



**Okwaro v Kituo Cha Sheria t/a Legal Advice Centre (Cause E560 of 2020) [2024] KEELRC 1796 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1796 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E560 OF 2020  
NJ ABUODHA, J  
JULY 5, 2024**

**BETWEEN**

**LOISA SHETAKWA OKWARO ..... CLAIMANT**

**AND**

**KITUO CHA SHERIA T/A LEGAL ADVICE CENTRE ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed her Memorandum of Claim dated 9<sup>th</sup> September, 2020 and pleaded inter alia as follows: -
  - a. That on or about 26<sup>th</sup> March, 2018 the Respondent employed the services of the Claimant, where she was appointed to work as the Organization' Finance, Administration and Human Resource Coordinator.
  - b. That it was agreed she would receive monthly salary of KENYA SHILLINGS ONE HUNDRED AND THIRTY-SEVEN THOUSAND ( KSHS 137,000/=) inclusive house allowance and statutory deductions of NHIF, NSSF and PAYE.
  - c. That her duties and responsibilities included financial planning and budgeting of the Respondent, providing support to fundraising efforts, developing and installing effective management support systems and procedures, overseeing the management of human resource activities, monitoring and evaluating departmental and individual performance against set targets, team building, providing effective leadership and implementing on-the-job training programmes to improve staff performances.
  - d. That she reported to work on 26<sup>th</sup> March 2018 and the relationship between the parties herein remained cordial and the Claimant discharged her duties diligently.



- e. That on or around 26<sup>th</sup> November 2018, the Respondent's then Executive Director one GERTRUDE NYAUSI ANGOTE sent an email to her alleging that she was undermining and disobeying instructions.
- f. That she responded to the allegations levied against her through a letter dated 27<sup>th</sup> November 2018, which was forwarded to Gertrude Nyausi Angote through email.
- g. That upon receiving her response the Respondent took no further action and the Claimant continued to discharge her normal duties.
- h. That on around 5<sup>th</sup> March 2019 a defamatory email was circulated to all staff and some board members of the Respondent and it was alleged to have come from an anonymous source.
- i. That the email contained allegations and innuendos aimed at her and was meant to harass, intimidate and pressurize her into resigning from employment. That the Author threatened to cause actual bodily harm to her.
- j. That the email caused lot of embarrassment, humiliation and greatly demoralized her and because of the threat of causing bodily harm, she was forced to report the matter at Kilimani police station under 0B NO70/7/3/2019.
- k. That she expected the Respondent to Investigate and the action against the authors of said email but to her disappointment, no action was taken.
- l. That on or around 21<sup>st</sup> March 2019, while discharging her normal duties one LYDIAH AKINYI AWITI who was the personal assistant to Gertrude Nyausi Angote, stormed into her office hurling insults and physically attacked her and she had to be restrained by other members of staff.
- m. That she was shocked at the Lydiah Akinyi Awiti's actions for she did not know the reason why she was being physically attacked.
- n. That at the time of the attack, Gertrude Nyausi Angote was in the office and being the Director of the Respondent, she took no action to stop the attack neither did she reprimand Lydiah Akinyi Awiti for her actions, thereby causing lot of tension within the members of staff.
- o. That she immediately through a letter dated 21<sup>st</sup> March 2019, filed a complaint with the then Chairman of the Board one ANTHONY MULEKYO and demanded that an investigation be done, however, the Respondent neglected and/or refused to take any action or address her complaint.
- p. That she filed a complaint against Lydiah Akinyi Awiti with Kilimani Police under 0B NO. 17/22103/2019.
- q. That the Respondent's failure to take action caused a lot of tension and created a toxic working environment for her and other members of staff.
- r. That on or around April 2019, the Respondent issued her with a suspension letter enclosed with a notice to show cause and a complaint letter from Gertrude Nyausi Angote.
- s. That the suspension letter alleged gross misconduct, misappropriation of funds and insubordination. That Gertrude Nyausi Angote personally handed the suspension letter to her and she told her not to report to work until April 2019.



