



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 74 OF 2011

SIMON NJATHI KIARIE.....CLAIMANT

VERSUS

BROOKSIDE DAIRY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for resolution of a dispute he framed as unlawful, unfair and wrongful summary dismissal. He filed his Memorandum of Claim on 24th January 2011 and averred therein that he was employed by the Respondent on 1st November 2003 as a Data Entry Clerk and was promoted to Sales Data Analyst on 14th June 2007. He averred the dismissal was a gross violation of the Constitution of Kenya, the Employment Act 2007 and the provisions of ILO Fundamental Conventions and Declaration and that he was not accorded the trite rule of *audi alteram partem* and he was never accorded any hearing as required at law in violation of his natural rights to fair hearing. He also averred that the Respondent failed to observe its own discipline policy in the company's Rules and Regulations. He thus sought benefits in respect of loss of income owing to the premature, unlawful and malicious dismissal from service; payment in lieu of notice; payment of service; house allowance unpaid for 4 years; employer contributory scheme payment. In his prayers he sought a declaration that the dismissal was unfair, wrong and unlawful, an order for payment for the pecuniary loss, an order for payment of interest, costs and any other costs or relief the Court may deem fit to grant.

2. The Respondent filed a Memorandum of Defence on 5th April 2011. In it, the Respondent averred that the Claimant was employed by the Respondent in various capacities from 1st December 2005 up to 3rd September 2008 when he was summarily dismissed for inflating sales orders by manipulating the sales data. It was averred that the manipulation led to a loss of Kshs. 2,581,622/- that was discovered after a sales representative failed to account for some dispatches, remit sales proceeds. The Respondent averred that the Claimant manipulated the system by changing the figures for quantity, total value, mass per product and this had the effect of bringing the value of the order to at times zero. The Respondent averred that the Claimant was called for an interview presided over by the security manager and his supervisor where he denied the manipulation of the system. On being escorted to Ruiru police station the Claimant sought permission to buy airtime credit and escaped and went into hiding until April 2009 when he was arrested. The Respondent averred that the Claimant committed a breach of his contract contrary to Section 44 of the Employment Act resulting in substantial loss to the Respondent. The Respondent thus sought dismissal of the suit.

3. The Claimant testified on 21st July 2011 before Kosgey J. and 10th July 2014 before me. The Claimant was led in his examination in chief by Mr. Onyony and testified that he was employed 1st December 2003

