



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 713 of 2012**

**JUDY NJOKI.....CLAIMANT**

**VERSUS**

**DHL EXCEL SUPPLY CHAIN (K) LTD.....RESPONDENT**

**JUDGMENT**

The claimant in this cause is Judy Njoki. She filed the memorandum of claim on 27<sup>th</sup> April, 2012 through Onchuru Oyieko & Associates Advocates. The Respondent is DHL Excel Chain (K) Limited and it filed the memorandum of Response on 12<sup>th</sup> June, 2012 through J.A. Guserwa & Company Advocates.

The claimant is praying for judgment against the respondent for-

- (a) Compensation for wrongful and unfair termination;
- (b) payment in lieu of notice;
- (c) leave days for leave not taken for 4 days;
- (d) cost of the suit; and
- (e) any other orders this Honourable court may grant in the interest of justice.

The respondent prays for the dismissal of the claimant's claim with costs.

The case came up for hearing on 2<sup>nd</sup> November, 2012 and on 6<sup>th</sup> November, 2012.

The claimant gave evidence to support her case as follows:

1. The respondent employed the claimant on temporary basis as an Order Processing Clerk effective 16<sup>th</sup> August, 2009. She served well and after 1<sup>st</sup> July 2011, she was confirmed in employment as a permanent employee. She initially earned Ksh.60,000/= per month and later increased to Ksh.80,000/= per month being Ksh.960,000/= per annum.
2. On 3<sup>rd</sup> January 2012, which was a Tuesday, the claimant was telephoned by a friend from Safaricom and informed that the Huawei Ideos X5 products from Safaricom, which was the respondent's customer, supposed to be in the respondent's warehouse were on sale in the open market.

3. On 4<sup>th</sup> January, 2012 the claimant's colleague one Peter Omwoyo informed the claimant that he was unable to locate Ideos x5 products in the Respondent's stores. They were twenty four handsets that had gone missing.

4. On 10<sup>th</sup> February, 2012 the claimant was at work when she was called to go for a meeting in the Human Resources Manager's office. She was served with the letter marked "JN 3" on the memorandum of claim. The letter stated as follows:

***"REF. DESC/ST/991  
February 10, 2012***

***Judy Njoki  
Inventory Supervisor – Saficom  
DHL Excel Supply Chain (K) Ltd  
NAIROBI***

***Dear Judy,***

***RE: SHOW CAUSE LETTER***

***On January 5, 2012, it was reported that Huawei Ideos x5 products which had only been released for care centers had been spotted being sold somewhere in Luthuli Street in town.***

***A spot check was quickly done on the stock and it was discovered that 24 pieces of the same were missing from the warehouse.***

***Investigations into this incident have revealed that you had prior knowledge of the loss but decided to keep the information to yourself instead of passing it to the concerned parties for timely action.***

***This kind of behaviour amounts to gross misconduct punishable by summary dismissal both under the law and the company policy and cannot be tolerated into the business.***

***Consequently you are required to show cause within 8 hours of receiving this letter why appropriate disciplinary action should not be taken against you.***

***Yours sincerely,  
DHL EXEL SUPPLY CHAIN (K) LTD  
SIGNED  
Nancy Kawira  
AG. CONTRACT MANAGER – SAFARICOM (k) LTD***

***C.C. Business Unit Manager: C&T  
Human Resource Manager"***

5. On 10<sup>th</sup> February 2012 was a Friday. The letter required the claimant to show cause within 48 hours. 12<sup>th</sup> February 2012 was a Sunday and 13<sup>th</sup> February 2012 was a Monday. The respondent's offices were open over the weekend but the claimant did not report on duty. On Monday, 13<sup>th</sup> February 2012, the claimant did not report to work – she had no permission to be absent. On 14<sup>th</sup> February 2012, she reported at work. It was a Tuesday and she was called to the Human Resource Manager's office. She was issued with a termination letter titled "***Summary Dismissal***" dated 14<sup>th</sup> February, 2012 being annexure JN5 on the memorandum of claim. The letter stated as follows:

***Dear Judy,***

**RE: SUMMARY DISMISSAL**

***On January 5, 2012, it was reported that Hawaei Ideos x5 products which had only been released for care centers had been spotted being sold somewhere in Luthuli Street in town.***

***A spot check was quickly done on the stock and it was discovered that 24 pieces of the same were missing from the warehouse.***

***Investigations into this incident revealed that you had prior knowledge of the loss of the said stock way back in December 2011 but decided to keep the information to yourself instead of passing it to the concerned parties for timely action.***

***On February 10, 2012, at about 2 p.m. you were issued a letter to show cause within 48 hours why disciplinary action should not be taken against you, and you left your place of work at around 3.00 p.m. without permission or communication and never came back.***