- t. That she responded to the allegations contained in the Suspension letter through a letter dated 24<sup>th</sup> April 2019 addressed to Antony Mulekyo.
- u. That the disciplinary hearing of her suspension was meant to take place on 29<sup>th</sup> April 2019 but was pushed to 10<sup>th</sup> May 2019 and to 31<sup>st</sup> May 2019.
- v. That on 31<sup>st</sup> May 2019, the disciplinary hearing was meant to take to place at Heron Portico at Nairobi and she arrived at the said venue at 10:00am and waited for the proceedings to start at 2:00pm, however the Respondent's board of directors informed her that the same would not take place on that day but on date to be later communicated.
- w. That the entire time she was on suspension, she was receiving her salary in full.
- x. That on or around 22<sup>nd</sup> May 2019, the Respondent shared an audit report compiled by CARR STANYER GITAVJ & COMPANY with her and requested her to respond to the same.
- y. That she responded to the audit report through a letter dated 29<sup>th</sup> May 2019 addressed to Anthony Mulekyo.
- z. That on or around July 2019, the Respondent convened a special general meeting in which Eight (8) of its board members' terms of service ended and a new hoard was appointed.
- aa. That the newly appointed board of directors was acting in an interim capacity and therefore legally had no powers to neither hire, fire nor proceed over any disciplinary matters. That they were discharging their duties in an acting capacity and further they had not been registered with the Non-Governmental Organizations Co-ordination Board as is legally required.
- ab. That through a letter dated 6<sup>th</sup> August 2019, the Respondent informed her that she was required to attend a hearing on 14<sup>th</sup> August 2019 and the same was to take place at the Respondent's offices.
- ac. That upon arrival at the Respondent's offices, she was shocked to find that the Board of Directors that issued her with the suspension letter had been changed and that a new hoard would be presiding over the hearing.
- ad. That the new board was not privy to the circumstances that led to her suspension, neither were they aware of her complaints, therefore for them to proceed with the hearing, as greatly prejudicial to her case and she had no chance of getting a fair hearing.
- ae. That on the material day the Respondent's board of directors refused to address her complaints regarding the defamatory email and the physical attack that happened on 21<sup>st</sup> March 2019.
- af. That further, during the hearing the Respondent never gave her a chance to plead her case for they only required her to answer questions that the Board was asking her.
- ag. That upon conclusion of the hearing proceedings, the Respondent informed the Claimant that she would be notified of the board decision.
- ah. That on or around 16<sup>th</sup> August 2019, the Respondent through their Executive Director one ANNETTE MBOGOH, sent an email to her requesting for her to forward documents that were in support of her defence and further stated that they were preparing her July 2019 salary.
- ai. That on or around 18<sup>th</sup> August 2019, she wrote a letter addressed to Anthony Mulekyo sent through email, in which she requested for her concerns regarding the Audit report to be addressed.



- aj. That the Respondent neglected and/or refused to respond to the letter or address the issues raised.
- ak. That on or around September 2019, the Respondent summarily dismissed her from employment.
- al. That prior to the hearing and determination of the Claimant's disciplinary hearing, the Respondent had appointed one BRENDA LUCAS as the Organization's Finance, Administration and Human Resource Coordinator.
- am. That from the Respondent's conduct and appointment of Brenda Lucas to take over her duties and responsibilities, it is clear that they had already predetermined to terminate her employment. That it was important to note that the Respondent had not officially registered its board members the Non-Governmental Organizations Co-ordination Board as is legally required under the Non-Governmental Organization Co-ordination Act.
- an. That therefore the actions of their then Chairman Anthony Mulekyo and the current chairman that issued the termination letter one JUSTUS MUNYTHYA were clearly illegal, unlawful, null and void ab initio.
- ao. That the Respondent's constitution does not provide for appeal proceedings where one is appealing a decision issued by the board of directors.
- ap. That the Claimant had no chance at a Fair determination because the Respondent does not have a proper and functioning administrative hierarchy.
- aq. That the Respondent never shared with her the minutes for the disciplinary hearing, the terms of reference to the report neither was tangible evidence adduced to support her termination.
- ar. That the Respondent further neglected and/ or refused to pay her July and August salaries neither did they address her complaint.
- as. That after the wrongful, unfair and unlawful termination of the Claimant's, the Respondent failed to pay her terminal dues which included the following: -
  - a. July and August 2019 salary arrears Kshs.274,000/-
  - . One month's salary in lieu of notice
  - c. Staff welfare deductions  
Kshs.137,000/-  
(300 x 15 months)  
-Kshs.4500/-
  - e. Compensation for unfair termination (137,000 x12 months)KSHS 1,644,000/=
  - f. Damages discrimination KSHS 3,000,000/=

TOTAL KSHS 5,059,500/=

2. The Claimant in the upshot prayed for the following against the Respondent;

- a. A declaration that the Claimant's termination was unlawful, unprocedural and unjustified.
- b. That Claimant be paid KSHS5,059,500/as particularized above



