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Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Kebira Ocharo
Citation:	Evans Bosire Mayaka v G4S Kenya Limited [2022] eKLR
Advocates:	Mr. Sheikh for Claimant Ms. More for Respondent
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claimant's case dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2539 OF 2016

(Before Hon. Justice Ocharo Kebira on 28th March 2022)

EVANS BOSIRE MAYAKA.....CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction.

1. Through a statement of claim dated **6TH December 2016**, the Claimant contending that he was unfairly dismissed from his employment by the Respondent sued the latter seeking the following reliefs;

- a) A declaration that the termination of his employment was unfair.*
- b) Payment of the equivalent of months' salary for such aggregate period as the court may consider reasonable.*
- c) Compensation equivalent to twelve [12] month's salary for unfair termination.*
- d) Payment of exemplary damages for unfair dismissal.*
- e) Costs of this suit.*
- f) Cost of the suit*
- g) Interest at court rates.*

2. The Respondent filed a statement of response dated 27th **February 2017**, denying the Claimant's case and his entitlement to the reliefs he has sought. It too filed attendant documents and a supplementary list and bundle of documents dated 17th April, 2018.

3. When this matter came up for hearing on the **18th October, 2021**, the Claimant and the Respondent's witness testified, had their respective witness statements adopted as part of their evidence in chief and the respective documents that the filed under various lists of documents adopted as documentary evidence in support of their respective cases.

The Claimant's case

4. The Claimant states that through its letter of offer of employment dated 16th January 2010 the Respondent offered to employ him as a driver which offer he accepted w. The employment was to take effect on the 1st March 2010, with a salary of Kshs. 12,687, an amount inclusive of House Allowance Kshs. 1,655.000. Subsequently, the salary was reviewed upwards, and as at April 2016, his

gross salary was Kshs. 56,499.41.

5. The Claimant testified that on the 27th and 30th November, 2015, he together with colleagues, Winnie Gitonga-as custodian and Daniel Kagua- as lead car driver, were tasked with processing and loading a total of Kshs.7,000000 [seven million] from the Respondent's ATM vaults to KCB [Kenya Commercial Bank] ATM Langata Branch.

6. He contended that on the 27th November, 2015, Winnie and Daniel processed the money. As they proceeded to the Bank, Daniel was driving the motor vehicle that was carrying the cash, in company of a police officer. He was driving a chase car.

7. On the 30th November 2015, they again did the loading, Winnie was the custodian, and Daniel the lead car driver. The supervisors, Florennce Irundu, Emily Omolo and one faith, at the office confirmed that there was no discrepancy before the Claimant and the others proceeded with the money to the ATMS. When the money was being loaded into the Bank's ATM, Winnie was the supervisor.

8. The Claimant stated that on the 3rd December 2015, he sought for leave, which was granted. Mr. Bonface Irungu stepped in for him. On the 4th Day of December 2015, in his absence, the money was picked from the Bank's Langata Branch's ATMS and brought to the office. He resumed duty on the 7th November, 2015, and upon so resuming he was assigned to work on same route. He was not told that a loss of money had been discovered.

9. The Claimant further stated that on the 17th day of November 2015, he was suspended from work by his supervisor, Samuel Munya, orally. Also suspended were Winnie and Daniel Kagua.

10. He alleged that on the 13th November 2013, they had been called by, and appeared before, their managers, Mr. Nato, Samuel Munya, Julia Gachanja and Bonface [HRM], who told them to resign, but him and others declined to.

11. He stated that on the 24th December, 2015 he was issued with a suspension letter, and on the 14th January 2016, a summary dismissal one. He was informed of his right of appeal, which right he exercised. On the 5th March 2016, he was called for the hearing of the appeal, but contrary to what he expected he was not given an opportunity to make a representation on his appeal. Only a verdict thereof was pronounced to him and his colleagues that the decision to have them dismissed from employment had been upheld.

12. He asserted that his dismissal was not preceded by any notice and that he was not accorded any reason for the dismissal. His dismissal was without a reasonable reason.

13. Cross examined by Counsel Sheikh for the Respondent, the Claimant stated that he was suspended through a letter dated 24th December 2015, and in that letter the reasons for the suspension were put forth.

14. The claimant maintained that he was the chase car driver not the lead car one.

15. He stated that on the 30th day of November, 2015, at Lanagata KCB he, assisted carry the Seven Million to the ATM, whereat the custodian did feed the machine[s] with the same. According to him, at that time the machine was in order.

16. Investigations were conducted the Respondent. He asserted that the supervisors confirmed that the seals were intact. He stated that at the KCB ATM bay, there was a cctv camera.