***On February 12, 2012, although it was a Sunday, you were required to be on duty to co-ordinate inventory activities given the fluid nature of the stock under your care and again, you neither showed up nor called any of your seniors to inform them that you were not in a position to report to work.***

***Yesterday February 13, 2012, you were meant to be on duty but you never reported and neither bothered to call any of your senior to explain your whereabouts.***

***In the show cause letter, it was made very clear to you that the kind of behavior amounts to gross misconduct punishable by summary dismissal both under the law and the company policy and cannot be tolerated in the business.***

***Consequently you are hereby summarily dismissed from the service of the company effective today February 14, 2012.***

***Do organize to hand over any company property that could be in your possession to the undersigned and obtain a clearance certificate dully completed and signed after which your final dues if any will be paid to you.***

***Yours sincerely,  
DHL EXEL SUPPLY CHAIN (K)  
SIGNED  
Nancy Kawira  
AG. CONTRACT MANAGER – SAFARICOM”***

6. The claimant's letter dated 12<sup>th</sup> February 2012 being marked JN4 on the memorandum of claim was to be delivered to the Respondent on 14<sup>th</sup> February 2012 but the letter of summary dismissal was handed to the claimant before she delivered that letter of 12<sup>th</sup> February, 2012. The letter was a response to the show cause letter. In that letter the claimant stated as follows:

(a) On the evening of 3<sup>rd</sup> January, 2012 she received information that Ideos x5 handsets residing in the stores as per oracle were out in the market and were being sold in shops along Luthuli Avenue. She asked one Elizabeth Mukami a cycle count team member to conduct cycle count of the items.

(b) On 4<sup>th</sup> January 2012 in the morning she instructed Peter Omwoyo to go through the lots on the ground and from that she discovered that 24 were pieces missing. It was not clear how that could have

happened because checks were conducted at every point in picking and verification of quantities at dispatch and which was usually done in presence of security team. She conducted a serialized count of the items and came up with a list of 24 serials that could not be accounted for.

(c) On 5<sup>th</sup> January, 2012 between 12.00 p.m. and 1.00 p.m. a further warehouse search for the missing items did not yield any positive results. The claimant therefore personally reported the loss of the 24 pieces of Hauwei Ideos x5 handsets to one Nancy Kawira, Acting Safaricom Contract Manager in Respondent's establishment. She also immediately reported the loss to one Meshack Ochieng, the Business Unit Manager. She also reported it to David Odhiambo, the Respondent's Safaricom Contract Security Supervisor and she documented the issue to the Security Manager Mathews Ogola and all other concerned parties.

(d) The claimant then stated in the letter that at no time did she have prior information of the loss and kept it without sharing with the team.

In that letter the claimant proceeded to state, thus;

***“The communication was complete with details regarding the missing serial numbers for the Ideos Handsets and was also copied to the Safaricom Fraud Dept. Manager and Senior Manager Safaricom Supply Chain Operations. This is in tandem with the procedure in place for reporting such cases.***

***It is important to note that at no time did I have information of this loss that I kept without sharing with the teams.***

***As cycle count team falls under inventory, I took it upon myself to use the resources at my disposal to verify the information based on facts with factual supporting evidence.***

***The cycle count team is responsible for counting and reporting and conducted a major count on 18<sup>th</sup> December, 2011. At the time there was no variances relating to this item that were reported.***

***After you came back from leave, Erick Korir confessed to you in my presence that he was aware of the variance on this item and did not report to me but to Martha Njoki.***

***Had I had prior information on this I would have acted on it without delay. It is therefore not true that I had information on the missing items as I would have already acted on this.***

***I was called upon by David Odhiambo the Security Supervisor Safaricom Contract on the 9<sup>th</sup> of January, 2012 to record a statement which I did. I also recorded a statement with the CID on the same.***

***I am fully committed to my duties and responsibilities and would not in any way act contrary to that.”***

The Respondent's first witness was Nancy Kawira, the respondent's Inventory Manager and claimant's immediate supervisor. She testified that on 24<sup>th</sup> December 2012 she received a report that the stock count of 18<sup>th</sup> December 2011 did not disclose any variance in the Handset products in issue. On 5<sup>th</sup> January, 2012 the claimant called her and informed her she, the claimant, had information from Safaricom that the stocks were in the market.

The claimant informed the witness that she had not informed one Meshack Ochieng, the Business Unit Manager and the witness advised the claimant to inform him because the witness was on leave.