- c. General damages for emotional distress
  - d. Interest on (ii) above at court rates from the date filing until payment in full
  - e. Costs of this Claim
  - f. Any other relief that this Honourable Court may deem just and fit to give.
3. The Respondent filed its Amended Statement of Defence dated 19<sup>th</sup> July, 2022 and averred inter alia as follows;
- i. The Respondent admitted the fact that the Claimant was appointed by the Respondent on 26<sup>th</sup> March 2018 as a Finance, Administration and Human Resource Coordinator at a basic salary of Kshs. 137,000/=, as it averred that the Claimant had been warned severally for failing to follow Labour Laws in dealing with members of staff.
  - ii. The Respondent averred that the Claimant was not a diligent employee as alleged and denied that no further action was taken as alleged in paragraph 10. That it never received any letter dated 21<sup>st</sup> March 2019 from the Claimant as alleged under paragraph 19 of the claim.
  - iii. The Respondent averred that the incident referred to under paragraph 20 was reported to the police and the Respondent was later informed of the decision. That in denying allegations of paragraph 21 it did act by calling a disciplinary hearing and allowing Ms Lydia Awiti to respond to the said allegations as well as questioning all concerned parties.
  - iv. The Respondent averred that the term of the board that had been in place had expired and that a new board was properly and validly elected in the Special General meeting held on 15<sup>th</sup> July 2019.
  - v. The Respondent further averred that the formalities of Registering the aforesaid changes with the Non-Governmental Organization Co-ordination Board were on going and this did not in any way make the Respondent's board in place illegitimate and incapable of carrying out its functions including those of hiring, firing or presiding over any disciplinary matters.
  - vi. The Respondent averred that its newly constituted board had all the relevant records and was privy to all the relevant information regarding the disciplinary issues facing the Claimant, acted independently, fairly and above reproach when handling the Claimant's disciplinary hearing.
  - vii. The Respondent averred that it was a stranger to the averment that the Claimant was "shocked" of the changes to the board handling her disciplinary issues as alleged in paragraph 35 of the Memorandum of claim and averred that the Claimant may have all along been aware of the changes as is indicated in appendix 14 that she has annexed in her list of documents.
  - viii. The Respondent further averred that the Board was privy to all the relevant information and gave the Respondent an independent and fair hearing.
  - ix. The Respondent further averred that the Claimant did not raise the issue of hearing of her alleged complaint of a "defamatory email" or "physical attack" and in any event this was not the subject of the disciplinary hearing.
  - x. The Respondent further averred that the Claimant was given all the chance and opportunity to explain herself and plead her case contrary to the assertions contained in paragraph 38 of the Memorandum of Claim.



- xi. The Respondent further averred that the Board did grant the Claimant leave, at her request, to provide better and further particulars of her defence after the disciplinary hearing, which she did.
- xii. The Respondent averred that the Board did take into account the Claimants further documentation together with the response from staff on the issues that the Claimant had raised before it made the decision in regard to the Claimant.
- xiii. The Respondent averred that the provision of additional information did not warrant any further response from the Board as alluded to in paragraph 42 of the memorandum of Claim as the Result of the hearing and consideration thereof were communicated vide the letter dated 4<sup>th</sup> September 2021 terminating the Claimants employment.
- xiv. The Respondent averred that it did appoint someone in an acting capacity as the functions of a finance Officer are critical to the running of the organization and this appointment was only confirmed upon the exit of the Claimant from the organization.
- xv. The Respondent averred that an Appeals process is provided for in in paragraph 32 (10) of the Human Resources manual and not *the constitution* of the Respondent and the fact that Claimant who was in charge of the Human Resources function of the Respondent organization is unaware of this is very telling of her competence in this regard. The Respondent further averred that the Claimant was informed of the right of appeal in her letter of termination but, for reason(s) best known to her, she choose to ignore this offer.
- xvi. The Respondent averred that Human Resources Policy Manual at paragraph 30 details the grievance handling mechanism which the Respondent chose to ignore in order to address in her grievance concerning the alleged attack in the office and the alleged defamatory email. The Respondent averred that the Claimant ought to have addressed her grievance(s) to her immediate superior for redress which she failed to do.
- xvii. The Respondent averred in respect to the specific Claims being sought for under paragraph 54. a.) to 54. e.), both inclusive, of the Memorandum of Claim, as follows:
  - a. The Claimant did pay the Claimant salary for July 2019 and August including and up to the date of termination of 4<sup>th</sup> September 2019. That in any event this claim appears to be an afterthought and is a malicious and ill-conceived claim.
  - b. The Claimant was summarily dismissed using due process and for good reasons. Her claim for a month's salary in lieu of notice at paragraph 54. b.) fails on this score.
  - c. The staff welfare fund was a voluntary scheme set up and managed by the staff to contribute to staff welfare for issue such as deaths, weddings and other social welfare issues. The fund is not run nor managed by the Respondent and thus this claim is farfetched and ill intentioned. In any event the funds therein may have been utilized for the purposes the fund was set up.
  - d. The Respondent reiterated that the Claimant was summarily dismissed using due process and for good reason. Her claim for 12 month's compensation for unfair termination at paragraph 54. d.) fails in this regard.
  - e. The Respondent averred that at no time did it discriminate in any way whatsoever against the Claimant. The Claimant has not indicated or particularized any incidence of discrimination against her on any basis known to law. Any differential treatment, if



any was fair, legitimate and based on the Respondent's policies based on the law and legitimate expectations. Her claim for damages for unspecified discrimination as set out in paragraph 54. e.) is invalid, ambitious, unwarranted and unproved and ought to be dismissed.