as per his letter of employment. He stated that he worked for Respondent as a Sales Data Analyst at the time of termination. His duties were to analyze the sales reports and generation of new sales dispatched on orders from the accounting system. In analyzing sales report computer has to be accessed. He testified that he would key in the user name and password and once he had keyed them in to the computer desktops open automatically and there was an icon on the desktop named sales analysis report and by clicking on it, it opens. The report was a Microsoft excel formatted sheet used to calculate the amount of milk in liters the company has sold in a day. In the columns of the excel sheet there was indication of routes where milk was delivered and the rows would indicate all the products manufactured by company. The Sales Administrator Mr. Lawrence Kimani had access to all the data including the routes and products delivered to the respective routes. The Claimant testified that he was accused of manipulating the sales data system of the Respondent's accounting software system. He stated that he reported to work at 8.00 a.m. and once he had the date, he would key in the data to the sales analysis reports on instruction of the Sales Administrator. After keying all data he could close the Microsoft excel sheet then inform the Sales Administrator that he was through with the report either via phone or directly and verbally. He gave the sequence of generation of orders for new sales dispatches and stated that the salesperson of a specific route would indicate on a plain paper the route intended to be taken to deliver the milk plus all the products intended for delivery. This request would be given to the Sales Administrator and the Sales Administrator would confirm the products and the routes. Confirmation is done on daily basis and after confirmation, the Sales Administrator would bring all the pieces of paper to the Claimant's desk. The Claimant would assign numbers to the papers in order and at random every other day. He would then take an order book in the custody of Sales Administrator and would then go to his desktop and click on the Syspro icon – (the accounting software of company) and all features of accounting software would appear. He always opened that with username and password. They were different from the first clocking and he would click to show he was authorized to work on it. If one is not authorized it cannot open. He would key in the number of the order and on conclusion could print the order from the accounting system. 6 documents were printed and the document would show order number, the route, the warehouse of that note, all the products, the date order was made, the time, the name of whoever issued order but it did not indicate where order came from. The Sales Administrator could collect the printed documents with order book and would verify the quantity of products, stamp the document to confirm the correctness and so authorize that the products could be issued as well as sign. He testified that on 3rd September 2008 he was summarily dismissed. On the morning of the said date he was called to the security office by supervisor where he found the security manager who told him the company had decided to suspend him pending investigations into an alleged offence. He testified that he was escorted out by security manager to the main road about 2km away and that he was left on Thika Road. Two weeks after suspension he received a letter of summary dismissal by post. He testified that the suspension was verbal and the dismissal letter is dated 3rd September 2008. He testified that the allegations were false as it was the responsibility of sales cashiers within the sales accounts section to account for all the sales process. He stated that accounting was not his responsibility and that his duties have no relations to the allegations. He testified that two months after dismissal 23rd November 2008 he was arrested by C.I.D officers from Ruiru Police Station and they produced his photograph with his name, ID number. At the station on 23rd November 2008 he was detained on instructions from Respondent and on 24th November 2008 at 5 p.m. was issued with free bail bond by the police officers. He was required to report on 2nd December 2008 at 10.00 a.m. and he complied and the bond was extended. On 3rd December 2008 he was ordered to report on 5th December 2008, 8th December 2008 and 17th December 2008. On 17th December 2008 the police told him that there is no need to report again to police. He returned the original bond and in January 2009 went to inquire from police and was told he would not be taken to court as there was no evidence against him. He testified that he was not given a hearing before being dismissed and did not know the facts leading to the dismissal. He stated that paragraph 4 of Respondent's Response is untrue because he could not know the password or usernames of his colleagues. He stated that there was no collusion and that even the IT Manager did not know. He admitted knowing Pascoline a lady who used to work in the accounts section as sales cashier. He worked in sales administration and there were 5 of them and the computers were at their discretion. He referred to Annex 3b and stated that it was a computer audit transaction of that day but that it was not a complete document. He testified that the computers had been tampered with. He stated that the operator is the user and that it was possible to show who used the computer. He testified that the System Administrator had power to change the numbers. He stated that he was not aware of

passwords of colleagues that he used. He stated that he was not charged and there was no ongoing criminal case. He denied running away from the police. He stated that he had not been paid terminal dues. He testified that the sales analysis report was accessible by 5 people and the data on accounting system was accessible to the IT Manager only. He stated that it was not possible to manipulate the records.

4. In cross examination by Mr. Okeche for the Respondent, the Claimant testified that he was employed 1st November 2003, first as a general clerk then as a data entry clerk and finally as a sales data analyst. He stated that he had an Advanced Diploma in Business Administration and that he left Respondent on 3rd September 2008. He stated that the sales persons would indicate the products to be taken for sale in the market and the sheet of paper would be given to the Sales Administrator who instructed him to generate the sales orders for collecting the products. He admitted that he keyed them into the system. On 2nd September 2008 when he reported, the security manager called him and informed him that he had been suspended indefinitely and should go home and wait for a call. He admitted that he was taken to Ruiru Police Station in July but did not record any statement and that the first statement he wrote was on 11th July 2008 before the security manager. He was given a bond by police and the bond was extended several times. He stated that he used to report to the police then go to work. The security manager's instructions suspending him were oral and two weeks later got a letter of summary dismissal through the post office. He testified that the police said there was no evidence to charge him in a court of law. He denied jumping out of a police Landrover on 3rd September 2009. He stated that in his day-to-day work he reported to the Sales Administrator and the security officer dealt with security matters. He admitted that he did not query the payments and that he was terminated for alleged fraudulent activities between 2007 and 2008 which is untrue. He stated that it was claimed there was alteration of sales orders. He testified that he generated sales orders but never altered or manipulated them. He admitted that he recorded a statement on 11th July 2008 before the security officer and stated that he was compelled to write it. Most of it is the security officer's handwriting and he was asked if he had altered records or manipulate any sales orders. He stated that he was not aware of how to alter the orders. He testified that the authority of Sales Administrator was very crucial. The accounting system could not allow double logging-in at the same time. He stated that he could not recall if he was using the computers at the same time one evening. He testified that there is no way he could change what had been recorded in the stores records. He admitted that he received the dismissal letter via post office and that it spelt out what led to the terminations. He sought compensation because dismissal was unfair and wrongful. He was employed intermittently but did not want to work with Respondent again due to the victimization that he suffered.