The witness reported back from leave on 12<sup>th</sup> January, 2012 and confirmed the loss. The claimant was given the dismissal letter on 14<sup>th</sup> February 2012. She had failed to respond within the prescribed 48 hours and the witness further stated that the claimant had failed to report on duty on Monday, 13<sup>th</sup> February, 2012. The claimant had not been appraised in January 2012 because she had failed to appear for the appraisal as requested by the witness on e-mail.

The Respondent's 2<sup>nd</sup> witness was Claudio Onyango Otieno, the Respondent's Human Resource Officer. He issued the show cause letter by drawing it up and conveying it to the 1<sup>st</sup> Respondent's witness to deliver it to the claimant. It was delivered but then the claimant left her work station that day at 3.00 p.m. and resurfaced on 4<sup>th</sup> February, 2012. She had been absent from duty, according to the witness, without permission. She had also failed to respond to the show cause letter within the prescribed 48 hours.

The claimant's written submissions were filed on 15<sup>th</sup> November, 2012 and the Respondent's on 16<sup>th</sup> November 2012.

The main issues for determination are whether the termination was unfair and whether the claimant is entitled to the remedies as prayed for.

The court has considered the pleadings, the evidence and the submissions and makes the following findings:

1. There is no dispute that the parties were in an employment relationship as per the contract of service between the parties.
2. The claimant by her own testimony has confirmed that she received information that Ideos X5 handsets in the respondent's stores were out in the market and were being sold. She testified that she received the information from her friend at Safaricom, the Respondent's client who had contracted the Respondent to store the handsets. The claimant during cross examination by counsel for the Respondent refused to disclose her informant at Safaricom. She testified that she had been informed on the evening of 3<sup>rd</sup> January 2012. She did not inform her supervisors about that information that was adverse to the Respondent's interests until the afternoon of 5<sup>th</sup> January 2012 when she conveyed the information to her supervisor one Nancy Kawira, the Respondent's acting Safaricom Contract Manager. That was after about 48 hours since the claimant received the information of the handsets being sold in the market.

The claimant has explained the delay in conveying the information of the loss of the products or the availability of the products in the market on the account of taking upon herself,

***"... to use the resources at my disposal to verify the information at hand and to present information based on facts and with factual supporting evidence."***

3. The court has considered the claimant's conduct and explanation of the conduct and finds that her conduct fell short of an employee fully committed to her duties and responsibilities. The court finds that the claimant withheld crucial and very important information for unreasonably long time to the serious detriment of her employer, the Respondent. To confirm her unwillingness to discharge her duties honestly and without misleading the Respondent, she decided to withhold full disclosure of her informant. It is the court's considered view that prompt disclosure of the availability of the handsets in the market and her Safaricom informant would have gone a long way towards mitigating or redressing the Respondent's loss. Clause 2.3 of the letter of appointment at folio 4 on the memorandum of claim expressly stated thus;

***"2.3. If you engage in the management of any outside business interests, you must obtain the company's prior written consent"***. The court finds that the claimant's failure to disclose the information in issue to the respondent must have been due to ***"outside business interests"*** and was in breach of the quoted provision of the letter of appointment.

4. The court further finds that such conduct on the part of the claimant breached clause 22 on conflict of interests in the letter of appointment. The claimant having declined not to disclose the information promptly and having declined to disclose her informant to the respondent, the court's considered opinion is that she elected to protect her private interests over the employer's; the respondent's interests. As envisaged in Section 43 (3) of the Employment Act, 2007, the respondent was entitled to dismiss the claimant summarily because the claimant by her conduct indicated that she had fundamentally

breached her obligations arising under the contract of service.

5. The court finds that having decided to dismiss the claimant summarily, the respondent nevertheless accorded the claimant 48 hours notice to show cause why such dismissal would not be taken against her. The claimant in a rebellious manner, in the opinion of court, decided to dissent duty and failed to respond as permitted in the notice. The court's further finding is that even if the response by the claimant were to be examined and taken into account, it confirmed that the claimant was guilty of the gross misconduct as preferred against her. The claimant was absent, after the service of the show cause letter, without leave or other lawful cause as envisaged in Section 44 (4) (a). The claimant also willfully neglected to perform her duties or carelessly and improperly performed her work that it was her duty to perform, namely, failing promptly report the loss or the availability of the handsets in the market. Such conduct on her part, in the findings of the court, amounted to gross misconduct under Section 44(4) (c) of the Act.

6. Accordingly, the court finds that in the instant case the Respondent was entitled to summarily dismiss the claimant. The claimant is not entitled to the remedies as prayed for in the memorandum of claim.

In conclusion judgment is entered for the respondent against the claimant. The claimant's case is dismissed with costs.

Signed, dated and delivered in court at Nairobi on the 23<sup>rd</sup> November, 2012.

**Byram Ongaya**  
**Judge**