



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2043 OF 2011**

**ANGELO MAINA KIUMA.....CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF GERTRUDES'S CHILDREN'S HOSPITAL .....  
RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 2<sup>nd</sup> December 2011 and sought to have the issue he framed as unlawful termination of employment determined. He averred that he was employed by the Respondent as head of outpatient services on 30<sup>th</sup> July 2007 earning Kshs. 230,000/- monthly and subsequently was promoted to position of head of shared services and was earning Kshs. 380,000/- a month. It was further averred that he was invited to the office of the Respondent's chief executive officer to attend a routine meeting to discuss costs of repairs and renewals. He averred that he attended the meeting in the company of the projects & maintenance manager and the chief accountant. He averred that CEO made general accusations against the Claimant, the projects & maintenance manager and the purchasing manager. It was averred that the projects & maintenance manager was accused of diverting the materials to his hardware shop and accused him of building a house using the materials bought by the Respondent. It was averred that the CEO accused the three of paying for goods not delivered and accused them of diverting roofing tiles, mahogany doors, overhead showers and drawer locks had been procured at inflated prices. The human resource manager was called and asked whether she had checked the projects & maintenance manager's references and stated that the projects & maintenance manager should be investigated for the alleged fraud involving the items. He averred that the CEO turned to him and sought to know whether the Claimant was part of the scheme to defraud the hospital. The Claimant averred that he denied any knowledge of the alleged scheme to defraud the hospital and was then asked to leave the room together with the projects & maintenance manager. Each was called back in one by one and the Claimant was asked to resign for causing the hospital loss of Kshs. 15,000,000/- during his watch. He was to do so within 10 minutes failing which the CEO would dismiss him. He averred that he was called back to the CEO's office after 10 minutes and asked for the letter of resignation. The Claimant averred that he told the CEO that he had no reason to resign as he had not done anything wrong. He averred that he was told to await his letter of dismissal and that he would be escorted out of the premises by security. He averred that fearing humiliation and embarrassment of such a departure, he went away and did not wait to be escorted out of the hospital by security. He averred that the CEO simultaneously with the posting of the letter of termination circulated an email to the Respondent's other employees notifying them that the Claimant had left the Respondent's employment. He averred that the letter, though couched as a normal notice of termination was in truth not a normal termination but wrongful and unlawful dismissal arising out of the Claimant's

refusal to resign as demanded by the Respondent's CEO. The Claimant averred that he appealed the decision to terminate him on 20<sup>th</sup> October 2011 to the Respondent's board of trustees and sent a reminder on 11<sup>th</sup> November 2011 to which the Respondent's board of trustees responded confirming that the dismissal was upheld by management. The Claimant averred that his dismissal and withholding of salary was without any reasonable cause. He averred that on 29<sup>th</sup> November 2011 a sum of Kshs. 922,118/- was deposited into his account by the Respondent and that he did not know the breakdown for the sum deposited. He averred that he had served the Respondent with diligence and had been promoted and received salary increments alongside commendations. He thus sought a declaration that the termination of the Claimant's services was wrongful and unfair, an order that the Respondent reinstates the Claimant to his former position with full benefits and in the alternative for orders directing the Respondent to pay salary for 12 days in the month of October 2011 and 29 days in the month of November 2011, 12 months compensation for wrongful and unlawful termination of services, and order that the Claimant is entitled to both the employee's and employer's portion of the pension funds and a clean certificate of employment as well as costs of the suit and interest.

