



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2536 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**WYCLIFFE ELIJAH NYAKUNDI.....1<sup>ST</sup> CLAIMANT**

**PAUL KIHU KABUKURU.....2<sup>ND</sup> CLAIMANT**

**STEPHEN NGARE MATHENGE.....3<sup>RD</sup> CLAIMANT**

**GIDEON MUINDI MULWA.....4<sup>TH</sup> CLAIMANT**

**JOSHUA KIPKORIR KEMBOI.....5<sup>TH</sup> CLAIMANT**

**GEORGE N. K. KARANU.....6<sup>TH</sup> CLAIMANT**

**DENNIS MAKAU MUTINDA.....7<sup>TH</sup> CLAIMANT**

**VERSUS**

**SAFARICOM LIMITED.....RESPONDENT**

**JUDGMENT**

Wycliffe Elijah Nyakundi, Paul Kihui Kabukuru, Stephen Ngare Mathenge, Gideon Muindi Mulwa, Joshua Kipkorir Kemboi and George N. K. Karanu filed a Statement of Claim dated 17<sup>th</sup> December 2012 against the Respondent, Safaricom Limited. Wycliffe swore the verifying affidavit on behalf of the other Claimants and further annexed the Authority to Sue from each of the other claimants.

The Claimants aver that they were employed by the Respondent in various capacities and under different remuneration packages, through letters of appointments made on diverse dates. That in the course of their employment, the Respondent received an anonymous email allegedly sent by Safaricom Business Dealers/Agents on 23<sup>rd</sup> April 2012. That this was followed by the Respondent issuing them with Notices of Suspension from Duty all dated 28<sup>th</sup> May 2012. That they were to be suspended for one month or such time as was reasonable to allow conclusion of investigations and were also to cooperate with the Respondent's investigations team. That during the suspension period, the Respondent separately invited each of them to attend 'meetings' at their offices on Waiyaki Way to discuss the allegations in the anonymous email but it later transpired they were to meet its Risk Team.

Wycliffe avers that on 21<sup>st</sup> June 2012, his lawyer accompanied him to attend a meeting with the Risk Team who confirmed they had not honoured his lawyer's letter of 11<sup>th</sup> June 2012. He was told that the meeting could not proceed as his lawyer was not allowed to be present. That the meeting was therefore called off after reasons for the meeting were explained and recorded. That the Risk Team agreed to respond to Wycliffe's lawyers letter and further furnish him with any documents or information that he may require. He avers that when he attended another meeting with the said team, they were yet to respond to his lawyer and that the Respondent declined his request for documents, information and statements in its possession. All the Claimants aver that they attended their "meetings" without legal representation, the benefit of information and the opportunity to cross-examine the givers of the information. The Claimants seek to rely on the recordings of the meetings in support of their case.

The Claimants further aver that the Respondent then issued them with Notices of Summary Dismissal dated various dates indicating that their actions amounted to gross misconduct and a fundamental breach of company expectations and that it had decided to summarily dismiss them with immediate effect. They contend that the entire process leading to termination of their employment breached their constitutional

rights to information and privacy and the principles of natural justice. That the Respondent infringed on their right to privacy by going through and interjecting their phone records and communications outside the scope of the alleged transactions under investigations and without notice to them. That the Respondent also misrepresented to them the true nature of the meetings and hearings which they were not informed would be disciplinary hearings and for which they thus claim damages. They contend that their termination was characterised by malice and bad faith by the Respondent.

They aver that they were entitled to a yearly bonus fixed at a figure equivalent to or more than their monthly payments and that they had each earned a bonus by the time of their termination but the Respondent declined to pay them the said bonuses which they were entitled to. The Claimants pray for:

- a) A declaration that the Respondent infringed on the Claimants' constitutional rights and fundamental freedoms.
- b) A declaration that the Respondent breached the principles of natural justice in the process of terminating the Claimants.
- c) A declaration that the summary dismissal of the Claimants by the Respondent was unfair and unlawful
- d) General damages for infringement of the Claimants' constitutional rights and fundamental freedoms.
- e) General damages for unlawful and unfair dismissal.
- f) Payment in full of retained incentives and bonuses earned but not paid.
- g) Costs of this claim.
- h) Interest on (d), (e), (f) and (g) above at court rates from the date of filing until payment in full.
- i) Reinstatement of employment in similar capacity under prevailing terms.
- j) Any other relief the court may deem fit to grant in the circumstances.

