



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO. 439 OF 2017**

**CAROLINE WANJIRU KARORI.....CLAIMANT**

**VERSUS**

**THE BOARD OF TRUSTEES,**

**NATIONAL SOCIAL SECURITY FUND (NSSF).....RESPONDENT**

**JUDGEMENT**

The claimant is a female adult and the respondent is a body corporate and who employed the claimant vide letter dated 22<sup>nd</sup> December, 2010 as regional manager with effect from 8<sup>th</sup> February, 2011 and was confirmed on 9<sup>th</sup> January 2012. The claimant was based at Nakuru as the Regional Manager Rift Valley region from July 2013 at the AFC building and which hosts other government offices.

On 11<sup>th</sup> May 2017 the claimant had gone out for a meeting and upon return at 2.30pm found the regional accountant Lorna Mulindi with the ag. Audit manager, Mohamud Sebit and Joshua Mumo from the head office. These officers were at her secretary's office. They told the claimant that they were carrying out audit with focus on general expenditure and that they needed to carry documents to the head office. The claimant surrendered imprest warrant files dated 2<sup>nd</sup> July, 2012 to 27<sup>th</sup> April, 2017 and work tickets dated 15<sup>th</sup> February, 2013 to 30<sup>th</sup> April, 2017 and attendance register files dated 22<sup>nd</sup> October, 2012 to 31<sup>st</sup> March 2017.

The claim is also that on 22<sup>nd</sup> May, 2017 the claimant was called by Sebit while away in Eldoret branch and required to return to Nakuru. Upon arrival her driver, Paul kiptoo was taken away for interviews by the auditors (Sebit and Mumo). They then interviewed the claimant and directed her to write a statement without giving details as to why and the two told her she was being uncooperative.

By 22<sup>nd</sup> May, 2017 the claimant felt harassed and decided to seek audience with the PS Ministry of labour the line ministry vide petition of equal date. The auditors then gave the claimant until 25<sup>th</sup> May, 2017 to write her statement. Sebit then called to demand for the reply to which the claimant sought to know the scope and nature of areas for the audit clarifications.

On 12<sup>th</sup> June 2017 the claimant received letter dated 26<sup>th</sup> June, 2017 alleging imprest accounting malpractices. She replied to the allegations on 16<sup>th</sup> June, 2017 and by letter dated 18<sup>th</sup> July, 2017 the claimant was invited to attend before the fraud prevention and discipline committee despite the entire audit process contravening the internal audit and risk department, procedure for auditing.

On 2<sup>nd</sup> August, 2017 the claimant appeared before the committee which comprised the executive committee members being;

Dr Anthony Omerikwa ag. CEO as chair;

Austin Ouko, corporation secretary;

Nancy mwangi, ag. GM social security;

Joseph Kimote, GM strategy, research and development;

Moses Chesoto, Ag. Finance and investment; and

Carolyn Okul, HR manager.

There was no member from the fraud prevention and discipline committee. The claimant was in the company of Dr Christopher Khisa, the PR manager.

The meeting related to why the claimant had written to the PS labour instead of using the respondent's chain of command. The chair directed the claimant to await the decision of the board.

On 18<sup>th</sup> October, 2017 the claimant received letter requiring her to attend before executive committee on 19<sup>th</sup> October, 2017. She requested for more time and was given 23<sup>rd</sup> October 2017 when she was informed the meeting was meant to share the board decision following the previous committee meeting with regard to summary dismissal from the employment with the respondent but had the option to resign so as to exit honourably.

The claimant asked from time to time to make a decision in consultation with her family but was told it had to be done immediately. The claimant was issued with letter of summary dismissal and Ms Okul then gave her a paper to write her resignation letter and then took away the letter of dismissal. The claimant was allowed to make a copy of her letter of resignation.

Instead, The claimant was then issued with letter of summary dismissal dated 16<sup>th</sup> October, 2017 and the meeting was therefore sorely meant to coerce her to resign from her employment. Such was in violation of her right to natural justice as the allegations made were not presented for interrogation; the proceedings had been conducted with a preconceived finding; the respondent failed to follow its own human resource policies; and failed to provide the claimant with records of proceedings and findings.

This amounted to unfair labour practice against the claimant. This arose from dismissal on unfounded allegations; failure to adhere to the rules of natural justice; treating the claimant unfairly; having a predetermined mind and failure to provide evidence on the allegations made.