2. The Respondent filed a memorandum of response and counterclaim on 25<sup>th</sup> April 2012. In it, the Respondent averred that the Claimant was employed by the Respondent as head of outpatient services and was to be subject to the Respondent's staff rules and regulations and notices of the Respondent in force. The Respondent averred that the Claimant was confirmed in position and in October 2011 executed documents of declaration of secrecy and fidelity and general conduct in service code of ethics in which he was bound to report to the CEO any irregularities which would come under his observation and which could be detrimental to the affairs of the Respondent *inter alia*. It was averred that the Respondent issued a letter of censure on 2<sup>nd</sup> July 2010 after it was established that due to negligence in the performance of his duties and failure to develop systems and processes of work, the Claimant had placed the Respondent at risk leading to incidences of robbery. The Respondent averred that after restructure at the beginning of 2011, the Claimant was promoted to the position of head of shared services and that his duties included overseeing and implementing expansion, construction and renovation of projects, project management, supervision and co-ordination of the projects and related work, planning and administering budgets *inter alia*. The Respondent averred that upon the Claimant being appointed to his new post, the cost of procuring goods immediately shot and between January to July 2011 the cost shot up by 57%. It was averred that the CEO raised the issue of escalating costs with the Claimant and the audited accounts for the year 2011 showed an increase of 40% in cost of repairs and maintenance. The Respondent averred that in spite of the Claimant's promises to cut costs the costs kept escalating and on seeing an invoice with an item (mangrove tiles) invoiced at Kshs. 115/- while the price ranged at Kshs. 40/- the CEO of the Respondent commissioned an investigation which revealed serious indiscretion on the part of the Claimant and the projects & maintenance manager. It was averred that the physical address of a key supplier of the Respondent Hansun General Supplies & Contractors had not been visited contrary to the Respondent's procurement requirements and therefore it was not possible to verify the existence and competency of the supplier. The investigations further established that the prices for some of the supplied items were obscenely exaggerated when compared to prevailing market prices and some were as high as over 600%. It was averred that the Claimant signed approving the items with inflated prices and that the CEO consulted the board of trustees and decided to invite the Claimant to a meeting to hear the explanation for the excess expenditure concerns and show cause why disciplinary action should not be taken against him. The Respondent averred that at the meeting on 19<sup>th</sup> October 2011, the Claimant confirmed he had been unable to control the escalating costs and more particularly that there had been far reaching discrepancies in procurement processes and that the Claimant was given the option of an honourable resignation from employment but the Claimant declined prompting his dismissal. The Respondent averred that the Claimant's terminal dues were remitted through telegraphic transfer on 22<sup>nd</sup> November 2011 and that the calculation of final dues was emailed on 29<sup>th</sup> November 2011 after the Claimant failed to collect it.
3. The Respondent raised a counter-claim against the Claimant and averred that the Claimant, in the

course of performance of his duties acted negligently and or in breach of his duty and either participated in or condoned the perpetuation of fraudulent activities in the course of procurement of supplies for the Respondent and particulars whereof supplied. The Respondent particularised the loss suffered being loss due to over pricing, non-delivery of items. The Respondent submitted that the decision to terminate the Claimant was arrived at after investigations established that the Claimant had engaged in various acts in breach of his employment contract, the code of ethics and the procurement procedures of the Respondent in violation of Section 44 of the Employment Act. The Respondent thus sought dismissal of the Claimant's suit and entry of judgment for the Respondent in terms of the counter-claim together with costs and interest.

4. The Claimant testified on 19<sup>th</sup> June 2014 and 2<sup>nd</sup> July 2014. He testified that he was employed by the Respondent as a head of outpatient services and was later promoted to head of shared services. He stated that he earned Kshs. 505,800/- at the time as evidenced by the payslips for August and September 2011. He testified that he was terminated on 19<sup>th</sup> October 2011 and that he appealed the decision on 20<sup>th</sup> October 2011 and did not receive any communication. He wrote a reminder on 11<sup>th</sup> November 2011 and asked for an opportunity to explain himself but was not granted such opportunity and instead received a letter dated 24<sup>th</sup> November 2011 upholding his termination. He was aware there were procedures and had received a copy of the Human Resources Manual. He referred an extract of the HR Manual attached to his claim and read clause (vi) and (xiv) which made provision on summary dismissal. He stated that the incident begun on 18<sup>th</sup> October after he received an invite to attend a meeting at the CEO's office and he carried a note book as it was a routine meeting and also invited was the project & maintenance manager and the chief accountant. He stated that the meeting was for repairs & maintenance and was to take 30 minutes. He testified that the CEO had 2 files and asked why the project manager was building a house and if the project manager had a hardware shop. He stated that this insinuated that the items bought were going to a hardware shop. The overhead showers were fixed in general ward and the mahogany doors were for the operating theatre, the roofing tiles were put in the staff quarters. He stated that the CEO called it direct theft and called the HR to find out if the references for the project manager had been checked. He testified that the CEO then asked him if he was a party to the theft of items stolen from the hospital. He was asked to wait outside the office and on being called back in was told that the Respondent had lost 15 million. He was asked to resign and he stated that he declined to resign as he had not done anything. He was told to go and come back with a resignation letter and was called back after 10 minutes and told the CEO he had no resignation letter. He was sent away and was told by the CEO that he would be given a dismissal letter and escorted by security officers. He testified that he was asked by his colleagues why he had resigned as there was email communication. The email was exhibited and he said that the termination letter was sent to his email address and he received it the next day. He was referred to the Respondent's bundle of documents and shown a report dated 26<sup>th</sup> October 2011. He testified that it was a report by the accountant and that no one talked to him about it. He stated that he was not aware of any payments made without supporting documents and that the termination was unlawful and unfair. He sought compensation for the unlawful dismissal.
5. In cross examination by Mr. Obura for the Respondent, he testified that he was initially the head of outpatient services and was in permanent employment as shown by letter of appointment. He stated that it was a one year contract and was a permanent employment. He said the employment was subject to staff rules and regulations and that he was bound by them. He stated that he was working in a hospital and the employment was based on trust, integrity as employee and honesty. He agreed that it was true that if he was found dishonest the employer would be entitled to terminate. He testified that when he was head of outpatient services, there was one incident of robbery in one of the clinics and that he was issued with a censure letter. He stated that he did not write a letter in response to the censure letter and that he did not write to the Trustees on the break in or circumstances of the loss of funds at Embakasi. He stated that he was given a letter transferring him to take over a newly created department and there was elevation of salary. He testified that the issue of safe and cash collections was for director finance. He was responsible for budgeting and day to day running but not handling cash. He stated that he became the head of