All the Claimants filed their Witnesses Statements stating as follows:

WYCLIFFE NYAKUNDI states he joined the Respondent company on 3<sup>rd</sup> June 2008 as a Retail Sales Manager on a monthly salary of Kshs.350,000/= and that at the time of dismissal, his monthly salary was Kshs.417,600/=. He states that he handed over his laptop, employee ID, access card and company vehicle to the investigations team after he was suspended and that he attended several meetings with the Respondent's fraud team and had another session with the legal and human resource teams jointly. That he also received an invitation for a disciplinary review via his private email on 20<sup>th</sup> July 2012, to be held on 26<sup>th</sup> July 2012 and which further instructed him to attend with a colleague if he chose to. He further states he was not shown his accuser's witness statement and that the Respondent did not explain to him its decision to terminate his employment.

GEORGE KARANU states he joined the company on 4<sup>th</sup> March 2008 as Area Sales Manager and that he received an email on 11<sup>th</sup> July 2012 to attend a disciplinary review on 16<sup>th</sup> July 2012. That on 16<sup>th</sup> August 2012, he received another email to attend the disciplinary feedback.

GIDEON MUINDI MULWA states he joined the company on 10<sup>th</sup> September 2008 as Area Sales Manager and that he attended a disciplinary review on 17<sup>th</sup> July 2012.

JOSHUA KEMBOI states he joined the company on 23<sup>rd</sup> April 2007 as Simu Ya Jamii Area Sales Manager and around 2009, he was appointed the Area Sales Manager consumer business posted to Nyanza/Western region. Joshua received an email on 13<sup>th</sup> July 2012 to attend a disciplinary review on 18<sup>th</sup> July 2012.

STEPHEN NGARE MATHENGE states he joined the company on 1<sup>st</sup> November 2000 as the Chief Executive Officer's driver for 2 years and was promoted in 2003 to maintain reception, mailing department and switch boards for 2 years. That he was further promoted to M-Pesa Administrator in 2010 again for 2 years and in 2011, he was promoted to Area Sales Manager posted to Western/Nyanza. Stephen received an email on 6<sup>th</sup> July 2012 to attend a disciplinary review on 12<sup>th</sup> July 2012.

PAUL KIHU KABUKURU states he joined the company on 15<sup>th</sup> April 2007 as Simu Ya Jamii Area Sales Executive and was relocated to Bungoma on 28<sup>th</sup> April 2011 as Area Sales Manager, Consumer Sales. He states he attended a meeting on 12<sup>th</sup> July 2012.

DENNIS MAKAU MUTINDA states he joined the company on 8<sup>th</sup> August 2007 as the customer care representative and was promoted to M-Pesa operations officer in charge of sales on 1<sup>st</sup> February 2007. That he was later appointed the Area Sales Manager and posted to Mombasa in November 2010 until June 2012 when he was transferred to Nyahururu. That he received an email on 6<sup>th</sup> July 2012 to attend a disciplinary review on 12<sup>th</sup> July 2012.

All the Claimants state that after their disciplinary hearings, they each received a notice of summary dismissal dated 6<sup>th</sup> August 2012

terminating their employment.

The Respondent filed a Statement of Response dated 1<sup>st</sup> February 2013 admitting to have employed the Claimants. It avers that each of them was provided with its staff manual which they executed in acknowledgment. It avers that it suspended the Claimants after receiving several reports of operational malpractices concerning each of them, so as to investigate the claims. That it constituted and subjected each of them to an investigative panel of its risk management team between 23<sup>rd</sup> May 2012 and 26<sup>th</sup> July 2012 where each of them was given an opportunity to respond to individual allegations against them. It seeks to rely on the forensic investigation reports of each of the Claimants. It avers that there is no provision either under its Staff Disciplinary Policy or the Employment Act for legal representation during disciplinary hearings. That each of the Claimant was however entitled to have another employee of his choice present during the hearing pursuant to the staff disciplinary policy set out in its staff manual.