The claimant is seeking for a declaration that the summary dismissal was unfair and unlawful; an order setting aside the summary dismissal and substitute it with an order of reinstatement; an order for reinstatement. In the alternative the claimant is seeking for compensation in salary for the remainder part of her employment being 18 years with interest from the date of the suit and until paid in full; Compensation at Ksh.491, 648.07 per month x 216 months at ksh.106, 195,983.10; 3 months' salary in lieu of notice at ksh.1, 474,944.07; and any other relief the court may deem fit to grant. the claimant is also seeking for her costs.

The claimant testified to support her claims.

The claimant testified that on 11<sup>th</sup> May 2017 she was out of the office for official business and upon return she found auditors in her office who informed her that they were carrying out normal checks and she was directed to hand over various books of accounts including imprests work tickets, attendance registers to which she protested as this was not an ordinary check from past experiences. There was no letter of request for the records demanded for by the auditors. She felt coerced to give the reports. She had not been aware of such audit. The claimant wrote to the permanent secretary ministry of labour.

The audit that followed implicated the claimant for alleged financial malpractices and she was called to explain. Specific instances were cited and the claimant was invited to attend before the executive committee and present were the general manager, human resource and the chief executive officer. This did not comply with the internal human resource manual.

The claimant also testified that she was invited to attend before the disciplinary panel with her representative Dr Khisa and the panel addressed with her various allegations of alleged falsified work tickets and loss of Ksh.60, 000.00 to the respondent. the claimant gave her defence to the effect the work tickets had no discrepancy and all were in accordance with travels made and the auditors were privy to these documents and travel records.

The claimant as regional manager was driven by Paul Kiptoo in vehicle No.KBT 635N and who would fill in each trip and close the day with the details of travel. The motor vehicle would be parked at its designated location and there is no discrepancy in the records as alleged. While in Nakuru the vehicle had a designated parking at AFC building and not Polo Centre as alleged in the letter of show cause. She was not left in the filed by the driver and would travel together from the regional office at Nakuru to the field and back. These trips related to; 16<sup>th</sup> to 18<sup>th</sup> March, 2017 the claimant had travelled to Kitale and an imprest filed with the details; from her imprests Paul Kiptoo the driver would make similar requests as he drove the claimant to and from the field and back;

On 28<sup>th</sup> and 29<sup>th</sup> July, 2016 the claimant was at Eldama Ravine and made an imprest and work ticket to support the travel upon return on 30<sup>th</sup> July, 2016 as the vehicle records show return was on 29<sup>th</sup> July, 2016; 27<sup>th</sup> to 30<sup>th</sup> September, 2016 the claimant was attending a conference at Kapsabet and work ticket file on 1<sup>st</sup> October, 2016 and motor vehicle returned on 30<sup>th</sup> September, 2016. The records from Polo Centre show a different date of return.

There is a work ticket to confirm date of return.

The claimant also testified that the records the respondent relied upon taken by Clossec Security related to a different venue from the one her vehicle were parked. The driver would be guided by the work tickets she signed for each trip.

## **Defence**

The defence is that the claimant was employed as regional manager, Nairobi on 8<sup>th</sup> February 2011 and on 1<sup>st</sup> July, 2013 was transferred to the Rift Valley Region as regional manager. The claimant was a high ranking officer of the respondent with benefits as under the human resource manual.

The defence is also that the claims made are denied save that the respondent was informed through an anonymous letter from a whistle-blower of the claimant's financial impropriety and fraudulent activities and which letter was copied to the EACC which commenced its investigations.

The respondent called for an investigation on the matter through an internal audit and was shocked by the claimant's attitude to frustrate the investigations and she refused to cooperate with the auditors and in contravention of regulations 162(3) and (4) of the internal audit manual which allow for direct and prompt audits. To intimidate the audit the claimant wrote to the PS Labour to stop the audit process alleging it was with malice and should intervene.

On 31<sup>st</sup> May, 2017 the PS, Labour replied and requested the respondent to a detailed report on the matter. There was a detailed report on the process of the audit, scope and purpose.

On 25<sup>th</sup> May 2017 the respondent acting manager of internal audit prepared an audit report and which revealed that;

The claimant on 5 different occasions took imprest to travel and attend different official functions only to report a day earlier on ever trip;

The claimant falsified the work tickets to reflect that she reported back to work on the expected date as per the imprest application forms;

The claimant made claim for night out allowance for each journey amounting to a loss of ksh.60, 000.00; and

The claimant refused to cooperate with the auditors when they requested from the claimant's statements.