shared services on 13<sup>th</sup> January and if there was improvement in services, credit would go to him. He stated there were people who were responsible and each individual had responsibilities to discharge and failure in proper management would fall on the CEO and if there was failure in the departments it would fall on the head of department. He testified that the CEO raised issues on water, power, catering and paper which were recurrent expenditures and were going up. He stated that the report showed that there was a 40% increase in recurrent expenditure and that these expenses were exceeding the budget. He knew the excesses were a concern and the meeting he went to attend was on excesses. He testified that the CEO begun interrogating the project & maintenance manager who was reporting to him. He testified that the project & maintenance manager was asked about roofing tiles, mahogany doors, overhead showers and drawer locks. The CEO stated there were overpriced and that some had not been delivered. He testified that the project & maintenance manager said that the mahogany doors were fixed at theatre and when the CEO asked if he was part of the loss he said that he was not party to the loss. He testified that he was aware there were investigations undertaken and that the CEO had two files he was perusing at the meeting. He stated that it would be of concern to him if there was overpricing. He said that he had seen the name Hansa in the delivery and that these were suppliers to the Respondent and it was said that Hansa was charging a lot more. He testified that it would be a concern to him if it was over priced. He confirmed some of the signatures on the documents indicating the documents had been reviewed by the head of department were his.

6. Further cross-examination was set for 2<sup>nd</sup> July 2014 and the Claimant agreed that there was a big variation in prices as per the analysis undertaken and that if Hansun supplied at those prices the hospital lost substantial sums of money. He testified that he was not aware that Hansun was blacklisted. He stated that he had abandoned his claim for days worked in October and that he was aware that he was a member of the pension scheme under Alexander Forbes and that he had not sued them. He stated that he had not gone back to the Respondent and the letter of dismissal was posted to him. He said that he as dismissed on 19<sup>th</sup> October 2011 and was now working at a security & logistics firm since May 2012. He testified that he attended a course for procurement and was in charge of procurement and other departments. He stated that he was well prepared for his job.
7. In re-examination by Mr. Kairaria, he testified that he did not know how the figures on the columns in the analysis were arrived at and that he had not been shown prior to coming to court any of the price comparisons. He stated that the tenders were concluded in November before he was appointed. In regard to his appointment to shared services he stated that he had been promoted and his responsibilities increased. He testified that the letter of censure was delivered by the office manager and no discussion took place prior to the letter. He stated that the letter of censure did not seek his comment and was asked to give a detailed plan on how he was to secure finances. He testified that he responded by outlining the measures he put in place to avoid recurrence. He stated that the termination was not connected to any of the issues in the letter of censure. He testified that the increase was for the financial year which commenced in August while he took over in February 2011, 7 months after commencement of the financial year. He stated the increments included staff costs, security, printing and stationery and audit fee, bank charges as well.
8. The Claimant called Mr. Kioko Peter Wambua who testified on 2<sup>nd</sup> October 2014. He stated that he is a mechanical engineer by profession currently working at Ole Sereni as chief engineer. He testified that he was employed by the Respondent between 15<sup>th</sup> November 2010 and 19<sup>th</sup> October 2011 and was invited to a meeting at the CEO's office by email. The meeting was to do with tenders and suppliers. He testified that he found the CEO seated and was accused of defrauding the company of 15 million. He testified that he was asked whether he was building a house or whether he had a hardware shop. He stated that the HR was called into the CEO's office and that she took him to her office and he was asked to resign and leave immediately. He was escorted to his car and called the Claimant who told him he too had been asked to resign. He testified that the Claimant had not resigned and wanted to go home and think about it. He stated that the costs went up and he had been hired to spearhead projects. He testified that he was given tasks by the CEO

and that he would be called for a walkabout by the CEO who would also call the Claimant, head of housekeeping and the Matron. He stated that the CEO would give instructions on the removal or fixing of parts. He said that the deliveries were to the purchasing and stores department and that once the goods were delivered an invoice would be paid after it had been checked by the user department. He stated that the system did not allow for payments without deliveries. He testified that there was tender process where there were prequalified suppliers and the department would go for the best quality at the best price and non-tender items would be subject to 3 quotations. He stated that the Claimant was not the one who solely decided and that he was not told of any allegations prior to before being called.