17. The Claimant confirmed that he was taken through a disciplinary hearing. According to clause 8 of the Respondent's manual negligence by any employee that puts the Respondent's property or client to risk or results to damage would amount to a ground for summary dismissal.

18. Under re-examination by his Counsel, he stated that at the material time and assigned to the task, were two vehicles, the chase car and the lead.

The Respondent's case.

19. One Emily Omulo, testified as the Respondent's witness. She represented herself to court as a Cash Processing Supervisor. She testified that the Claimant was engaged in the Respondent's Cash Services Department. His duties entailed collection of cash from the Respondent's vaults and loading it to various ATM machines belonging to the Respondent's customers as instructed from time to time.

20. She stated that according to clause 8 of the disciplinary code of conduct, which the Claimant subscribed to as an employee of the Respondent, provides that where an employee negligently performs his duties or exhibits gross negligence with regard to safe guarding client's property, such could attract a dismissal from employment.

21. The witness asserted that on the 30th November 2015, the Claimant together with his colleagues, Daniel Kagua and Winnie Gitonga who were also working in the Cash Services Department were instructed to load various ATMs belonging to the Respondent's clients. One of such ATMs was that of Kenya Commercial Bank [KCB] situated at the then Uchumi Supermarket in Langata.

22. She stated that the Claimant and her two colleagues, [the crew] were required to load the ATM with Kshs. 7,000,000 contained in various cassettes. As per the standard procedure, they were supposed to and they did empty the cassettes in the ATM machine, then load the entire Kshs. 7,000,000. That in order to ascertain that the machine was in working condition, the machine ran a test by depositing Kshs. 5,000 in the rejection bin. This can be discerned from the journal roll for 30th November 2015.

23. She further stated that on the 4th December 2015, the Respondent was again instructed by the client to replenish the ATM at Uchumi Supermarket in Langata with cash. On this date, the Claimant was away on leave. The crew was made up of Winnie Gitonga [custodian], Daniel Kagua [crew commander], and Bonface Irungu [driver], attended the loading. They emptied the cassettes from the machine and replenished the same as were instructed.

24. The witness stated that according to the Journal roll dated 4th December 2015, of the Kshs. 7,000,000 that was loaded in the ATM on the 30th November 2015, KCB customers withdrew a total of Kshs. 6,187,000.00. There was expected to be a residual of Kshs. 813,000.00 in the ATM, and Kshs. 8000.00 of which had been placed in the reject bin.

25. The crew returned to the Respondent's vault 334 pieces of Kshs. 1,000 notes worth Kshs. 334,000.00. There was therefore a shortfall of Kshs. 479,000.00 from the expected Kshs. 813,000.00. A further Kshs. 21,000 retract had been reported on the 30th November 2015 as reflected on the journal roll for same date.

26. The witness further stated that a reconciliation of the loaded amounts and the residues recovered from the machine was done, it revealed that Kshs. 500,000 was missing at the time of replenishing the ATM with the Kshs. 7,000,000. The amount would not be accounted for.

27. It was stated that the Respondent's Risk Division Manager analysed the ATM records for the period between 30th November 2015, and 4th November 2015 and concluded that there was no mechanical breakdown of the machine during that period, and that the crew had confirmed that they loaded the entire sum as required. He submitted a report, which report revealed breaches on the part of the crew, breaches that amounted to gross misconduct. The risk Division Manager found them liable for the shortfall.

28. On the 24th December 2015, the Respondent's team leader, Cash services Department, Daniel Muruga, who is no longer with the Respondent, wrote to the Claimant suspending him from duty.

29. The Claimant was issued with a notice inviting him to a disciplinary hearing that had been slated for the 6th January 2016. He acknowledged receipt of both the suspension letter and the invitation notice.

30. She stated that the disciplinary hearing was held on the 6th January 2016. The Claimant attended the hearing. During the hearing, the Claimant contended that his crew had loaded the entire 7,000,000 into the KCB ATM as instructed and that they followed the required procedure.

31. The witness stated that the disciplinary panel in its deliberations took into account the evidence what was presented before it, including the Claimant's representations, the findings in the investigation report and clause 8 of the disciplinary code and found that the Claimant was negligent in the performance of his duties leading to the loss of Kshs. 500,000. The panel noted that the crew didn't note any problem with the machine when loading that would explain the deficit. That the crew had signed the Key ATM Work Instructions whose clause 11 holds them accountable for any unexplained shortages. The panel recommended that they be summarily dismissed.

32. The Human Resource Business Partner, Julia Gachanja, by a letter dated 14th January 2016, wrote the Claimant informing him of the dismissal. His terminal dues were duly computed and his entitlements were fully settled. The dismissal was procedurally fair and with substantive justification.