5. In re-examination by Mr. Onyony, he testified that he expected to retire at the age of 65 years. He stated that the computer audit only reflects 4 out of 13 orders claimed to have been interfered with and that the 4 orders complained of were attributed to him. He stated that 13 orders are in a summary of audit trail. He testified that he had not been charged in any court of law by the police. He stated that he raised illegal termination issue and that he saw the records in the CID offices and he was not given a hearing to defend himself. He was locked in for 24 hours and the statement that he wrote was under duress.

6. The Claimant was recalled to the stand to respond to some questions relating to the documents filed by the Respondent dated 19th June 2014. He testified that the report filed related to an ex-salesman Richard Alai Onditi and the report was not signed. He stated that there was no connection between them and it had not been indicated in the report that he was in conjunction with the salesman. He testified that the audit trail only showed 2 orders out of 7 orders listed. He stated there was no evidence of alteration or manipulation. He testified that the report did not indicate him as a suspect or the colleagues whose passwords were used and even the passwords were not shown. He testified that there was no evidence that he logged into Syspro. He stated that only the IT department had the user names of the Syspro users and he did not work in the IT department. He testified that he did not share his password with anyone and no one shared their password with him. He stated that report indicates that the sales order query was the only thing that would indicate the alteration and the Respondent had not shown the sales order query. He testified that there was no document to show the employees on leave or absent as there was no attendance sheet. He stated that there was nothing to prevent Pascalina to commit fraud. He testified that he did not know her password and she had not given him her password. He denied knowing any password from the

other employees. He testified that his password was not used even once and wondered why the Respondent insisted he was the culprit.

7. An oral application for the amendment of the Memorandum of Claim was made by Mr. Onyony on 24th November 2014 in relation to prayer 8. (a) of the Claim to read Declaration in place of Dismissal. The amendment was not opposed by Mr. Molenje for the Respondent and the Court granted the application to amend.

8. In cross-examination by Mr. Molenje, the Claimant testified that when he was called to the Security office he was told of the allegations. He admitted recording the statement and that he was taken to the police station on 12th July 2008. He stated that he spent the night in the security office on the night of the 11th July and that he was detained by Mr. Maina. He testified that he was given a bond to sign and would appear as required by police. He stated that the next time he was arrested was on 3rd September 2008 and on the material day he was asked to shut down his computer and was escorted to the Respondent's gate and a vehicle from Gicheha farm gave him a lift to Thika Highway and from there he went home. He testified that the letter of termination indicate the reason for termination was given as manipulation of system. He admitted being interrogated on that extensively and he denied involvement. He admitted that the Respondent paid NSSF and that he received the pension dues he had contributed.

9. In re-examination by Mr. Onyony he stated that the statement was written at the security office. He stated he was taken to the police and was told he would be charged but he was not charged. He testified that he was not given a hearing and the termination was summary dismissal through post.

10. The Respondent called 2 witnesses. The first was Samuel Kahuri Maina who testified that he was the security manager at the Respondent. He testified that he knew the Claimant who was his colleague at the Respondent working as a sales data analyst. He testified that the Claimant was involved in fraudulent alterations of sales orders and based on that the Claimant's services were terminated. He stated that a sales order is to accompany the sales to cover the dairy products to be sold and has the products, prices, quantities and the total value of the products. He testified that he was given the task to investigate and prepared a report titled Tracing the Suspects. He testified that based on his findings the Claimant was in the computer room at the time of the alterations. He testified that there was no way Pascalina would come in and use the same computer used by the Claimant. He stated that it was the Claimant who logged as Pascalina had left at 13.00hrs and she was not present when the alterations were undertaken. He referred to Appendix 4B by the Respondent and showed that Pascalina had left having logged out at 11.47am. He testified that the next entry shows that the Claimant was logged in on the computer and logged out at 21.08.28 and then there is entry of Rashid Rehema who was on leave and it shows her using the machine that the Claimant had used. He concluded that the person using the PC and the different user name was one and the same person. He testified that he called the Claimant into his office at around 4.00pm on 11th July 2008 and that the Claimant was interrogated till 7.00pm and allowed to go home. He testified that the Claimant was not held overnight. The Claimant was taken through the investigations done, the job log report and then took a statement. He identified the statement recorded from the Claimant as Appendix 4A.