9. He was cross-examined by Mr. Obura and testified that he was a project & maintenance manager and his duties were to execute projects. His main duty was to look at the technical aspects of what was quoted as against the requirements. He stated that he supervised projects to completion and certified that the projects were properly done. During prequalification he was involved in setting the specifications and on requesting for goods, the purchasing department would source the goods and he would verify if they are the right ones then use them. He testified that he was answerable to the Claimant and the Claimant was answerable to the CEO. He stated that the CEO's concern was goods supplied at inflated prices and that for the specific items the CEO was disputing the existence of, he offered to show the CEO the items. He did not know why the Claimant was dismissed. He testified that one cannot compare counter price and supplier delivery as delivery is pricier than cash prices. He did not know how the prices were exaggerated. He stated that the CEO could blame the Claimant and directors could blame the CEO. He was aware about budgetary costs and was aware the budgetary costs had gone up and the increase could include increases in maintenance costs.
10. In re-examination, he testified that the increase in budgetary cost was because of undertaking projects that were not budgeted for due to orders by the CEO. He stated that the Claimant was not the purchasing officer and that prices were determined at point of payment and there was no static value.
11. The Respondent called Mr. Samuel Njuguna Mugo who testified on 13<sup>th</sup> November 2014 and stated that he is the Chief Accountant at the Respondent. He testified that he oversees the functions of the finance department and the Claimant used to work with him. He testified that the Claimant was in charge of the non-core services, laundry & house keeping, security, procurement among others. He stated the Claimant had a role to ensure that the purchase by the hospital was the best priced. He testified that the items for renewal and maintenance showed a sharp increase from 2008 to 2011. He stated that he did a counter check, compared prices and went to hardware shops and even got quotes on prices. He said the random checks revealed differences and the summary of items showed that the prices were inflated. The subject matter of discussion in meeting called by CEO was why the Respondent paid more for items. He handed a preliminary report to CEO the day before and explained the process he had gone through in preparing the report. The Claimant and the project manager were called for the meeting and the CEO raised concerns about the items whose prices had been inflated. The CEO read the report and they were to respond. He testified that the Claimant's response was that he was not aware of the inflated prices. He stated that he found that Hansun did not exist and he did not find its office and the Claimant did not know where Hansun was located. He testified that the complaint by CEO had nothing to do with capital works but supplies of hardware materials.
12. In cross-examination by Mr. Kairaria on 14<sup>th</sup> January 2015, he testified that the Claimant was head of shared services from 20<sup>th</sup> January 2011 and that the Claimant was not the procurement manager. He confirmed that there was a system for procurement in place and that the user department would requisition and LPO issued, the purchase would be made and upon delivery payment would be made. He stated that the Claimant was not the one to sign at stores. He testified that there was a tender committee and that the CEO is a member as are the head of procurement and the head of shared services. He stated that in 2010 there was no head of shared services and one of the complaints was that the Claimant did not visit the supplier as expected. He testified that

ideally the user department and technical manager procurement should have gone to verify Hansun. He stated that the meeting he and the Claimant were invited to was a repairs & renewals tender/supplies meeting and not a disciplinary meeting. He stated that the report was a preliminary report. He confirmed that the audited accounts do not show specific items and that the breakdown would be available from auditors. He stated that costs are recognised when they are paid and not when they are incurred. He confirmed that when he did the report it was without the Claimant's input.

13. In re-examination he testified that the Claimant had a responsibility as head of the department to know his suppliers and that at the meeting the Claimant was given time to explain the discrepancy in prices.