The respondent denies violating any of the Claimant's constitutional rights as alleged in the Claim. It avers that each of them was given all the information necessary to answer the allegations and that all scrutinized records were for purposes of investigating the allegations made against the Claimants. Further, that the Claimants were each informed they would be subjected to a disciplinary hearing and that it explained to each of their employment in a language they each understood prior to the said terminations that it was considering terminating them on grounds of bribery and corruption. That it also availed to them copies of their CD recordings for the disciplinary hearings as well as written letter showing how the decision to dismiss them was arrived at. It avers that the Claimants were summarily dismissed owing to their acts which amounted to gross misconduct in terms of **section 44(3) and (4) of the Employment Act**. They urged the court should not endorse and compensate their corrupt acts.

The Respondent avers that the Claimants had a right to appeal against the decision to terminate their employment as provided under its staff manual but none of them exercised this right. It confirms it paid each of the Claimants salary for days worked in the month of termination, any accrued leave not taken, any accruing allowance and issued each of them with a Certificate of Service. That the termination of the Claimants' employment was therefore lawful and justifiable as under the law. It prays that their suit is dismissed with costs.

The Respondent filed two Witness Statements dated 12<sup>th</sup> November 2018 and 1<sup>st</sup> November 2018 made by its Senior Manager, Fraud Detection, Emmanuel Mulwa Ndibo and the Senior Manager Employee and Labour Resources, Odhiambo Ooko respectively. Emmanuel states that a report was made sometimes in 2012 that Area Sales Managers within the Consumer Business Team received bribes for approval of new tills and till relocation. That the Respondent also received written confessions from its business dealers/agents on the same issue.

Odhiambo states that the interviews the Claimants had with the risk team was strictly for investigative purposes and not a disciplinary hearing. That the risk team prepared **Forensic Investigation Reports** for each Claimant recommending appropriate disciplinary action to be taken against them. Odhiambo states that the Claimants were still entitled to and were paid their full pay and benefits during their suspension. That the disciplinary hearings were conducted between 12<sup>th</sup> July 2012 and 26<sup>th</sup> July 2012 after notices of the same were issued to the Claimants. He states that the Claimants did not personally request for documents relied on by the Respondent. He confirmed that the disciplinary policy does not provide for attendance of an external party. He states that the Respondent was justifies and acted with procedural fairness in terminating the employment of the Claimants.

#### Claimants' Submissions

The Claimants submit that the Respondent confirmed through its witnesses that it indeed did not call the makers of the documents and witnesses during the hearings that led to the termination of the Claimants' employment. That the Claimants also testified that no one has ever been charged to date or called to record a statement in regards to charges of corruption and bribery. That they find it hard to get employment because of the allegations in the termination letters.

They submit that they were suspended prematurely even before contents of the anonymous email had been keenly interrogated and that the Respondent violated clause 36.0 of its staff manual on procedure to follow after a complaint against an employee is made. That the Respondent failed to give them prior notice of all charges and the documents it would use, that even the emails it alleges it sent does not give details of the sender or recipients while the email addresses on the notice were handwritten. That under section 107 of the Evidence Act, whoever alleges existence of facts must prove that those facts exist. They rely on the case of David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR where the court outlined the principles of fair hearing such as sufficient opportunity to prepare, right to understand the charges and the right to documentation which they urge this court to adopt. That the court in Kadenge Karisa Konde v Coast Clay Works Limited [2016] eKLR further observed that the respondent did not show the court that beyond the warnings, it took other procedural steps in satisfaction of section 41 of the Employment Act.

That even if the Respondent summarily dismissed them, it ought to have complied with the basic requirements of section 41 of the Act. That the reasons it advanced for the terminations are unfounded. They deny that they were given an opportunity to be heard. They submit that they have discharged the burden of proving that their dismissal was wrongful and unjustified while the Respondent has failed to rebut the same. That they did not appeal because the CEO signed their dismissal letters yet he was the same person they were to appeal to. That in the upshot, the process was not fair. They further submit that in the case of Jared Aimba v Fina Bank Limited [2016] eKLR, the Court of Appeal held that under section 45 and 41 of the Employment Act, terminations for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process.

It is submitted by the Claimants that the Respondent failed to appreciate that the provisions of section 44(4)(g) of the Employment Act are subject to those of section 41(2) of the Act which require an employer to consider any representations by the employee prior to dismissal. That section 45(4) (b) of the Act allows the court to find a termination unfair if the employer did not act in accordance with justice and equity and that their dismissal did not conform to dictates of justice and fairness. The Claimants urge this Court to find that their dismissal from employment by the Respondent was unfair and/or unlawful and award them the reliefs sought in the claim. They further urge this Court to exercise the wide discretion and powers conferred upon it by section 12(3) of the Industrial Court Act in terms of the remedies it can grant and grant the same.

