notified of the reason for which her dismissal was being considered and invited to defend herself in writing and thereafter orally before a disciplinary committee in company of a fellow employee as a witness but she chose not to call any. In her response to the show cause letter she never complained of denial to access the three (3) material files and did not also protest that the offence charged lacked material particulars. She also did not protest that she was denied sufficient time to peruse the files or to make an effective response. It is my finding therefore, that the said complaints are afterthoughts.

55. However, I am not satisfied that the claimant was accorded any hearing on her appeal. There is no correspondent from the respondent inviting her to a hearing or informing the claimant that her appeal was considered and rejected. To that extent, I find that the procedure followed was not fair because hearing of an appeal after the termination is as important as the hearing before the dismissal because under the terms of the contract of employment they all determine whether or not a separation would be done.

56. Clause 7.9 of the respondents HR Manual provides for Grievance Procedure and it includes the right to appeal. The manual provides that the Managing Director will study the minutes of the proceedings of the hearings and exercise discretion whether or not to constitute a grievance committee to hear the matter and advise him. The manual further provides that the ruling on any matter on the appeal by the Managing Director is final and binding.

57. Considering the said clause 7.9 of the manual, I am convinced that at the end of the day, the Managing Director must make a ruling on every appeal filed by an employee. The Managing Director has no discretion not to make a decision. It follows therefore that if a decision must be made, the same must be conveyed to the appellant. RW1 contended that the appeal was determined but that allegation was not substantiated by any written evidence.

58. In this court's view the right to fair hearing before dismissal under section 41 of the Employment Act extends the right to be heard on appeal. The failure to hear the claimant on her appeal amounted to, not only to violation of section 41 of the Act but also a breach of the contract of service which is governed by the respondent's HR Manual. In **Kenfreight (EA) Ltd v. Benson K. Nguti [2016]eKLR** the Court of Appeal held as follows in a case where the employee was dismissed for improper performance of duty.

*“an employer is duly bound to explain to an employee in the presence of another employee or union official in a language the employee understands the reason or reasons for which the employer is considering termination of the contract. In addition the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of services is taken.”*

59. The claimant further contended that new matters not raised in show cause letter were introduced during the disciplinary hearing and the same were the basis of the dismissal. The new matters included **Keroka SPMCC 301 of 2010** and **Keroka SPMCC 302 of 2010**. The said two cases are not pleaded in the claim and the claimant has not shown that she was prejudiced by being asked questions about the two cases which were in a series with **Keroka SPMCC 40 of 2013** and which arose from the same accident, which also related to the same insured person.

### **Reasons for the termination**

60. The claimant contended that there was no valid reason to justify her dismissal. She maintained that she acted diligently in handling the said three (3) cases with the aim of saving good money for the respondent and blamed the respondent for delay in settling matters due to the strict policy and procedure of settling claims and also cash flow constraints. The respondent has however denied the said allegation and accused the claimant of negligence and improper performance of her duty under her contract of service.

61. I have carefully considered the evidence presented by the parties. Section 43 of the Employment Act places the burden of proving the reasons for terminating an employee's contract of service on the employer in any legal proceedings challenging the termination. In addition under section 45(2) of the Act, termination of employee's employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the operational requirements of the employer.

62. Under section 43(2) of the Act, the reasons for termination are those matters which the employer genuinely believed to exist at the time when the termination occurred. In this case, the employer alleges that the claimant fundamentally breached her obligations under her contract of service and neglected to perform her duties as required. The basis of the foregoing conclusion was that the claimant handled or managed the said three (3) cases negligently and improperly and this caused financial and reputational injury to the company.

63. However, after careful consideration of the evidence and the submissions presented, I do not agree with the respondent that the alleged financial and reputational injury suffered by the respondent, ‘if any’ with respect to **Mombasa CMCC 4165 of 2004, Gatundu RMCC. 203 of 2008 and Keroka SPMCC 40 of 2013** was caused by the claimant’s negligence. In my view, evidence tendered by claimant point to an act of prudence because all her instructions to external counsel to record consent on liability were not whimsical, but a last effort to save some coins for the respondent. The said instruction’s were all backed by legal opinion from both external and internal counsel which she carefully evaluated. The said consents served the interests of the respondent because without availability of defence witness and without a reasonable defence on merits, the court would have entered judgment on liability at 100% against the respondent or her insureds

64. In addition, I agree with the claimant that the reasons why the execution for decreed sum in the said suits was done was because of the cash flow constraints and the respondent’s policy and procedure set out for settling of claims during the transition period after the company was acquired by Pan Africa. The claimant’s evidence that payments were not payable without approval by an external Director (from Pan Africa) and the CEO was not rebutted. Again her evidence that she was a member of the management committee which discussed management issues including delays in settlement of claims has not been rebutted. The said committee’s members included the CEO and the persons who sat in the committee to discipline the claimant.

In **Grace Gacheri Muriithi v. Kenya Literature Bureau[2012]eKLR** the court held that:

*“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further, the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”*

65. In view of the foregoing observations, I return that the respondent’s management were fully aware of the pending judgment debts but failed to settle them before the stay orders lapsed. Indeed, the executions were done months after the lapse of the stay order granted. Consequently I find that the reasons cited for dismissing the claimant were invalid and the respondent has failed to justify them.

66. In **Pius Machafu Isindu v Lavington Security Guards Ltd [2017]eKLR**, the Court of Appeal held that:

*“There is no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal or breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/ dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5) amongst other provisions.”*

**Reliefs**

67. In view of the finding above that the dismissal was not grounded on valid and fair reason and a fair procedure was not followed as required by section 45 of the Employment Act, the court returns that the dismissal was unfair, wrongful and unlawful within the meaning of the said section. Accordingly, section 49 read with section 50 of the Act, the claimant is entitled to salary in lieu of notice and compensation for the wrongful termination of her employment contract.

68. Her Letter of Appointment provided for a termination notice of 30 days by either party. I, therefore, award her one month salary in lieu of notice equalling to Kshs. 250,000. The claimant served the respondent for over 5 years without any warning letter and therefore, I award her 6 months gross salary as compensation for the unfair and wrongful dismissal equalling to Kshs. 1,500,000.

69. The claim for accrued leave deducted to offset compulsory leave is declined for lack of particulars and evidence. The claimant did not show how much leave had accrued before the compulsory leave was offset. I, therefore, agree with the unrebutted evidence by the defence that the claimant was paid for all her accrued leave plus salary for 14 days worked in September 2015, after the dismissal.

70. In view of the foregoing, the claim for the unpaid salary fails. Likewise the claim for service pay fails because the claimant admitted that she was paid pension after the dismissal. Under section 35(6) of the Employment Act, an employee who benefits from employments pension scheme is disqualified from claiming service pay.

**Conclusion and disposition**

71. I have found that the dismissal of the claimant herein was unfair both substantively and procedurally. I have further found that she is entitled to compensatory damages. Consequently, I enter judgment for her in the following terms:

<b>Notice (one month) .....</b>	<b>Kshs. 250,000</b>
<b>Compensation(6 months) .....</b>	<b><u>Kshs. 1,500,000</u></b>
<b>Total .....</b>	<b><u>Kshs. 1,750,000</u></b>

The said sum is subject to statutory deductions but in addition to costs and interest and court rates from the date hereof.

**Dated, signed and delivered in Nairobi this 26th day of June, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**