14. The Respondent then called Mr. Gordon Otieno Odundo on 10<sup>th</sup> March 2015. He testified that he is the CEO of the Respondent and that he worked with the Claimant from 2007 till 2011. He stated that the Claimant was issued with a letter of censure due to a safe which was not repaired on time causing the Respondent to suffer loss. He testified that the appointment to head of shared services was a lateral one. He stated that the Claimant was to basically manage all the non-core functions of the hospital – purchasing, projects, maintenance, house-keeping & laundry, transport, catering, security and licencing – and the responsibility of the Claimant was to coordinate all these functions and ensure prudent financial management and that all projects are completed on time and in line with budgets. He testified as CEO he was to bear full responsibility to the Board and that he noted increase in costs and that he raised concerns initially verbally followed up by email. He testified that his attention was drawn to some purchases which were procured at above market price. He testified that if something went wrong he would resolve it. Functions are delegated and he would in turn delegate to the Claimant and would expect the Claimant to take responsibility over what is delegated to him. He stated that there were monthly management accounts and these would seek to check the actual expenditures against budget as well as variances of the same over the previous financial year. He testified that over an extended period of time, management's attention was drawn to the repairs and renewals which were higher than budgeted for, as well as being higher than previous years. In terms of repairs and renewals this was painting, plumbing and repairs to ensure all the premises are well maintained. He was referred to Appendix 7 pages 14 and 14(a) and stated that the appendixes refer to email communication he shared with the Claimant as he was concerned about the expenses that had gone up. He testified that the audited financial accounts for year of 2011 show a 40% increase compared to 2010. To his recollection, the concerns were originally raised verbally and followed up by email communication. He stated that the Claimant was to rein in the expense by investigating cause and stemming the increase but no changes were forthcoming. As part of his routine, he has to approve payments and in this case his attention was drawn to items procured at high prices and the purchase of Mangalore clay roofing tiles had a price that was 115/= per roofing tile. He testified that he called a contractor who had done roofing for the Respondent and the contractor told him that the price the contractor could supply them at is 30/= per roofing tile. Subsequent to that because payment had gone through approval process he told the accountant that he was not comfortable paying and asked the accountant to get a report from other hardware suppliers. He stated that the accountant's report was extensive and the accountant did an analysis that was detailed. He testified that the Mangalore tiles were 132% above market price while other items were 300% above market price. He stated that the Evergood door lock are item 36 on the list and shows a discrepancy of 380%, item 42 – sand paper which was bought at 270% above market price, item 15 - gypsum ceiling board was 665% above market price. He stated that his attention was drawn to one of the purchases where the Respondent was to pay for installation of a mahogany door and he stated that it was not possible to ascertain where that door was installed. He testified that the goods were bought from Hansun General Suppliers and his investigations could not establish a physical address for this supplier and once he received the report he requested for a meeting with the Claimant and Peter Wambua the maintenance manager and Samuel Mugo, the chief accountant. The subject of the meeting was to discuss Repairs Renewal Tender/Suppliers. He testified that the meeting went very well and he presented the report and interrogated Peter Wambua and the Claimant. He stated that he requested them to show him where roof repairs had been done that required Mangalore roof

tiles being procured and also asked them to tell him where the mahogany door had been installed in the hospital. He testified that the Claimant could not give him a response. His expectation was that a senior manager would familiarize themselves of the key operations of the department and cannot express ignorance. He stated that it became apparent that because the Claimant could not explain the purchases it must be fraudulent and thus he requested that the head of human resources Linah Kowiti, who had no inkling of what was going, to come and listen. After listening keenly she requested that she leaves him with the Claimant and she proceeded with Peter Wambua to her office. He testified that because Mrs. Kowiti was a peer to the Claimant, it was not fair that she sits in the discussion discussing the integrity of the Claimant. He stated that he explained to the Claimant that the matter of increased expenses was bothering him and the institution and as CEO he was the one who had to establish why this was happening in spite of written requests to put a stop to the increases. He stated that he told the Claimant that this was clear negligence on the Claimant's part as head of shared services. He testified that he felt that his confidence in the Claimant had been shaken and in his opinion the only honourable thing for the Claimant to do was to resign. He testified that the Claimant requested to be given time to think about what had happened and would revert. He stated that the Claimant came back after an hour or so and communicated that he did not feel responsible for what had happened. He stated that he discussed with the Claimant and told the Claimant that he was left with no option but to terminate the Claimant's employment as per the letter of employment which provided 3 months' notice or payment in lieu. He testified that after his discussion that he would terminate the Claimant's services, he can only confirm the Claimant left the premises and efforts to contact the Claimant failed. He stated that he can confidently state no employee has during the 12 years of his tenure been frog marched from the Respondent. He stated that as per the appendixes attached to the Respondent's reply, there was a clear distinction between repairs and renewals and capital expenditure. He stated that the repairs and renewal relate to expenditure that would be incurred in keeping the Respondent's premises well maintained and what is alluded to as capital expenditure are items budgeted for and approved by Board for spending within the financial year. He testified that there is no choice when machinery breaks down regardless of budgets, they have to be replaced. If water tanks are leaking they are replaced. That is not repairs and renewals but for air conditioning, that would have to be approved for capital expenditure. He stated that the queries he made were specific to supplies from Hansun General Suppliers and that they had a very amicable discussion in his office and his first option was that the Claimant tender a resignation or he would terminate the Claimant's contract. He testified that the Respondent did not owe the Claimant as 3 month's notice and leave dues were paid and the Claimant did not return and say it was not correct.