The respondent's internal audit report recommended disciplinary action is taken against the clamant as she was implicated in the report. The claimant was issued with a show cause notice on 26<sup>th</sup> May 2016 and on 16<sup>th</sup> June, 2017 the claimant replied thereto and denied all the allegations made against her.

On 18<sup>th</sup> July, 2017 the respondent invited the claimant to appear before the Fraud Prevention and Discipline Committee on 2<sup>nd</sup> August, 2017 to made clarifications on the matter and was advised to have her fellow colleague of choice. The claimant attended as directed. Upon consideration of all matters the committee found the claimant culpable of gross misconduct and on 23<sup>rd</sup> October, 2017 the respondent communicated its decision to dismiss the claimant from its employment.

Summary dismissal is allowed for gross misconduct under section 44(4) (g) of the Employment Act and the claimant was found in breach of the respondent's human resource manual, the Leadership and Integrity Act and the Public Servant's Code of Ethics. The claimant was dismissed for gross misconduct and paid all her terminal dues as per her contract of employment. The dues were paid less the liabilities due to the respondent as per letter dated 23<sup>rd</sup> October, 2017.

The defence is also that the prayers made are not due as the claimant was found to be of gross misconduct and reinstatement, notice or compensation are not due in a case where section 44(4) of the Employment Act allow for the dismissal. As a high ranking officer of the respondent e claimant was found to have abused her office and in breach of fundamental terms of her employment contrary to section 44(3) of the Act. such conduct compromised trust and reinstatement cannot issue as required under section 49(4) (b0, (c) & (k) of the Act.

The respondent observed procedural fairness in accordance with the human resource manual and section 41 of the Employment. The claimant was issued with a show cause letter and notice and advised of the hearing in the presence of her representative and which right she exercised. The claimant was allowed to give her defence and her conduct found justifying a summary dismissal. All terminal dues were paid.

The alternative prayers sought are not due. the claims for payment for 18 years of contract terms are untenable and not justified and such is not contemplated as a remedy under section 49 of the Employment Act. the claim for 3 months' notice pay is not a remedy in law, in the employment contract or under the respondent's manual. On his basis the claim for costs and interests should not arise as the suit should be dismissed with cots to the respondent.

In evidence, Carolyn Okul the human resources manager for the respondent and who testified that the internal audit and risk management presented an audit report of the investigations audit that had been conducted on the regional manager, rift valley region and done as a result of an anonymous letter received by the acting chief officer and dated 17<sup>th</sup> April, 2017 pointing to malpractices in Nakuru regional office. The investigation confirmed the allegations with references that there were 5 occasions when the claimant took imprest to travel and attend official functions only to report back a day earlier and claim for imprests with the respondent loosing ksh.60, 000.00. these incidents related to; 15<sup>th</sup> March, 2016 for travel on 16<sup>th</sup> to 18<sup>th</sup> March, 2016 and on 18<sup>th</sup> March, 2016 the vehicle was parked at Polo Centre with a falsification for Ksh.12, 000.00;

On 26<sup>th</sup> July, 2016 for travel on 27<sup>th</sup> to 29<sup>th</sup> July, 216 and on 29<sup>th</sup> July, 2016 the vehicle was parked at Polo centre and a falsification of ksh.12, 000.00; 29<sup>th</sup> August 2016 for travel on 29<sup>th</sup> August to 2<sup>nd</sup> September, 2016 and on 2<sup>nd</sup> September, 2016 the vehicle was parked at Polo centre with a falsification for Ksh.12, 000.00;

The September, 2016 for travel on 13<sup>th</sup> to 17<sup>th</sup> September, 2016 and on 16<sup>th</sup> September, 2016 the vehicle was parked at polo centre a falsification of Ksh.12,000.00; and On 21<sup>st</sup> September, 2016 for travel on 27<sup>th</sup> to 30<sup>th</sup> September, 2016 and on 30<sup>th</sup> September, 2016 the vehicle was parked at polo centre a falsification of ksh.12, 000.00.

Ms Okul also testified that there was an investigative audit following the letter by a whistle-blower and which is spot on with auditors

required to ask for documents as the investigation was reactive. This is provided for in the audit manual and with a process different from the planned audit.

Based on the audit report, the chief officer directed the human resource to conduct a disciplinary action against the claimant. The audit had recommended action on the claimant who had refused to write a statement to explain why she had claimed extra night out and manipulated the work tickets, work sheet and motor vehicle tickets to cover for the extra day meaning the claimant was out in the field and which as not the case..