11. In cross-exam he testified that the report he made was on 10th July 2008 before the Claimant was dismissed. He stated that the Claimant was dismissed on 3rd September 2008. He testified that he and his colleague took the Claimant through the report. He testified that none of the alterations involved the use of the Claimant's password. He testified that no staff said that they had given their password to the Claimant. He stated that he used the job log-in report, statements of users who appear in the job log-in report, sales orders and any other mentioned in the report. He testified that at the time they took the Claimant through they had the documents in place. He admitted that there was no clock-in or clock-out report and that he had no document on the attendance at work. He testified the Claimant could work from the sales administrator office or computer room. He stated that the administrator had no power to change passwords. He testified that passwords should be secret. He testified that on all the dates the alterations took place the Claimant was there.

12. In re-examination he testified that report made an error to refer to a PC that was in the computer room

as being in cash office.

13. The Respondent next called Mr. Julius Njathi Mwangi. He stated that he worked as a security officer at the Respondent since 2002 and was now security supervisor. He recalled 11th June 2008 when he was investigating a matter and the Claimant was called by Mr. Maina who took the Claimant through the security report. He testified that there was a statement taken from the Claimant and the Claimant wrote part of the statement and when the Claimant was taken through the question and answer section the Claimant broke down and started crying and a colleague Pascalina Wajihia was called and she started consoling the Claimant. He testified that he could recall the 2nd of September 2008 when the Claimant was being escorted to the Ruiru Police Station. He stated that the Claimant requested him to kindly take him to Githurai Equity to see if the salary was in and it was not. The Claimant asked that he escorts the Claimant to his sister and sought to buy airtime. He testified that he too bought his own and as he scratched his top up card the Claimant took the opportunity to run away. He stated that the Claimant was later arrested in some flats in Githurai.

14. In cross-examination he testified that he knew when the Claimant was rearrested by the police. He testified that from the police investigation diary the Claimant was arrested on 23rd November 2008 and that this was also from the Occurrence Book of 23rd November 2008. He testified that the Claimant was due to appear in Court on 2nd December 2008 from the information received from the investigating officer. He testified that the Claimant did not sign the statement as the Claimant broke into tears before signing it. He testified that after Pascalina came the Claimant was consoled and stopped sobbing. He testified that the Claimant left with Pascalina and Mr. Maina. He denied keeping the Claimant at the premises and stated that the Claimant went home and reported to work later though he could not recall when. He testified that the Claimant was taken to the police station on 12th July 2008 and later was escorted to police station, ran away enroute and was rearrested on 23rd November 2008.

15. In brief re-examination he testified that the Claimant was issued with a P22 form at Ruiru Police Station on 12th July 2008. He stated that the Claimant was not arrested on 11th July and was not put in custody. He testified that the Claimant left with his colleague Pascalina Wanjihia and went home.

16. Mr. Molenje indicated he had intended to call one more witness but would not do so as the evidence he was to adduce had been adduced by the second defence witness. Parties agreed to file written submissions.

17. The Claimant filed his written submissions on 29th January 2015 while the Respondent filed its submissions on 17th February 2015. The highlighting of the submissions was on 5th March 2015 and judgment set for 22nd April 2015 but the same was deferred as the proceedings before Kosgey J. had to be typed first before I could pen the judgment deferred to today.

18. The Claimant submitted that the evidence of the two defence witnesses was inconsistent, non-factual and unreliable. The Claimant submitted that the Respondent's second witness prepared a security report dated 10th July 2008 but failed to include the warehouse report, the complete logging in report, exceptional report, sales orders and the signed witness statements of employees whose passwords had allegedly been used in the fraud. The Claimant submitted that the report had glaring gaps and could not be fully interrogated. It was submitted that the witness admitted that the report prepared by him had errors and thus it cannot be relied on. The Claimant also submitted that there was no evidence showing the Claimant was culpable in the alterations of the data. It was submitted that the Respondent failed to call any witness who could admit that they had given their password to the Claimant. The Claimant relied on the case of **Avtar Singh Chauhan and Another v Ruth Wanjiru Shadrack and Another [1998] eKLR** where Koome J. (as she then was) held that "It is a well established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. Allegations of fraud must be strictly proved and although the standard of proof may not be to require proof as beyond reasonable doubt, it ought to be more than a balance of probabilities". The Claimant submitted that the Respondent wrongly accused, mistreated and mishandled the Claimant for alleged actions it did not have sufficient proof to ascertain.