15. In cross-exam by Mr. Kairaria, he confirmed that the increase was due to supplies by Hansun Suppliers. He testified that the financial year for the Respondent begins in August and ends the next year in July and confirmed that the Claimant begun working in February as head of shared services. He stated that he showed the Claimant the increase in expenses and showed the Claimant the payment invoice and that he had been given a verbal quote and had the report by the chief accountant which was the basis of the discussions. He stated that the Claimant was responsible for the increases. He testified that the procurement manager would be able to source goods and services and also would compare prices, visit suppliers. The user department would requisitions and it would have to be approved by head of department then procurement would have the authority to procure. Finance department would not have a role to pay at this juncture. Finance has a role after purchase in payment. He stated that in capital acquisition, the approvals are from Board and the finance department would ensure it is budgeted. He stated that he was responsible for capital expenditure and would only approve other expenditure after the head of department has approved. He testified that he only initiated for capital expenditure and did not initiate the expenditure for routine items and was not involved in routine supplies. He stated that the Claimant should be aware but that the Claimant was not responsible for receiving goods. He testified that the Claimant was invited by his personal assistant who had access to his electronic calendar. Regarding the report, he testified that they had the invoice together with the list and all the items on that list were on an invoice from a supplier. He could not recall when he sent the official to investigate and that should have been in the report. He stated that the annual tenders are between

September and the Respondent was preparing for tenders but he was not involved in the tendering process at all as tender process is delegated to heads of department. He was referred to an annexure which was an award letter and confirmed that it was an award to Hansun General Suppliers and it was his name as Chairman Tender Committee on the letter. He testified that Hansun was awarded the tender in October 2010 and the Claimant was not head of shared services in 2010. He stated that the issues that have been raised were specific to the period when the Claimant was head of shared services and that there was email correspondence for that. He confirmed that the award letter states that Hansun was a successful bidder. He testified that the report that was prepared was not prepared with the input of finance department and sought to clarify that when it was noted the repair and renewals were escalating rapidly there was needed to review that and from the audited accounts the costs of repairs and renewals was 30,316,274 and in 2011 it was 42,249,242 or thereabouts. He stated that the difference is about 12 million and this was the amount lost due to the inflated cost. He stated that the Respondent sought refund from Hansun and they refused to refund. He testified that the amount to be paid to Hansun was negotiated but he did not have the figure. He confirmed some of the appendixes are delivery notes and invoices and that there was no signature on those documents by the Claimant. The invoices would come with LPO supporting the payment and the Claimant does not need to sign the invoices.

16. In re-exam by Mr. Obura, he testified that the Claimant was terminated in October 2011 and that before the dismissal they discussed the issues. The issues were presented with documentation including the invoices from Hansun and the documents. He stated that the report was a preliminary report, a management report and not a report on the Claimant. He testified that the matters were put to the Claimant and that the Claimant could not satisfactorily respond to them and did not respond appropriately. He stated that the Claimant was answerable to him as the CEO and that he gave the Claimant the opportunity to explain. He stated that he was satisfied that he gave the Claimant an opportunity to explain. He testified that Hansun was not awarded tender as the letter confirmed Hansun was not successful but was entered in list of suppliers and could be asked to give quotations. He testified that the documents prepared by the Claimant did not explain the variance in prices and did not absolve the Claimant on the pricing and does not rule out any fraud in the pricing. He stated that the Claimant's signature appears in some documents and that the payment and preparation of documents were under the Claimant who had to authorize the authority to procure which is LPO and that he was the one who has the remit to ensure those procedures are working. He stated that it was a delegated responsibility from himself and that he lost confidence in the Claimant and that is why the Claimant was dismissed and services terminated.

17. That marked the end of testimony and the parties resolved to file submissions. The Claimant filed submissions on 16<sup>th</sup> April 2015 and the Respondent filed submissions on 16<sup>th</sup> June 2015. In the submissions, the Claimant submitted that the issues that fell for determination are whether the Respondent had a valid reason to terminate his services, whether the process adopted by the Respondent to terminate the Claimant's services was a fair procedure, whether the Claimant has proved his case for unfair, unlawful and wrongful termination of employment, whether the Respondent has proved its counterclaim, and finally who should bear the costs of the suit. The Claimant submitted that on the basis of the material presented to this Court both orally and through documentation has proved that the termination was not only wrongful and unfair but also unlawful. He submitted that it was indeed demonstrable from the evidence that the Respondent did not have a valid reason to terminate the Plaintiff's services and the decision to terminate the Claimant's services was reached capriciously and in violation of the rules of natural justice and the Respondent's own disciplinary procedures. The Claimant submitted that the so called investigations had been shown to be sham and that these were conducted solely with the purpose of justifying the dismissal. The Claimant submitted that the investigation report presented was dated 26<sup>th</sup> October 2011 while the Claimant was terminated on 19<sup>th</sup> October 2011. It was submitted that there was no input by the Claimant in the report and that the tender process appointing Hansun Suppliers as a prequalified supplier was by a tender committee in 2010 and not by the Claimant who was appointed to his position on 2011. The Claimant submitted that it was