From the audit report the claimant was alleged to have been uncooperative and reluctant to give documents and failed to answer questions and also tried to stop the audit by writing to the PS, Labour. such petition was done during audit investigations and the PS, Labour wrote to the respondent seeking clarification and the respondent replied giving a detailed account ton the matter.

Ms Okul also testified that the was due process in the matter, the claimant was issued with a notice to show cause and following which she was invited to a disciplinary hearing and was allowed to give her defence. The claimant was not in the unionised category of employee and she attended her disciplinary hearing before the executive committee. A decision was taken to dismiss the claimant and allowed an appeal to the board which she failed to take.

Ms Okul also testified that an audit of the work tickets and imprests by the claimant show that every trip taken the vehicle returned a day earlier and parked at polo centre. Clossec services singed for all the vehicles parked at such venue and show the claimant's vehicle KBN 635 N was parked at this venue on dates when the claimant claimed for imprests amounting to ksh.60000.00. such was by falsification of the records, it is fraud and theft by servant and amounted to gross misconduct.

Upon dismissal, the claimant was paid all her dues by 24<sup>th</sup> October, 2017 which was an overpayment and there was a recovery on 29<sup>th</sup> January 2018. The claims made are not justified and should be dismissed with costs.

In cross-examination the witness testified that the audit report done with regard to the allegations made against the claimant was not shared with her or attached to the notice to show cause. This was not a deliberate move to conceal evidence.

On the meeting held on 2<sup>nd</sup> August 2016 there is no record to show the deliberations taken or recommendation or resolution of the panel. The charge was that the claimant the claimant would take official trips but return a day early but claim for imrests for such time and Glosec Security kept a record of such events and parking at polo centre. The claimant got these documents from the auditors and during the oral hearing of her case. There is however no evidence those parking records are owned by the landlord, polo centre or Closec Security and there is no letter forwarding these records to the respondent.

The witness could not tell if these records were manufactured.

Ms Okul also testified that on 23<sup>rd</sup> October, 2017 she met with the claimant and the disciplinary committee informed her of its decision to dismiss her. she recalls the claimant was given options relating to a resignation. A member of the executive committee gave the claimant an option. These conversations are not recorded in the filed minutes for the day.

At the close of the hearing, both parties filed written submissions.

The court has considered the pleadings, the evidence and written submissions by the parties and the issues which emerge for determination can be summarised as follows;

Whether there is unfair and unlawful termination of employment;

Whether there was due process;

Whether the remedies sought should issue.

The events leading to the summary dismissal of the claimant is a report by a whistle-blower dated 17<sup>th</sup> April, 2017 sent to the respondent and received on 9<sup>th</sup> May, 2017 on allegations that;

*.....since she [the claimant] was transferred to Right Valley in June 2013 for all her official trips, she fraudulently claims an extra day for every trip she undertakes. If she authorised trips are 3 days she will come back to Nakuru on the 2<sup>nd</sup> day but falsify the work ticket to show that she came back on the third day.*

*On the day she returns she ensures that she is in Nakuru after office hours (5pm) and parks the vehicle at AFC or POLO CENTE building.*

*These fraudulent claims of extra payment and falsification of the official vehicle movement ticket can be counterchecked against the records kept by the security guards for the vehicle parked overnight at AFC and at Polo Centre building. ...*

On these information, the respondent commenced investigations against the claimant. An audit team was sent to the branch and carried investigations and a report was done.

Ms Okul in her evidence confirmed that this audit report was not shared with the claimant. The filed report is dated 25<sup>th</sup> May, 2017 and signed by Mahmoud Sebit, Ag. Manager Internal Audit & Risk and with recommendations that the claimant as regional manager should be asked why she refused to do written statements to the auditors; be made to explain why she was involved in malpractices including claiming extra night outs when she had travelled back to her duty station and manipulating motor vehicle work tickets to conceal the malpractices; should be asked to refund the office imprests from 5 nights at ksh.60,000.00 which was obtained irregularly; and the driver should also be called to explain why he was involved in malpractice and failed to report the actions of the regional manager.

A notice to show cause was issued and dated.