The Claimant submitted that the Respondent did not call the evidence of a police officer and stated that the Respondent had produced documents that were not signed. The Claimant submitted that the Respondent used malice in form of evidence manufactured against the Claimant for ulterior motives to apportion blame on another. The Claimant submitted that there was no clock out register produced to show the other employees had not perpetrated the fraud. The Claimant submitted that most of the employees were still in the employ of the Respondent and they were not called to give crucial evidence. It was submitted that Francis Mungai had given his password to several employees and no evidence was presented to show that the employees who had the password did not commit the fraud. The Claimant submitted his password was not used even once in the fraud and there was no evidence of his presence in the premises or being alone in the office block. The Claimant submitted the dismissal was a sham and opposite Article 27, 41 and 50 of the Constitution of Kenya as well as ILO Convention 158 Termination of Employment Convention 1982, ILO Convention 122 Employment Policy Convention 1964 and ILO Declaration on Fundamental Principles and Rights at Work. The Claimant submitted that the infarctions nullified the acts of the Respondent and he relied on the case of **Benta A. Khayo v Margaret Nderitu T/A Olive Gardens [2012] eKLR**. The Claimant submitted that there was no fair hearing as required under the provisions of the Employment Act 2007 and the trite rule of *audi alteram partem*. The Claimant relied on the case of **Solomon Amiani and Another v Salome Mutonye Otunga and Another [2012] eKLR** and **Patrick Njuguna Kariuki v Del Monte (K) Limited [2011] eKLR**. The Claimant submitted that he was thus entitled to the judgment as sought in his claim.

19. The Respondent on its part submitted that it had a reason to terminate the Claimant from employment. The Respondent isolated three issues for determination by the Court. These were

- a. Whether the Respondent had a reason to summarily dismiss the Claimant from employment;
- b. Whether the Respondent followed due process before terminating the Claimant;
- c. Whether the Claimant is entitled to the reliefs sought.

The Respondent submitted that there was reason to dismiss the Claimant from employment because there was a discovery of failure to account for some dispatches and failure to remit sale proceeds leading to unaccounted cash amounting to Kshs. 2,745,422/-. The Respondent submitted that investigations into the computer audit trail indicated that the Claimant working in collusion with the sales representative had been manipulating the computer sales orders using the passwords of his colleagues to change the figures for long life products and thus reduced the value of the orders. The Respondent submitted that its two witnesses testified as to how investigations were conducted to reveal the malpractice occasioned by the Claimant. The Respondent submitted that in all the fraudulent activities highlighted in the report it was the Claimant who first logged onto the system, worked on the system for a considerable time using his profile before logging into his colleagues profiles using the same computer and complete the fraudulent sales entries. The Respondent submitted that in all the fraudulent transactions the Claimant never denied having logged into the computer first and never provided any evidence to prove that at the time he was logged into the computer any of the employees purported to have used the same computer were present. The Respondent submitted that it was improbable to have two officers use the same computer when there were many other computers in the computer room. The Respondent submitted that the Claimant was arrested and taken to Ruiru Police station and was compelled to attend before a decision to charge him was reached only for his to escape while being escorted to the police station. The Respondent submitted that the failure by investigating officers to follow up and have the Claimant arrested and charged in Court was no bar to the Respondent's prerogative to take disciplinary action. The Respondent relied on the case of **Republic v Public Service Commission of Kenya Ex parte James Nene Gachoka [2013] eKLR**. The Respondent submitted that Section 44(4)(g) of the Employment Act allowed for summary dismissal and placed reliance of the decision in **Clement Mutiso Muinde v British American Insurance Company Limited [2013] eKLR**. The Respondent also relied on the cases of **Banking Insurance and Finance Union v Post Bank Ltd [2013] eKLR** and **Moses Chavangi v Barclays Bank Industrial Court Cause No. 694 of 2010**. The Respondent submitted that it thus had a valid, fair and justifiable reason to dismiss the Claimant from employment. The Respondent submitted that it followed due process before the dismissal. It submitted that the Claimant had admitted during cross-examination to have been

interrogated by the Respondent's officers and recorded a statement in regard to the system manipulation. The Respondent submitted that the Claimant was unable to exonerate himself from any of the accusations and that the dismissal was lawful and fair. The Respondent submitted that the Claimant had failed to adduce any evidence to prove the allegation that his termination was unfair and unlawful. Reliance was placed on the case of **David Getare Nyangau v Houseman General Contractors Ltd [2013] eKLR**. The Respondent submitted that Section 41 of the Employment Act 2007 does not envision a hearing in the manner of a Court hearing but a mere inquiry onto the alleged offence or misconduct where an employee is granted an opportunity to explain himself. The Respondent submitted that the Claimant was not entitled to the reliefs sought as he had not proved them at all. The Respondent submitted that the appointment letter of the Claimant was clear on the salary that was consolidated. The Respondent submitted that the Claimant had not proved his case and the same was fit for dismissal with costs.