33. In her evidence under cross examination, the witness asserted that on that particular day, the lead car was being driven by the Claimant while Bonface Irungu drove the chase car. However, pressed further, she stated that Bonface Irungu was driving the lead car. He had stepped in to do so. She confirmed that this is what she stated before the panel.

34. She further stated that between 27th – 30th November, 2015, processing and loading of the Kshs. 7000,000 was done. Processing involved two to three people. The loading was done by Evans, Winnie and Gitonga. Bonface Irungu came in the last day when he went to pick the residual.

35. Mr. Irungu was the driver of the chase car, on 4th December, 2015, when the Claimant was on leave. She went ahead to state that she usually doesn't know who drives the lead or chase car. The lead car carries the money. The driver of that car can access the money that he is carrying.

36. She stated that before the money is offloaded, it is in the vaults of the vehicle. The custodian cannot access the vaults not unless the door of the vehicle has been opened.

37. She further stated that when any money reaches the Respondent's office, it leaves the vehicle to the main vault. The main vault is manned by specific officers who have combinations. The officers were investigated. The Claimant was not there when the residual was picked and taken to the office.

38. The shortage was discovered when the residual was taken to the office. All through, the seals were confirmed as being intact.

39. The witness further stated that no CCTV cameras are installed within the KCB ATM room.

40. Asked about the DVR within the Respondent's premises, the witness stated that any query on it would be best answered by the security team. At the time the Claimant was asking to view the same was already overwritten. The system overwrites itself automatically after a period of time.

41. In her evidence in chief, she stated that during the investigation process, the Claimant confirmed that he was driving the lead car. The cassettes automatically open once inserted into the machine.

The Claimant's Submissions.

42. The Claimant identifies three issues as those that emerge for determination, thus;

[a]. Whether the Claimant's termination amounts to unfair dismissal.

[b]. whether due process was followed.

[c]. Whether the Claimant is entitled to the reliefs sought.

[d]. Whether the Claimant was a lead or chaser car driver on the material day.

43. On the 1st issue it was submitted that the termination was wrongful, procedurally unfair and unlawful in the circumstances, riddled with illegality and in violation of his labour rights as enshrined in the Constitution of Kenya, 2010.

44. It was argued that the Claimant was not accorded an opportunity to respond to the accusations that were levelled against him. Further that there was no tangible evidence connecting the Claimant to the disappearance of the Kshs. 500,000. The Court was invited to consider the findings at item d-h of the investigation report that purports to implicate the Claimant, more specifically the subsequent recommendation on culpability as against the other parts of the report and surely see a contradiction. The Respondent acted on suspicion.

45. The evidence of the Claimant that at the material time he was a chase car driver and therefore with a very limited role in the processing and loading of the money into the ATMs was not shaken, it was so submitted.

46. The Claimant wonders why at the material time the CCTV cameras were not working, and submitted that the Respondent's witness did not explain why.

47. The Claimant placed reliance on the provisions of section 41, 43, and 45 of Employment Act, 2007 in support of his position that the dismissal was procedurally and substantively unfair. He invited the court to be persuaded by the holding in the case of **Walter Ogal Anuro vs Teachers Service Commission [2013]eKLR**, thus;

"..... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness."

48. Reliance was further placed the case of **Nicholus Muasya Kyulu v Farm Chem Limited Industrial Cause No. 1992 of 2011:[2012]LLR 235**, the court expressed itself :

"It is not sufficient for the employer to make allegations of misconduct against an employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."

49. On whether there was procedural fairness in the termination process, the Claimant's counsel urged this Court to find that there was not. She submitted that the Claimant was subjected to a disciplinary process that was arbitrary in the circumstances of the matter. There is no evidence showing that the Claimant was accorded an opportunity to express himself at the purported disciplinary hearing.

50. The Claimant's appeal has never been determined to date, there has never been any communication over it at all.

51. As to whether the Claimant was driving the lead or chase car, it was argued that the position that was taken by the parties on this issue was diametrically opposite. Since the Respondent's witness stated that she would not be aware as to who was driving which car at what time, it was imperative for the Respondent to avail, a witness who could testify on the position with certainty. The disciplinary hearing minutes reveal that Bonface Irungu who had relieved the Claimant was driving the chase car. This will leave an impression that the Claimant was a chase car driver who did not have a role in handling the money.

52. The evidence by the Claimant on this aspect was not controverted at all.

53. As regards the reliefs sought, it was submitted that the Claimant is entitled to the relief for damages sought, his rights were arbitrarily and maliciously violated by the Respondent. This is a proper matter where aggravated damages, general damages, punitive and exemplary damages should be awarded in his favour.