## Respondent's Submissions

The Respondent submits that the process leading to dismissal of the Claimants was fair as it has demonstrated that their disciplinary hearings were preceded by investigations done by its risk team who afforded the Claimants a chance to respond to the allegations against them. That all the Claimants confirmed in their witness statements which were adopted by court that they were issued with proper notification prior to their disciplinary hearings. That their submission that they were not given the said notice is not supported by the evidence on record. Further, that clause 36 of the Human Resource Manual is clear that under the disciplinary procedures, an employee may be accompanied by a colleague or manager of their choice but not legal representation, which is also provided in section 41 of the Act in terms of another employee, or a shop floor union representative accompanying an employee to a hearing. That since it was an internal matter and the allegations were grave and sensitive, it was necessary for the investigations to be conducted in a very confidential matter.

That a disciplinary hearing is not a criminal proceeding as was affirmed by the Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR. That in the case of *Senzo Justice Zondo & another vs. Uthukela District Municipality & another*, Case No. 631 of 2014, the Labour Court of South Africa whilst faced with an application to stay disciplinary proceedings because the employer had refused to allow for legal representation, found that the collective agreement with the applicants' trade union prohibited legal representation and the applicants being bound by the terms of the collective agreement, were therefore not entitled to legal representation. That in the instant case, since the Human Resource Manual which prohibits representation was part of the Claimants' employment contract, they are bound by the terms of the contract and it was thus justified to deny their demand for representation. Further, that the Employment Act does not provide for cross-examination of witnesses during investigations stage or disciplinary hearing. It cites the *JSC v Gladys Boss Shollei* case above where the court quoted with approval the holding of Lord Denning in *Selvarajan vs. Race Relations Board* (1976) 1 All ER 12 that: "The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."

The Respondent submits that George Karanu had had a disciplinary hearing on 23<sup>rd</sup> May 2012 for failing to disclose an accident that had happened with its vehicle which was in his possession and that the recommendation was to issue him with a final warning as shown at page 54 of the Respondent's Bundle. It also submits that the Claimants have not challenged the explanations captured in the various Forensic Reports and the disciplinary recordings. It contends that they did not plead breach of their rights under Articles 47(1) and (2) of the Constitution.

That since the Claimants did not appeal against its decision the process leading to their dismissal was fair in the circumstances of this case. It further submits that since the Claimants only challenged the procedure it adopted in dismissing them, they are barred from contesting reasons for their dismissal which they only raise in their submissions. That it is trite that parties are bound by their pleadings. It submits that submissions are not pleadings.

It is submitted by the Respondent that indeed section 43 of the Employment Act enjoins an employer to prove the reason or reasons for termination failure to which termination would be deemed unfair within the meaning of section 45 of the Act. That under section 43(2) of the Act, reasons for termination are matters 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. It submits that the Respondent's Anti-Corruption & Bribery Policy is among the policies that regulated the Claimant's employment and that clause 5.2 of the said policy (page 255 of the Respondent's Bundle) provides examples of unacceptable behaviour such as receiving or soliciting for bribes. The Claimants were to further consult the Respondent's Gift Policy which is provided in clause 3.9 of the staff manual to the effect that accepting gifts or favours from its customers or suppliers is prohibited and that all gifts exceeding Kshs.1,000 must be declared to the Director Risk Management.

It submits that section 47(5) of the Employment Act vests the burden of proving unfair termination/wrongful dismissal on the Claimants herein while the burden of justifying the grounds for termination of employment/ wrongful dismissal rests on the Respondent. That an objective test referred to as band of reasonable responses test is applicable in determining whether a reasonable employer in similar circumstances would have dismissed the employee as was affirmed in *Mwanajuma Juma Kunde v KAPS Municipal Parking Services Ltd* [2013] eKLR. If the test of legality and reasonableness is satisfied by the employer, the reason for termination would be deemed as fair and proper. That the substantive requirements for employers to act reasonably in all termination decisions was clearly articulated by the House of Lords in *Polkey vs. A.E Dayton Services Limited* (1987) UKHL 8 as follows: "...in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of the misconduct fully and fairly, and then hears whatever the employee wishes to say in his defence or in explanation or mitigation..."