- xviii. The Respondent averred that it did not receive any demand and notice of intention to sue from the Claimant herein and thus the Claimant is not entitled to any costs herein.
- xix. The Respondent, averred that it adhered to the law, its Human Resources Policy manual as well as its constitution prior to terminating the Claimant's employment.
- xx. The Respondent further averred that it shared the Auditors recommendation report with the Claimant prior and during the disciplinary hearing and even went further to allow the Claimant to tender further documents and information after the disciplinary hearing prior to reaching the decision to terminate the Claimant's employment. In so doing it acted in a transparent and fair manner.
- xxi. The Respondent averred that the assertion that the Claimant was not accorded a fair hearing was an afterthought since the Claimant never complained about the legitimacy, composition and conduct of the board, prior, during or after the disciplinary hearing.
- xxii. The Respondent further averred that the Claimant was given every chance and opportunity to express herself orally and in writing prior during and after the disciplinary hearing. The Claimant was given every chance and opportunity to call any witness of her choice during the disciplinary hearing. The Claimant's performance was in issue and the manner in which she conducted her work that led to loss of funds or potential loss of funds belonging to the organization by flouting well laid procedures and accounting policies.
- xxiii. The Respondent avers that the Claimants prior record was taken into account prior the decision to terminate her employment but her conduct was grave and a danger to the financial wellbeing of the organization which is heavily reliant on donor funding and support, and accountability thereof.
- xxiv. The Respondent averred that the Claimant treated her superior with haughtiness and contempt and failed to follow her lawful commands and instructions.
- xxv. The Respondent averred that the charges against the Claimant were well set out and elucidated and the Claimant had every chance and opportunity to respond to the same and that the minutes of the disciplinary meeting were shared with the Claimant.
- xxvi. The Respondent further averred that the process leading to termination was procedural and there were valid reasons to terminate the Claimant's employment. The Claimant admitted to having flouted the accounting procedures but lay the blame systemic process and historical faults.
- xxvii. The Respondent averred that it is a premier human rights organization that prides itself in adhering to the principles of justice, equity and fighting for the weak and indigent in the society and it would be the last institution to go out and trample on anyone's rights, more so its own staff.
- xxviii. That the Claimant did transgress and did conduct her duties in a careless and manner that exposed the institution not only to financial risk and loss but also reputational risk to its donors and other stakeholders. exposed the institution not only to financial risk and loss but also reputational risk to its donors and other stakeholders.



- xxix. The Respondent prayed that this court dismisses the Claimant's claim with costs.
4. The Respondent raised its counterclaim and averred that the Claimant carried her duties in a careless and negligent manner as a result of which the Respondent suffered loss of its funds. That the Claimant also breached its contract of service and unjustly enriched herself.
  5. The Respondent prayed for the following against the Claimant;
    - a. An order for reimbursement Kenya Shillings Two Hundred and Fifty Five Thousand two hundred and sixty (Kshs 255,260) of the lost funds together with interest.
    - b. General damages
    - c. Costs of the counterclaim and interests of the above sums.

## EVIDENCE

6. The Claimant's case was heard on 18<sup>th</sup> May, 2023 and the Claimant herein (CW1) testified that she was suspended on 18/4/2019. That the suspension letter set the grounds for suspension and that the issue in the suspension letter had earlier been brought up in 2018 by the Director. It was her evidence that the Disciplinary hearing was to take place on 29<sup>th</sup> April, 2018 and she was not informed of her right to be represented and to call a witness and further that the Disciplinary hearing was rescheduled severally and took place after four months, in August 2019. At the conclusion thereof, she was not issued with the minutes.
7. It was her testimony that the Respondent asked for additional documents after the disciplinary hearing and that the Board that suspended her was not the same board that heard the case.
8. CW1 testified that the position was filled by the Respondent's accountant after the hearing before she got the results. She therefore felt discriminated and there were several incidents apart from this. It was further her evidence that there was an anonymous email about her with threats and allegations of misappropriation of funds and illicit relations with a Board Member and further that there was a public attack on her by the PA to the Executive Director over which she filed a complaint to the Board but nothing happened prompting her to report the issue to the police.
9. CW1 testified that on 21/3/2018 the PA to the Executive Director attacked her again and reported again to the police and a complaint to the Board via email but she did not receive any response over the complaint but she was subsequently suspended. It was her evidence that the suspension was over financial misappropriation and she was suspended alone yet there were others in the department. According to her there was an audit that seemed skewed to the suspension letter.
10. Regarding the disciplinary hearing, it was her evidence that the hearing took place before a new board and was structured on the suspension letter and when she asked about her grievances shared on email she was told that the respondent was not privy to that. She was terminated after the hearing. According to her, the dismissal letter accused her of sexual harassment on account of policy number 31.
11. Regarding her terminal benefits, the claimant stated that she was not paid salary for July and August 2019 as well as her deductions to staff welfare which was mandatory. She sought compensation for unfair termination and discrimination.
12. In Cross-examination CW1 confirmed that she was unfairly terminated. That she was issued with a notice to show cause and explained to the grounds for termination in the termination letter. She confirmed that she understood the reasons for which she was terminated and responded to the accusations. The claimant conceded being invited for the disciplinary hearing and informed of the right