A case of summary dismissal from employee has grossly misconducted employment should only issue where an herself and the employer has taken the employee through the due process. In the case of **Anthony Mkala Chitavi versus Malindi Water & Sewerage Company Ltd [2013] eKLR** that even where there is procedural fairness with regard to termination of employment, the employer is legally bound to ensure substantive fairness. The court held that;

*The Claimant was dismissed based on multiple reasons. The Court is therefore enjoined to consider all the reasons, without more, since section 43(2) of the Employment Act, 2007 presupposes that the reasons for termination are the ones which genuinely existed and caused the employer to terminate.*

*The complexity with multiple reasons for termination under our framework however will arise where the employer proves one or some and not all the reasons.*

The claimant was issued with letter of summary dismissal dated 16<sup>th</sup> October, 2017 with four (4) reasons over alleged malpractices for falsifying work tickets for vehicle KBT 635N; fraudulently claiming extra nights out allowance amounting to Ksh.60,000.00; abetting lack of honesty in the staff under her supervisor; an refusing to cooperate with auditors when requested to write a statement.

Prior to the summary dismissal, a show cause notice dated 26<sup>th</sup> May, 2017 was issued to the claimant that following investigations it was found that on 5 occasions she took imprests for an extra night outs when the subject vehicle remained parked at polo centre and which was dishonest and lack of integrity and abetting dishonesty in the staff under her supervisor in the handling vehicle KBT 635N.

What then are the subject ingredients before summary dismissal?

In **Anthony Mkala Chitavi**, cited above the court held that;

*The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.*

*Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.*

*Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.*

Also in the case of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR**;

*Under subsection 43 (2) of the Employment Act, 2007, the reason or reasons for termination of a contract are the 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. However these reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.*

Effectively, other than an employee being taken through the due process of being given an opportunity to a hearing before dismissal from employment, there must exist genuine and valid reasons which exist and forming a good basis for termination of employment. See **Paul Wachiuri Ndonga versus Keroche Breweries Limited [2018] eKLR** .

The rationale is also to be found under section 45(2) of the Employment Act, 2007 that;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason—

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer;

and

c. that the employment was terminated in accordance with fair procedure.

In this case, great reliance for the summary dismissal of the claimant with regard to the 5 instances she took imprest to travel to different official functions and was alleged to have reported back a date earlier on every trip but falsified work tickets to reflect that she reported back to work on the expected date as applied for in the imprest application and thereby claiming extra night out allowances for each journey.

The claimant, in reply to the show cause notice, on 16<sup>th</sup> June 2017 stated that;

*I neither falsified or enabled the falsification of any work ticket, nor took imprest for official travel and returned on days other than those specified in the records. The travel dates for the said trips are as indicated in the relevant authority letters, imprest request, imprest surrender forms and work tickets for the journeys. As the manager in charge of motor vehicle KBT 635N, I always ensure I authorise the work tickets before commencement of each journey. In reference to the trips in question, I wish to confirm that I returned from official travel as indicated on the work tickets (i.e. on 19<sup>th</sup>/3/2016, 30/7/2016, 3/9/2016, 17/9/2016 and 1/10/2016 respectively) and NOT on the dates alleged in the Show Cause Notice. ...*

In the *Audit report on Malpractices by the regional manager – rift Valley* the author, Mr Sebit gives an analysis of the anonymous letter sent to the respondent and dated 17<sup>th</sup> April, 2017 and upon a visit to the regional office where the claimant was regional manager noted that;

The office had one vehicle KBT 635N with a parking bay at AFC building and locked from 5-6pm and when the manager is out and arrives back after office hours it is parked at Polo Centre building;

The management of AFC building do not keep movement records but Polo centre have day to day records of movement manned by Glosec Services Limited;

They interviewed the security guards from Closec Services Limited on duty on 11<sup>th</sup> may, 2017 and requested to be furnished with the vehicle movement records who referred them to the head office and managed to get some records and others mailed to them;

They obtained staff imprests and motor vehicle records kept by the clamant and compared them with the records obtained from Glosec Services and noted that;

On 15<sup>th</sup> March 2016 the claimant applied for imprest to travel from 16<sup>th</sup> and 18<sup>th</sup> March, 2016 and to return on 19<sup>th</sup> March but the vehicle was parked at polo centre on 18<sup>th</sup> March; 2016 and thus falsified work ticket to show return on 19<sup>th</sup> March, 2016;

On 26<sup>th</sup> July, 2016 the claimant travelled between 27<sup>th</sup> and 29<sup>th</sup> July, 2016 and was to return on 30<sup>th</sup> July,, 2016 but the vehicle was parked at polo centre on 29<sup>th</sup> July, 2019 thus a falsification of the work ticket;

On 29<sup>th</sup> August 2016 the claimant travelled between 29<sup>th</sup> August, to 2<sup>nd</sup> September, 2016 and to return on 3<sup>rd</sup> September but the vehicle was parked at polo centre on 2<sup>nd</sup> September, 2016;