On the reliefs sought, it submits that RW1 testified in court that call data records did not have capability of ascertaining the contents and the Claimants have not produced any documentary evidence showing it accessed the contents of their communication. That the Claimants have failed to meet the threshold of drafting constitutional petitions set by the court in *Anarita Karimi Njeru v the Republic* (No. 1) 1979 KLR 154. Further, that they have failed to precisely state how it breached Articles 31, 35 and 41 of the Constitution. That no damages can therefore lie against it for such alleged breach. It submits that section 49 of the Act does not provide for general damages as a remedy for wrongful dismissal and unfair termination. That the Claimants did not specifically plead the remedies under section 49 of the Act which gives the three options of payment in lieu of notice, compensation with a maximum of 12 months' salary or both as affirmed in *Express Connections Ltd v Ezekiel Kiarie Kamande*, Civil Appeal No. 50 of 2011.

It further submits that the Claimants did not provide particulars of the alleged retained incentives and bonuses for the court to appreciate and assess. That these being special damages, they must be specifically proved. That in view of section 12(3) of the ELRC Act, reinstatement can only be awarded within 3 years of dismissal of an employee from employment and this court therefore does not have jurisdiction to award the same as three years have lapsed since the Claimants were summarily dismissed.

## Analysis and Determination

As agreed by parties, the first issue for determination is whether the process that led to the termination of the Claimant's employment was fair. The second issue for determination is whether the Claimants were lawfully terminated. The third issue for determination is whether the

Claimants are entitled to the remedies sought.

**Section 41 of the Employment Act** provides that:

***(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 the employee 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.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations 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.***

In their evidence and submissions, the claimants have deduced on attacking the respondent extensively relying on what they allege the respondent did not do. They did not specifically deny the allegation against them of bribery and receiving gifts from customers against company policy.

The Respondent has demonstrated in its pleadings and documents produced in court that it engaged the claimants separately for a long duration of time which involved informing them of the allegations, investigating them through its risk team and finally affording them an opportunity to be heard at a disciplinary hearing. It has further adduced evidence that its Human Resource Manual which was part of the Claimants' contract prohibited legal representation during disciplinary hearings. The only part that they failed to comply with is furnishing the Claimants with information and documentation in their possession to enable the claimants adequately prepare their defence in readiness for the disciplinary process as affirmed in the David Wanjau Muhoro case above. It however submitted that it needed to treat the process with confidentiality. Other than that, I find that the Respondent extensively adhered to section 41 of the Employment Act and the process leading to termination of the Claimants' employment was largely procedurally fair. In the case of JWN –v- Teachers Service Commission [2014] eKLR, the Court held that what the law requires is not a perfect hearing but a fair hearing.

Section 41(1) as read together with Sections 43 and 45 of the Employment Act require an employer to provide an employee with valid reasons for considered termination while Section 44(4)(g) of the Act specifically lists an employee committing a criminal offence against an employer as a ground for summary dismissal. Further, the burden of proving that unfair termination of employment or wrongful dismissal has occurred rests on the employee as set out under Section 47(5) of the Employment Act. The Respondent has developed policies such as Anti-Corruption & Bribery Policy and a Gift Policy, which clearly prohibit corruption, bribery and acceptance of gifts by employees without declaring the same. Its reasons for summarily dismissing the claimants was therefore valid and fair and met the reasonable test as held by the court in the Polkey case above. The Respondent has accordingly discharged its burden of justifying its grounds for dismissing the Claimants.

I agree with the Respondent that the Claimants did not specifically plead remedies under section 49 of the Act, which gives the option of compensation for wrongful dismissal among others and not the general damages they seek in their Claim. Nevertheless, having concluded they were procedurally and substantively dismissed by the Respondent, they are not entitled to the prayers sought in their claim. The Claimants did not also provide particulars or proof of the alleged retained incentives and bonuses for the court to ascertain and determine the same. The said prayers thus fail for want of proof.

They are further not entitled to reinstatement as they have not proved unfair termination and more than 3 years have lapsed since they were dismissed by the Respondent.

The entire claim therefore fails and is consequently dismissed. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**