- to attend with a colleague of choice and to make representations. The Claimant further stated that she was given a copy of the investigations report and gave a response. She did not discuss the report but was asked questions on the report at the disciplinary hearing and responded.
13. CW1 confirmed that the disciplinary hearing took place after 4 months and the board changed during the period. According to her, she believed the police investigated her complaint and the anonymous email but was told the police allows the organization to investigate and try and resolve the matters internally. She conceded that the anonymous email soiled her family relationship and her husband left after she shared the same with him though he was not copied to the email.
  14. CW1 confirmed that she was paid her salary during suspension until June but was not paid salary for July and August. It was however her evidence that her colleagues who were mentioned in the audit report were not acted upon and that she was not aware if the Petty Cash officer was suspended.
  15. CW1 stated that she made her complaints but the board did not seem to have them. The Board however had her response to the show cause letter and that there was no charge on sexual harassment against her.
  16. In Re-examination CW1 clarified that she was supplied with the documents on her complaints after the hearing. She further clarified that the letter was issued about four months later and was not issued by the same person as the one who issued the suspension letter.
  17. The Respondent's case on the other hand was heard on 27<sup>th</sup> July, 2023 and 23<sup>rd</sup> January, 2024. Two witnesses namely the Executive Director of the Respondent and the Auditor were called and testified. RW1 adopted his statement and the Respondent's documents filed in court as his evidence in chief and further stated that the Claimant was summarily dismissed and the dismissal was justified on grounds of absenteeism where she went on leave without approval of Executive Director and insubordination. According to him the Claimant was disrespectful and misappropriated funds.
  18. Concerning the disciplinary process, RW1 testified that the Claimant was accorded an opportunity to be heard; informed of her right to be accompanied with a colleague. According to him, there was no discrimination against the Claimant.
  19. RW1 testified that no complaint was lodged with executive Director and that the investigations were done over the Claimant's allegations and members of staff responded to the allegations. That the Claimant reported the issue to police and so they felt it be taken up by the police.
  20. RW1 further stated that the Claimant's dismissal letter asked her to refund the lost amounts to Respondent who would then pay her dues after the refund and that the financial manual provided for refund before payment of dues.
  21. In cross examination RW1 confirmed that the amount to be refunded by the Claimant was Kshs. 255,260/= was in their counterclaim and was derived from the Rapid Audit and that the funds were for project activity and could not be used as petty cash.
  22. Regarding absenteeism, RW1 confirmed that the Claimant went on leave without approval in February, 2019, 15<sup>th</sup> April, 2019 and 12<sup>th</sup> April, 2019. And concerning undermining, RW1 confirmed that the Claimant failed to provide financial updates for three months, failed to attend Respondents programmes and did not explain her absence. That the said allegations were responded to by the Claimant.
  23. It was his evidence that the Claimant was consequently suspended and that the Notice to show cause did not contain all the issues the Claimant responded to as some were not included. Concerning the disciplinary hearing, RW1 stated that the disciplinary hearing was done by a committee of the board



- and not the board itself. That an appeal from the Committee would be done to the full board as per the manual paragraph 10. That the Claimant was informed of her right to appeal.
24. RW1 confirmed that the Claimant was informed vide the invitation to disciplinary hearing of her right to be accompanied to the hearing by a colleague of her choice and that the minutes were taken and a report documented from the hearing and the same were shared with the Claimant.
  25. RW1 stated that members of staff gave their responses to the anonymous letters and not allegations against the Claimant. That the Claimant did not lodge her compliant properly since the same had to be lodged with her immediate supervisor as per the grievance practice.
  26. RW1 confirmed that dues would be withheld until clearance and that they were withholding Claimant's two months' salary which was less than what they were claiming.
  27. In re-examination RW1 clarified that they knew the Claimant's absence from the staff records.
  28. RW2 the Auditor testified that he does Audits and tax work. That he does audits and give opinions to the NGOs and donors on how money has been used. That the money must be used for listed activities. RW2 stated that he did audit for the Respondent for 6 years where the Claimant was his employee and was the one who recommended her to the Respondent as an accountant.
  29. RW2 testified that they were to conduct investigation on the internal controls around cash, bank and petty cash reconciliation. That they were also to look at petty cash, cheque payments from September, 1<sup>st</sup> 2018 to April 2019 and that they came up with the with findings contained in the report and that they were arrived at after looking at bank reconciliation and petty cash payments.
  30. RW2 testified that the Claimant responded to the report and she was in charge of finances. And that her role was to ensure that authorized financial procedures were followed and that the funds went through authorization as per the project. However in reality the money went to petty cash and that this was not authorized.
  31. RW2 testified that petty cash was for control purposes and once petty cash was exhausted the imprest was suspended before petty cash could be replenished. That one was not supposed to withdraw from another petty cash. RW2 produced his report as evidence in chief.
  32. In cross examination RW2 confirmed that the instructions were in writing but did not produce letter of instructions. RW2 stated that they were not given the Claimant's scope of duties at the Respondent's but confirmed having worked for the Respondent as an external auditor for 6 years. He further did not produce the vouchers and petty cash documents in court.
  33. RW2 further stated that the funds were diverted to an activity they were not meant for and that no funds could be disbursed or used without authorization of Executive Director or the Board. It was his evidence that there were unauthorized diversion of donor funds where money was withdrawn to fund a particular project but was not used in the project. That there was a Petty Officer and the Claimant and that the claimant said she paid petty cash on behalf of Petty Officer. He however could not confirm if the Claimant was not at any time in charge of petty cash as there were no supporting documents. He further state that the Claimant did not appear in the list of the questioned transactions however she was in charge of the system and that they were concerned with how payments were done.
  34. In reexamination RW2 clarified that he received instructions just before his response. That the executive officer and the board were not involved in disbursement of petty cash. That the petty officer was a custodian and instructions were to come from the Claimant.