On 5<sup>th</sup> September, 2016 the claimant took imprest for travel on 13<sup>th</sup> to 17<sup>th</sup> September, and as to return on 18<sup>th</sup> September, 2016 but the vehicle was parked at polo centre on 16<sup>th</sup> September, 2016; and

On 21<sup>st</sup> September, 2016 the claimant had imprest for travel between 27<sup>th</sup> and 30<sup>th</sup> September thus to return on 1<sup>st</sup> October, 2016 but the vehicle was parked at polo centre on 30<sup>th</sup> September, 2016 therefore a falsification of the records.

As noted above and on the admission by Ms Okul for the respondent, the investigation report with the above details was not shared with the claimant. At the issuance of the show cause notice, the claimant was not privy to these details save for the general allegations against her.

Save for the above, the court analysis of the subject imprests, work tickets and Closec Services Limited vehicle movement records confirm the various trips taken by the claimant and the use of the subject vehicle KBT 635N as stated. However, on the Glosec records page 37 of the defence are records for 18<sup>th</sup> March, 2016 the date the claimant is alleged to have returned a day earlier than scheduled for 19<sup>th</sup> march, 2019.

The overnight record of vehicles for 18<sup>th</sup> March, 2016 does not include vehicle KBT 635N. the records run from No.1 to No.13.

Overleaf is another schedule without a date and runs from No.1 to 13 with KBT 635N at No.10. without a date to this schedule, it is clear it does not relate to the 18<sup>th</sup> March, 2016 as this date ended at No.13 and no more.

On next record is 29<sup>th</sup> July, 2016 for *overnight parking* and runs from No.1 to No.10 and without KBT 635N but overleaf is another record for the same date, 29<sup>th</sup> July, 2016 and for *overnight parking* KBT is registered at No.6. One leaf is signed off by John Waweru at 8pm while the second by Frankine Koech at 06.00am.

There is obvious ambiguity in these records. Keeping of two schedules for the same date one ending 08.00pm while the other ending 06.00am by different persons.

Of outmost interest is that in the first schedule, vehicle KBJ 565U is registered No.1 and on the second schedule is registered No.3;

KAT 596X is No.2 and then No.2 on the second schedule;

KAT 603X is no.4 and then No.1 on the second schedule;

KBR 445X is No.5 and then No.10 on the second schedule.

It therefore goes without question and it is apparent to the court that these records are manipulated. Without an explanation by the maker or makers, it is not clear exactly when KBT 635N was parked so as to be logged and the record closed at 0.600am on 29<sup>th</sup> July, 2016.

With regard to the trip and alleged parking at Polo centre on 2<sup>nd</sup> October, 2016 KBT 635N is recorded at No.9 and record closed at 06.00am. Overleaf to this record is a long schedule for 3<sup>rd</sup> August 2016 with a schedule for each vehicle noting the registration No., time in and time out. This is not replicated for 2<sup>nd</sup> July, 2016 ad the juxtaposition of these two records is not explained. The movement from 2<sup>nd</sup> July to 3<sup>rd</sup> August, 2016 is not explained.

On the record for 30<sup>th</sup> July, 2016 the vehicle KBT 635N is not recorded save for overleaf and without a date.

There is no record from Glosec Security Limited for the 30<sup>th</sup> September, 2016 and page 60 of the defence is a replication of page 37 of the defence.

This analysis is done as the records by Glosec Services Limited and he letter by the whistle-blower have largely formed the basis of the summary dismissal of the claimant as from these records, the respondent initiated an investigation and based on the synchronisation of the subject dates of travel and return, the claimant is alleged to have falsified records to claim for 5 nights out when she is said to have travelled back at the office.

As noted above, without the claimant getting access to these records to interrogate and being brought to her attention at the time of her defence to get a fair chance to question the authenticity, the makers or the auditors who applied these records to find her culpable, the rules attendant under section 41 and 43(2) of the Employment Act, 2007 are not adhered to. In her response to the show cause notice, the claimant asserted here innocence and that she travelled as requested, applied for imprests for the days of her travel and returned to her station as required.