clear from testimony that he was not the procurement officer and that the Claimant's signature appeared on the documents he executed in the ordinary course of his employment. The Claimant submitted that under Section 45(5) of the Employment Act, the burden of proof that the reason for termination was a valid reason is cast upon the employer and in the instant case, the Claimant submitted that the Court should find that the Respondent had not proved a valid reason for terminating the Claimant's services. He submitted that the procedure adopted by the Respondent in terminating his services was flawed and was not fair contrary to Section 45(1)(c) of the Employment Act. It was submitted that it is not disputed that the Claimant among others was invited for a routine 30 minute meeting to discuss repairs and renewals. The Claimant submits that he had no notice at all that this was supposed to be a disciplinary meeting. The Claimant was not informed that he was under investigation and there was no notice issued to him to show cause why disciplinary action should not be taken against him. The Claimant cited the Respondent's Human Resource Manual as making provision for an elaborate procedure where an employee is suspected of committing any disciplinary offence. The Claimant submitted that the procedure in regulations VI and XIV of the Human Resource Manual of the Respondent were not followed and the Claimant was therefore dismissed contrary to the rules of natural justice and equity and in contravention of Section 45(4)(b) of the Employment Act. The Claimant relied on the case of **Dr. Mwangi Ngumo v Kenya Institute of Management** Cause No. 851 of 2009 (unreported) where the Court awarded 12 months gross salary as compensation. The Claimant urged the Court to find in his favour and grant the maximum compensation.

18. The Respondent submitted that the Claimant as head of shared services was answerable to the CEO who in turn was answerable to the Board of Trustees. It was submitted that the CEO relied on the Claimant for the implementation of board policies and responsibilities. The Respondent submitted that the Claimant was in charge of purchases, project implementation, maintenance, housekeeping and laundry as well as transport, catering, security and licencing and that during the Claimant's watch the CEO raised concern over escalating costs. The Respondent submitted that there was overpricing as confirmed by the evidence tendered and the analysis which demonstrated that there was deceitful overpricing by Hansun. The Respondent relied on the South African case of **National Union of Mine Workers, Francis Sithole & Another v Commissioner for Mediation and Arbitration** Case No. 2512 of 2007 where Justice Snyman of the Labour Court observed that the employment relationship can only exist in an atmosphere of trust and subject to an employee acting in good faith. The Respondent submitted that the Claimant was informed and was aware of the events leading to the termination of his services long before 19<sup>th</sup> October 2011, the date of termination of his contract. The Respondent submitted that the Claimant was appraised on the issues of concern on email and participated in several meetings to address those issues prior to the meeting. It was submitted that the Claimant and the witnesses who testified were agreed that there was a report and investigations undertaken and these were relied on during the meeting. The Respondent submitted that the Claimant was asked questions and explanations sought and that the report was formalised subsequently presented as evidence. The Respondent submitted that the Claimant did not seek for time to study the report and provide an answer and therefore cannot be heard to complain about the short notice because the issue at stake had been current for some time. It was submitted that the Respondent was justified in losing confidence in the Claimant and therefore asking humbly to resign or have his services terminated. The Respondent submitted that the catch words in Section 41 of the Employment Act are that the employer should be able to *explain in a language the employee understands, the reason for which the employer is considering termination*. The Respondent submitted that upon such explanation the Act requires that the employee be given an opportunity to make representation and such representation be considered before terminating the services of the employee. The Respondent submitted that was a clear and simple process which did not involve rituals and ceremonies as the Claimant would like the Court to believe. The Respondent submitted that the law merely requires the employer to bring to the attention of the employee the wrong he or she is accused of committing and once the employee has understood the complaint against him or her, he or she is at liberty to provide any defence or mitigating grounds which would be taken into consideration by the employer. The Respondent relied on the South African case of **Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others (2006) 15 LC 1.11.4, [2009] 9 BLLR 833 (LC); [2006] JOL 17623 (LC)** and

the case of **National Union of Mine Workers v CCMA** (*supra*) where Snyman J. deprecated the tendency to rely on criminal justice procedure while evaluating fairness of disciplinary process an employee has been subjected to. The Respondent further relied on the South African case of **National Union of Mine Workers v CCMA & Timothy Boyce** Case No. 2910/08 where Justice Molaheli held that an employer does not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that he should do so on a balance of probability. The Respondent submitted that the Court should ask whether given the totality of evidence tabled before the Court the Respondent should have retained the Claimant in its employment. The Respondent submits the answer is, No. The Respondent further relied on the South African cases of **Somyo P. v Ross Poultry Breeders (PTY) Ltd** Case No. JA 9/97 and a South African appeal case between **HPN Brereton and Bateman Industrial Corporation Ltd & Others** Case No. JA 80/99 where observations on the basic requirements for substantive and procedural fairness were made and opined that although these remain constant across the spectrum of employment, common sense dictates that they need to be adapted to the nature of the employment relationship and the type of dismissal to which they are applied. The Respondent submitted that based on the cases cited and the case of **Sophia Wamboi Muthoni v Muramati SACCO Limited [2014] eKLR** where Rika J. held that minor procedural lapses preceding the dismissal of the Respondent's branch manager cannot vitiate or render the dismissal unlawful. The Respondent thus submitted that the alleged procedural lapses harped on by the Claimant in his submissions would not work in his favour even if such lapses did exist. The Respondent submitted that the Claimant had failed to prove his case for unfair, unlawful and wrongful. The Respondent submitted that it had dropped its counter claim and submitted that the Claimant should bear the costs of the suit. The Respondent submitted that if the Court were to find the Claimant had proved his case, the compensation sought should be mitigated by the fact that the Claimant obtained employment within 6 months and was even paid notice. The Respondent relied on Section 49(4)(l) read together with Section 50 of the Employment Act on the issue of compensation and submitted that the Court should only consider 3 months when the Claimant was not at work. The Respondent submitted that the termination was justified and no injury had been suffered by the Claimant.