## CLAIMANTS' SUBMISSIONS

35. The Claimant filed written submissions dated 13<sup>th</sup> February, 2024. On the issue of whether the Claimant was subjected to unfair and unequal treatment tantamount to discrimination, submitted that Article 27(1)(4) and (5) of *the Constitution* of Kenya states that every individual is entitled to equal treatment and protection under the law. The State and individuals are prohibited from discriminating against anyone based on factors such as race, gender, disability, religion, or other specified grounds.
36. It was the Claimant's submission that Article 41(1) of *the Constitution* of Kenya states that every person has a right to fair labour practices and Section 5 (3) of the *Employment Act* cap 226 states that no employer shall discriminate directly or indirectly, against an employee or prospective employee.
37. The Claimant submitted that the Respondent discriminated against the Claimant by the anonymous defamatory email sent to the Respondent's staff and board of directors on March 5, 2019, containing allegations and threats towards the Claimant. This email according to Counsel, was evidently from a member of the Respondent's staff. Despite the board of directors being aware of the email, they failed to investigate or take any action, showing discrimination against the Claimant.
38. It was the Claimant's submission that on 21<sup>st</sup> March, 2019, just 16 days after the email, the personal assistant to the Respondent's Executive Director physically attacked the Claimant in her office in front of other staff members. The attack was unjustified and intended to humiliate and harass the Claimant. Despite the Claimant filing a complaint with the Respondent and reporting the assault to the police, no action was taken against the assistant. That the lack of action is seen as discriminatory, as it is believed that if the attack had happened to someone else, action would have been taken.
39. The Claimant submitted that the audit report blamed the Claimant for transactions that occurred before she joined the company, as well as for payments to suppliers and laborers. That the report was used as a reason to dismiss the Claimant, suggested collusion between the auditor and the company as the auditor also wrongly held the Claimant responsible for petty cash transactions that were actually the responsibility of another staff member.
40. The Claimant submitted that the auditor included transactions in his report, that occurred while the claimant was suspended, this according to the claimant was discriminatory as she was not given a chance to respond.
41. It was the Claimant's submission that the Claimant was terminated based on a policy about sexual harassment that was not raised during her suspension or hearing, leading to accusations of deliberate embarrassment by the Respondent. That this termination based on an issue that was never addressed was discriminatory.
42. On the issue of whether the Respondent's interim board had capacity to proceed over the disciplinary hearing and summary dismissal of the Claimant, the Claimant submitted that the interim board was appointed on 5<sup>th</sup> July 2019 on a Special General Meeting held by the Respondent and the same was communicated to the Respondent's staff through a letter on July 16, 2019. However, the appointment was not officially registered with the Non-Governmental Organizations Co-ordination Board as required by law.
43. The Claimant submitted that the Respondent's constitution does not have provisions for an interim board and is silent on its function and as a result, the actions taken by the interim board, including presiding over disciplinary hearings, were invalid.



44. On the issue of whether the Claimant was unfairly terminated from employment, the Claimant submitted that Sections 41(1), 43(1) and 45 of the *Employment Act* outlines the procedures and requirements for employers to terminate employees fairly in that employers must provide a valid reason for termination, prove the reason is fair, and follow a fair procedure.
45. The Claimant relied on the case of Kenya Union a Commercial Food and Allied workers V. Meru North Farmers Sacco Limited Cause No. 74 of 2013, while submitting that employers must adhere to the mandatory procedures outlined in the Act when terminating an employee.
46. The Claimant submitted that the Respondent did not act on the Claimant's complaints and allegations, leading to an unfair termination.
47. The Claimant submitted that during the hearing, the interim board in charge was unaware of the Claimant's complaint and did not understand the circumstances leading to her suspension.
48. It was the Claimant's submission that she was also not informed of her right to call witnesses or given the opportunity to do so. The minutes of the hearing were not provided to the Claimant or the Court.
49. The Claimant submitted that when her employment was terminated, the interim board cited sexual harassment as one of the reasons, indicating a lack of understanding of the issues at hand. That the Respondent intended to terminate the Claimant's employment without a fair hearing.
50. On the issue of the terminal dues owed to the Claimant, the Claimant submitted that Section 49 of the *Employment Act* provides for remedies if an employee's dismissal is determined to be unjust.
51. It was the Claimant's submission that the Respondent neglected to pay the Claimant's July and August salary and should be compensated for the same.