The application by the respondent to audit the claimant's work records based on the anonymous letter and the records directly addressed in the anonymous letter ought to have gone beyond what the respondent was being invited to specifically find. Acting on information not verified and on records which to the court are manipulated to achieve the end for which the anonymous author wanted should have invited the respondent to apply the same with great caution and attention. Save for these secondary information, the respondent thus moved by a whist blower should have interrogate the driver to vehicle KBT 635N, the work records from the sites the claimant had visited and as noted by Ms Okul that the auditors undertook a prompt audit, apply the same prompt and apt fact finding when the claimant took up other trips.

Thus interrogated, the court finds no genuine, valid or fair reason applied to find the claimant culpable and deserving of summary dismissal. At the time of the disciplinary hearing on 2<sup>nd</sup> August 2017 there was no genuine and reasonable cause to justify a summary dismissal being issued as a sanction to the claimant.

On the other grounds leading to summary dismissal with regard to the claimant being alleged to have fraudulently claiming extra night out allowances for each journey covered on 5 different occasions and causing the respondent a loss of Ksh.60,000.00 without proof that the work tickets were falsified and the vehicle returned with the claimant a day before the time scheduled and for which the imprests were secured, such allegation is hereby found without basis and cannot apply to dismiss the claimant from her employment.

On the allegations that the claimant abetted lack for honesty in the staff under her supervision, these allegations were not gone into by the respondent and the witness called and even where such applied with regard to the subject vehicle KBT 635N, the respondent has applied work ticket and vehicle logs for use by its employees in the field and which the claimant admitted to use and also to apply for her imprests for each trip taken. Without any evidence that these records were manipulated by the claimant or any other employee under her supervision to thus lead to dishonesty by herself or any other employee, these allegations are without merit.

On alleged refusal to cooperate with auditors when requested to write a statement, Ms Okul testified that her only role in the matter was during the disciplinary hearing at the executive committee. She had no contact with the auditors. She could not relate to the process save for the recommendations.

The Court of Appeal in addressing a matter similar as herein in the case of **Standard Group Limited versus Jenny Luesby [2018] eKLR** held that;

*If indeed the claimant was insubordinate on 13<sup>th</sup> November 2013 against the respondent CEO, there is no evidence from the CEO stating what instructions he gave that were disobeyed by the claimant. What the court is left to extrapolate are the perceptions of those present, those he talked to after the fact and their general imagination and approach to the stated incident. This evidence as regards how the said incident occurred was vehemently disputed by the claimant. The offended party being the respondent CEO was never called to state his case as he, being the senior in authority present at this meeting, is the one whose authority was said to have been undermined.*

Without Ms Okul as the sole witness of the respondent being able to talk into the matters addressed by the auditors for them to arrive at the recommendation that the claimant refused to cooperate with their investigations, the claimant having been directed to hand over all the records relating to her journeys in the field and use of vehicle KBT 635N, then this finding lacks basis.

The other matter that was raised in defence was with regard to the claimant writing to the PS, Labour and requesting the office to stop the audit. This was taken to mean she wanted to frustrate the audit process. However, it did not stop, it proceeded and the claimant found at fault.

With the analysis above and finding that the claimant was sanctioned without justification, by escalating her concerns on the audit process to the PS, Labour this is hereby found to have been done with good foundation and responsibility as required under section 46(h) of the Employment Act, 2007 and should not be punished for the same. The law requires that;

*(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or*

This is well captured in the case of **Joseph Omollo versus Board Management Kisumu Boys High School [2016] eKLR**

*Having failed to contest the evidence, I find that RW1 dismissed the claimant from work because he wrote to the Respondent complaining about his underpayment and discrimination. Section 46(h) expressly forbids the dismissal of an employee for reasons that an employee has initiated or proposes to initiate proceedings against his employer except where such complaint is either irresponsible or without foundation*

The court finds the termination of employment of the claimant lacked any justifiable cause and the sanction of summary dismissal lacked foundation and the same is hereby declared unfair.

The primary remedy sought is that of reinstatement.

The claimant submitted that she is seeking the court for a finding that the summary dismissal is set aside and she be reinstated back to her position. the claimant relied on the case of BIFU versus Cooperative Bank Limited [2015] eKLR.

The respondent submitted at length that an order for reinstatement should not issue as the respondent has lost faith and confidence in the claimant as an employee. Under section 49(4) (d) of the Employment Act the court is bound to consider the grant of specific performance in contract of service should only issue in exceptional circumstances as held in **Civil Appeal No. 199 of 2013 CMC Aviation Limited versus Captain Mohammed Noor.**

Though set out as the primary remedy, the claimant did not delve on the remedy of reinstatement as required under section 49(4) of the Employment Act, 2007 save to urge her case that she had no record of indiscipline before. In her submissions this remedy is equally not gone into as required under section 49 with regard to demonstrating that this is the most practical remedy instead of the alternative remedies sought.