20. The dismissal of the Claimant was not disputed to have been made through the letter of dismissal dated 3rd September 2008. The dismissal letter provided the reason for the termination. The letter stated that it had been reported that as the sales data analyst, the Claimant had been inflating sales orders through system manipulation thus exposing the Respondent to loss of sales proceeds totaling 2,581,622/- and that amounted to dishonesty and gross misconduct. Section 41 of the Employment Act 2007 provides as follows:-

41.(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.

21. In the Claimant's case it was the Respondent's position that the actions of the Claimant warranted summary dismissal in terms of Section 44(4)(g) of the Employment Act. Section 44(4)(g) provides as follows:-

44.(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether matters not mentioned in this section, constitute or lawful grounds for the dismissal if:-

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

22. The Claimant is alleged to have committed a criminal offence, to wit, fraud, to the substantial detriment of the employer. The law provides that the enumeration of the matters or the decision of an employer to dismiss an employee summarily shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether matters not mentioned in the section, constitute sufficient reasons or lawful grounds for the dismissal. In this case, the actions complained of arose in July 2008 and investigations were undertaken prior to the interrogation of the Claimant. It is asserted that the investigation ended in tears and the Claimant was led away after sobbing his way out of the interrogation by a colleague Pascalina. It is her password that he is alleged to have used to perpetuate some of the fraud. In the Respondent's testimony, the Claimant reported to work the following day and was at work until there was a decision to charge him sometime in September 2008 when under escort to the police station he fled went into hiding until his arrest in late 2008. It is apparent that the investigations undertaken were over a period of time and the Claimant was not suspended or ordered to take compulsory leave. That meant the Respondent did not require the Claimant to depart the soonest possible. The Claimant was terminated by way of a letter sent to him by post. If indeed there was reason for summary dismissal that would have followed the accusations in July and not later in September 2008. The Claimant was entitled to some modicum of fair procedure. His interrogation in July would not

in any way amount to the fair procedure that is prescribed in law.

23. The burden of proving that unfair termination took place rests on the employee while the burden of justifying the dismissal shall lie on the employer. Section 47(5) of the Employment Act provides as follows:-

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

24. The Claimant allegedly was involved in sales data manipulation. Whereas some suspicion arises regarding the frequency of his presence in the computer room and the alterations made through other employees accounts, the Respondent failed to conclusively link the Claimant to the fraud. Suspicion alone would suffice for summary dismissal but for this to hold there ought to be cogent evidence. Why was interrogation abandoned? Why is it that the employees who were in the employ of the Respondent not called to incriminate the Claimant if he was the architect of the fraud? Is it because the Respondent had weak systems of gullible employees who liberally shared their passwords? It is hoped that the loss visited on the Respondent was a wakeup call on data manipulation.

25. I find and hold that the dismissal was unfair in the manner of it was executed as the Claimant was not accorded the indication of the intent to dismiss. No disciplinary hearing was taken in spite of the investigation report which seemed to have pointed liability in the Claimant's direction. It would be expected that a sitting would have been made. For this I would award him 3 months salary as compensation being Kshs. 36,225/-.

26. The Claimant sought payment of house allowance. He was employed and given a letter of appointment did not indicate the salary to be a consolidated one. He was entitled to payment of a house allowance at 15% of his basic pay. The Claimant thus would be entitled to house allowance pay at Kshs. 56,700/- for the 36 months preceding his termination. He did not prove the other claims and they are thus not awardable. He cannot recover pay for the years remaining till his retirement. As held by Rika J. in the case of **D. K. Njagi Marete v Teachers Service Commission** "a grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission." I am of similar persuasion as my learned brother and hold that the Claimant is not entitled to the salary up to his anticipated retirement age of 65 years.

27. In the final analysis I will enter judgment for the Claimant against the Respondent for:-

1. 3 months salary as compensation being Kshs. 36,225/-.
2. House allowance pay Kshs. 56,700/-
3. Certificate of service in terms of Section 51 of the Employment Act.
4. No order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of June 2015

Nzioki wa Makau

JUDGE