## **RESPONDENT'S SUBMISSIONS**

52. The Respondents filed their written submissions dated 29<sup>th</sup> February, 2024 and on the issue of whether the process of the Claimant's termination was fair and procedural, submitted that the process leading to termination of the Claimant's employment was fair and procedural and in line with section 45 *Employment Act*, 2007.
53. The Respondent stated that Section 41 of the *Employment Act*, 2007 outlines the process of procedural fairness when terminating an employee's contract due to misconduct, poor performance, or physical incapacity. The respondent relied on the case of National Bank of Kenya v Anthony Njue John [2019], while submitting that under section 45 of the Act, an employer cannot terminate an employee unfairly. The employer must show a valid reason related to the employee's conduct, capacity, or compatibility while considering the procedure followed by the employer, communication of the decision to the employee, handling of any appeal, and the employee's conduct and capability leading up to the termination
54. The Respondent submitted that the testimony of the Respondent's witnesses and Exhibits produced before Court including communication between the parties, an investigative report, company policies, and notifications regarding the disciplinary process showed that the claimant's termination was fair, procedural, and justified.
55. The Respondent submitted that the process began with the Respondent issuing the Claimant a notice to show cause letter, which informed the Claimant of the grounds for which the employer was considering terminating her employment.



56. It was the Respondent's submission that the Claimant was suspended in order to conduct investigations while putting reliance on the case of Elinathan G. Kairu -vs- Nakumatt Holdings Limited [2017], where the court held that employers have the right to suspend employees for investigations.
57. It was the Respondent's submission that after the Rapid Audit Report was completed, it was shared with the Claimant who was given an opportunity to respond to it and she did so vide her letter dated 29th May 2019.
58. The Respondent relied on the case of Lydia Moraa Obara v Tusker Mattresses Limited, in submitting that it is important to allow an employee the opportunity to respond to allegations of misconduct before a final decision is made. Fair procedure requires substantial compliance with this obligation.
59. The Respondent submitted that the Claimant did not provide additional documentation requested by the Respondent in an email dated August 16, 2019 which failure was a crucial aspect in considering the termination of an employee and relied on the case of John Jaoko Othino v Intrahealth International [2022] eKLR.
60. The Respondent further submitted that the Claimant was invited for a hearing, given adequate time to prepare her defence, and during the disciplinary hearing, the Claimant was provided with an opportunity to be heard and to present her case.
61. The Respondent submitted that Section 44 (4) of the *Employment Act* allows for dismissal based on careless or improper performance of work and that the Claimant was found by the Respondent to have performed her work negligently thereby occasioning loss of Donor Funds and injury to the Respondent and was summarily dismissed and subsequently issued with a letter of termination dated 4th September 2019.
62. The Respondent submitted that the Claimant was informed of her right of appeal in the termination letter, but chose not to exercise this right. Therefore, the Claimant cannot claim her dismissal was unfair as she did not complete the internal procedures.
63. The Respondent relied on the case of Alexina Kerubo Misaro v Postal Corporation Of Kenya [2019] eKLR in submitting that employees who do not utilize internal grievance processes provided by their employers cannot later claim they were not heard.
64. It was the Respondent's submission that it carried out a substantially fair process taking into consideration its employment policy and the Claimant's rights to fair process.
65. On the issue of whether the Claimant carried out her duties in a careless and negligent manner warranting her dismissal, the Respondent submitted that as the Finance, Administration and Human Resource Coordinator, the Claimant had a duty to discharge her duties in line with her job description and more so her professional ethics.
66. The Respondent submitted that it is the Claimant's failure in this duty that led the Respondent to carry out investigations illustrating the Claimant's failure and indiscretions prior to initiating the disciplinary process, a burden which lay with the Respondent.
67. The Respondent submitted that the Respondent's witnesses and the exhibits provided including the Claimant's job description, letter of appointment, accounting policies and procedures, HR manual, auditor's report, and the Claimant's response to audit findings demonstrate that the Claimant violated the Respondent's accounting policies, resulting in financial loss of donor funds. This justified her termination, despite her claims otherwise.