Though a discretionary remedy, the court should only order for a reinstatement in exceptional cases guided by the factors set out under section 49(4) of the Employment Act, 2007 and in my view for the court to be persuaded in this regard, the claimant must lead evidence as to why such remedy is deserved over and beyond any other remedy. To do this the claimant was required to demonstrate that there is no trust and confidence lost between the parties and by reinstatement what effect this shall have on other employees and the risk that there has been irreparable harm to the employment relationship.

The claimant was a senior officer of the respondent when she was accused of malpractices by an anonymous person. She was investigated by senior officers from the audit and placed for disciplinary hearing by the executive committee comprising the chief executive officer and the other top managers. Though the respondent is a large entity, to return the claimant in a similar position would place her at the same level with those seating in top management. Ms Okul testified to the fact that the claimant had been offered to resign from her employment and she declined. These events would not place the claimant in a conducive work environment. To order reinstatement would be to place the claimant back into a hostile work environment.

In **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR the Court of Appeal** held that;

*The remedy of reinstatement is discretionary. However, the Court is required to be guided by factors stipulated in section 49(4) of the Employment Act which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract of employment should not be offered except in very exceptional circumstances. The Court should also balance the interest of the employee with the interest of the employer*

This court finds the practicability of reinstatement will not serve either party well.

**Kenya Airways Limited versus Alex Wainaina Mbugua [2019] eKLR** it was held that;

*.. the remedy of reinstatement that was issued. Much as it appears logical that an employee who has been unfairly terminated and who in consequence is exposed to much financial and social harm and may in fact be ruined career-wise, should in fairness be restored to his position before his employer's unfair and other unlawful actions, the law on employment and labour relations is not so. Far from being the natural, logical result of a finding such as we have affirmed, reinstatement issues only in exceptional circumstances. The reason for this lies in the nature of the employment relationship, it is by definition very personal and, though not intimate, it is close enough for the law to appreciate that unless employer and employee be agreed; they can neither walk, nor work*

together

The claimant has sought for alternative remedies. On the decline to grant the primary remedies for reasons set out above, the court shall consider the alternative remedies as held in **Olive Mwihaki Mugenda & Another versus Okiya Omtata Okiiti & 4 others [2016] eKLR**.

The claimant is seeking for salaries for the term she had hoped to serve the respondent for 18 years. In the contract of employment issued to the claimant it contained terms for termination of employment upon notice and thus envisaged the ending of the relationship on terms contemplated under the Employment Act, 200 at section 35 and which must be read with remedies under section 49 of the Act.

The other remedy the claimant is seeking is that of compensation. As set out above, there were no valid, genuine or fair reasons leading to termination of employment. The claimant as a senior employee of the respondent had hoped to work and earn a living from her employment and which was unfairly terminated. Upon the decline to order reinstatement and payment for 18 years of employment, putting all factors into account, a compensation of ten (10) months is hereby found reasonable and appropriate.

This does not in any way return the claimant to the position she should have been at had her employment not been terminated and on the other hand this does not punish the respondent who has been found to have acted unfairly save to address the finding that there was unfair termination of employment. Compensation where found appropriate by the court is thus assessed at 10 months gross pay and not more of less.

The claimant was earning Ksh.491, 684.07 based on the last issued payment statement for September, 2017. Total award is Kshs.4, 916,840.70.

On the claimant for notice pay, the contract of employment provided for termination of employment upon notice of 3 months or payment in lieu thereof. Such notice pay is due to the claimant in accordance with section 35 of the Employment Act, 2007 read together with her contract of employment and the respondent's human resource manual all at Kshs.1, 475,052.21.

Costs are also due to the claimant on the finding that her claim is filed with good basis and responsibility following unfair termination of employment.

**Accordingly, court enters judgement for the claimant against the respondent in the following terms;**

- a. The court declares the summary dismissal of the claimant was unfair and letter of summary dismissal and dated 16<sup>th</sup> October, 2017 is set aside;**
- b. The claimant is hereby awarded compensation at Ksh.4, 916,480.70;**
- c. Notice pay at Ksh.1, 475,052.21;**
- d. The dues (b) and (c) above shall be paid within 30 days after which such shall attract interest at court rates;**
- e. The claimant is awarded costs of the suit.**

**Delivered at Nakuru this 24<sup>th</sup> day of October, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....