19. The pleadings, testimony and submissions of parties as well as the plethora of decisions made by other Courts and cited by the parties have been considered. It is not in dispute that the Claimant was dismissed by the Respondent on 19<sup>th</sup> October 2011 after some discussion with the Respondent's CEO Mr. Odundo. The Claimant had been called for a meeting to discuss repairs and maintenance issues. The parties also do not dispute that the Respondent has a Human Resource Manual which makes provision on the various steps to be taken prior to dismissal for negligence and conduct that would cause the employer to suffer a loss. There was an indication from the audited accounts of the Respondent that repair, maintenance costs and capital expenses had risen significantly over time. The Claimant was a manager and supervised departments that were involved in the maintenance and repair of the Respondent's facilities and that meetings and emails were available to show there were concerns on the escalating costs. It was remarkable that in spite of elaborate processes set out in the Human Resources Manual, the Claimant had no notice at all that the meeting of 19<sup>th</sup> October 2011 with the CEO, project manager and chief accountant was supposed to be a disciplinary meeting. The accusations made against the Claimant constitute what is generally referred to as gross misconduct. Section 41 of the Employment Act, 2007 establishes the following mandatory procedure for handling such cases:-

- i. The employer must explain to the employee in a language the employee understands the reasons why disciplinary action is being considered;
- ii. The employee is entitled to have a representative of their choice, being either a fellow employee or a shop floor representative present during the explanation;
- iii. The employer must hear and consider any explanations by the employee or their representative.

20. The Claimant had not been informed that he was under investigation and to boot there was no notice to show cause why disciplinary action should not be taken against him. The procedure in regulations VI and XIV of the Human Resource Manual of the Respondent were not followed and the Court holds that the Claimant was dismissed contrary the law. In my considered view, the

Claimant ought to have been addressed on the issues and asked to respond. Whether the CEO had lost confidence in him or not, there was a process that should have been applied. It was not a series of rituals and ceremonies. If that was the case, why have a Human Resource Manual? The South African cases cited by the Respondent made for very interesting reading but did not aid the Respondent. The Claimant only cited one local unreported case. There is plethora of decisions in this realm on the matters raised. That being said, the Claimant was not subjected to a proper process in the termination he faced. Whereas there was indication by the Respondent's CEO that in his service there was no employee who had ever been frogmarched, the dismissal was not fair in the circumstances. The Claimant left in distress after the accusations made on the morning of the 19<sup>th</sup> of October 2011. He mitigated his losses by obtaining employment within a few months and in the premises based on the considerations under Section 49 of the Employment Act, I would cap compensation for the unlawful dismissal at 3 months. I will also award the Claimant costs of the suit as well as interest on the sums awarded from date of the judgment till payment in full. The Counter Claim is dismissed but I make no order as to costs.

21. The Claimant filed submissions on 16<sup>th</sup> April 2015 and the Respondent filed submissions on 16<sup>th</sup> June 2015. The matter was mentioned in twice in May 2015 and there was no appearance on one day causing the file to be returned to the Registry. It was set for mention on 2 other occasions in September and November 2015 and finally after confirming the submissions were on file a judgment was to be on notice. Unfortunately, intervening between that date and today, the Court was engaged in a 6 month long exercise of ascertaining the land and assets of the Judiciary. Unfortunately as the judgment was being drafted, the computer was stolen and has had to be rewritten afresh. The Court unreservedly apologises for the marked delay in delivery of the decision.

22. I declare the dismissal as unfair and unlawful and enter judgment for the Claimant against the Respondent for:-

- i. 3 month's salary as compensation being Kshs. 1,517,400/-
- ii. Costs of the suit
- iii. Sum in i) above subject to statutory deductions.

Orders accordingly.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of June 2016**

**Nzioki wa Makau**

**JUDGE**