68. The Respondent relied on *George Njenga Kinyua v China Road and Bridge Corporation and Kenya Revenue Authority versus Reuwel Waithaka Gitahi & 2 others* [2019] eKLR and submitted that that the burden of proof lies with the respondent on a balance of probability when allegations are made against an employee and the employer only needs to prove the reasons they believed justified the termination.
69. It was the Respondent's submission that it provided evidence of the Claimant's negligence through an audit conducted by an independent auditor. According to the Respondent, the Claimant, in her role as Finance, Administration, and Human Resource Coordinator, was responsible for overseeing her department and should not avoid accountability for the mismanagement of finances and relied on the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.
70. On the issue of whether the claimant was discriminated against, the Respondent relied on among others the case of *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (22 October 2021) and submitted that discrimination occurs when individuals in similar positions are treated unequally without reasonable justification. The Respondent further relied on the case of *Reuben Wamukota Sikulu v Director of Human Resource Management* and submitted that in order to prove discrimination in employment, the employee must show evidence that they were discriminated against.
71. The Respondent submitted that the Claimant had not provided any evidence to support their claim of discrimination and the court must determine whether the new board conducting the disciplinary hearing was biased against the Claimant compared to the previous board while considering how others were treated in disciplinary hearings to determine if discrimination occurred.
72. The Respondent submitted that the letter from the Ministry of Interior acknowledging the appointment of a new board confirmed the legality of their actions and that the new board made a decision based on the evidence presented during a disciplinary hearing, as outlined in the HR manual.
73. The Respondent submitted that the Claimant's advocate even wrote to the NGO Coordination Board to confirm the appointment of the new board as evidenced by the letter dated 9<sup>th</sup> September 2020 from the Ministry of Interior & Coordination of National Government. It was therefore the Respondent's submission that the Claimant's allegations of bias was due to a change in the board was not sufficient. That the Claimant's discrimination allegations against the Respondent were therefore unfounded and appeared to be an abuse of the court process. The Respondent in conclusion submitted that the court ought to dismiss the Claimant's claim and allow its counterclaim.

## DETERMINATION

74. I have reviewed and considered the pleadings, testimonies, submissions and Authorities relied on by both parties.
75. I have I have come up with two main issues;
- a. the Claimant's dismissal from employment was unfair and unlawful
  - b. the parties are entitled to the reliefs sought.

### **a. the Claimant's termination of employment was unfair and unlawful**

76. In this instant case, the Respondent alleged that they terminated the Claimant on grounds of gross misconduct, misappropriation of funds, absenteeism and insubordination among other grounds.



77. The Claimant was first suspended on April,2019 to enable the Respondent undertake its investigations. This was not the first time the Respondent raised related issues since the Claimant acknowledged that the Respondent wrote a letter to her in 2018 which she responded to. Further the Claimant acknowledged that she was given a show cause letter which she responded to.
78. It is an established requirement that for a termination to pass fairness test there must be both substantive and procedural fairness. This was the principle established in Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR among other cases.
79. On substantive fairness the Respondent is under duty to prove and justify the reasons for the termination as per section 47(5) of the Employment Act while the Claimant under the same section was to prove that indeed she was unfairly terminated. Further section 43(2) of the Employment Act provides that the reasons for the termination must be fair and valid and which the employer must have believed to have existed at the time of termination.
80. In the instant case the main grounds for the termination of the Claimant's employment was misappropriation of funds, insubordination and absenteeism. These were the same issues in the letter of 2018, the suspension letter and the Notice to Show Cause.
81. The Claimant on the hand claimed that she was being singled out and discriminated after the defamatory email and the attack by the PA to the Executive Director. The Court however notes that the Claimant did not specifically illustrated how she was discriminated by the Respondent. Even though she stated that she was the only one who was acted upon despite the fact that other employees were mentioned in the Auditors Report, she did not dispute that as the head of Finance, she was the one liable ultimately in case of any loss of any money belonging to the Respondent under her charge.
82. When it came to the issue of misappropriation of funds the Respondent's witness (RW2) confirmed that he undertook the audit and informed the Court that he was the one who had earlier recommended the Claimant for employment by the Respondent. It would be interesting how he would recommend her and make an Audit Report against her if she did not violate her responsibilities. During hearing it became clear that the money given for projects was used as petty cash hence against the donors wishes.
83. On the issue of absenteeism, the Respondent stated that this was discovered after the employee records were checked. The Claimant responded to all these allegations against her which responses were not satisfactory. The Claimant stated that the Respondent did nothing about her complaints yet the Respondent illustrated that indeed it issued the said PA with disciplinary hearing and the members of staff mentioned all gave their views which seemed contrary to the Claimant's allegations.
84. From the foregoing, it is therefore not true that the Respondent did not act on the claimant's complaints. In any case the disciplinary hearing was not about her complaint against the PA but on performance related issues. In addition, the Claimant reported the incidences to police yet she did not mention if criminal charges were preferred against any of the mentioned persons.
85. The Claimant did not as well follow the right procedure of addressing her aggrievances as per policy 30 of their Manual where she was to report to her immediate supervisor. This showed disrespectful attitude the Claimant had was among other issues raised in her dismissal letter.
86. In conclusion this court finds and holds that the Respondent had fair and valid reasons to terminate the Claimant service and considering the process followed in executing the termination outlined earlier in the judgment, the Court is satisfied that the respondent did so through a fair procedure and in accordance with section 41 of Employment Act. The claim for unfair termination and indeed the claim in its entirety is found without merit and is hereby dismissed with costs.



87. It is so ordered.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2024**

**DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JULY, 2024**

**ABUODHA JORUM NELSON**

**JUDGE**