54. Counsel for the Respondent submitted that the Claimant displayed lack of candour in these proceedings as is demonstrated by the immense inconsistencies in his pleadings and testimony. For instance, the Claimant pleaded that at the time of the dismissal, he

was earning Kshs. 56,499.41, and with an intention to mislead the Court tendered his payslip which had an item for KShs. 18,614.41 which was payment of his dividends from Nyati Sacco, therefore an amount he ought not have called part of his salary. His actual salary being Kshs. 19,714.00 and House allowance of Kshs. 2,957.00.

55. That contrary to his submissions that he did not have a combination to the ATM, he however testified that he had, and that he assisted in loading the ATM.

56. On the inconsistencies and the impact thereof on a party's case Counsel placed reliance on the decision in **Julius Njagi Mbui V Nut Company Limited [2018] eKLR**, and urged the Court to be persuaded by it, and hold that the inconsistencies had a prejudicial effect on the Claimant's case.

57. Three issues were identified as the issues for determination in this matter, thus;

a. Whether there were valid grounds for termination of the Claimant's employment.

b. Whether proper procedure was followed in the termination; and

c. Whether the Claimant is entitled to the reliefs sought.

58. On the first issue, Counsel for the Respondent submitted that in a matter like is here, where an employer terminated an employee's employment on account of loss of its money, the employer is only required to demonstrate that there were reasons that it genuinely believed to exist that warranted the Claimant's dismissal. The standard of proof is not beyond a reasonable doubt. In support of this submissions, Counsel cited the Court of Appeal decision, **Kenya Power & Lighting Company Ltd v Aggrey Lukorito Wasike [2017]eKLR**.

59. The Circumstances of this matter considered in their totality, one can safely conclude that the Respondent genuinely believed that there was enough evidence to lead to a reasonable suspicion that the Claimant committed an offence to its detriment.

60. It was further submitted that section 44[3] of the Employment Act allows an employer to summarily dismiss an employee when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under a contract of service.

61. Section 44[4] [g] of the Employment Act, 2007 allows an employer to summarily dismiss an employee where 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.

62. It was argued, that the Claimant together with the crew were entrusted with loading the ATM with the instructed amount of Kshs.7,000,000. The Claimant acted in a manner that resulted in the loss of Kshs. 500,000, he fundamentally breached his obligations.

63. It was further argued that employees in Cash Services Department are required to be honest and individuals of integrity given that they handle and interact with large sums of money on a daily basis. The loss of Kshs. 500,000 put into doubt the crew's integrity injured the trust that the Respondent had on them. This lawfully attracted the summary dismissal against them.

64. To buttress the foregoing submissions, Counsel further urged the Court to be persuaded by the holding in **Robert Kenga & Another v Ocean Sports Resort [2015] eKLR**, thus;

"The standard of proving the reason for termination was a subjective test. It is all about what the employer personally and genuinely makes out of the conduct of the employee. Even if another employer would not have dismissed the Claimants for their conduct, it does not matter here. What matters is that the employer in this case considered the conduct of the Claimants as gross misconduct, which could not be tolerated in his business operations."

65. On procedural fairness, it was submitted that though the Claimant pleaded that the summary dismissal lacked procedural fairness, he did not put forth any material to establish the allegation. To the converse there is ample material before the Court, clearly demonstrating that the Claimant was informed of the charge against him, invited to a disciplinary hearing, he made representations thereat, before the decision to have him summarily dismissed was made.

66. Procedural fairness was present in the dismissal of the Claimant, it was concluded.

67. It was further submitted that though the Claimant was accorded an opportunity to appeal against the decision he didn't contrary to his contention. This is a matter that was not pleaded, it cannot properly be raised at the submissions stage.

68. On the reliefs the Respondent submitted that the Claimant failed to prove any of his claims, the suit should be dismissed.

Analysis and Determination.

69. From the material placed before the Court, I distil the following broad issues for determination;

- a. *Whether the summary dismissal of the Claimant procedurally fair.*
- b. *Whether the summary dismissal of the Claimant was substantively fair.*
- c. *Whether the Claimant is entitled to the reliefs sought.*
- d. *Who should bear the costs of this suit"*

Whether the summary dismissal of the Claimant was procedurally fair.

70. I have considered the Claimant's statement of claim herein, all that comes out as an attack on the procedural fairness of the process leading to his termination was captured in paragraph 6, thus;

"The Respondent abruptly terminated the Claimant's contract of employment without prior notice and without providing any reasons thereof and at the time of termination, there were no disciplinary case pending against the Claimant or notice to leave."

9. *Further and or in the alternative, the Claimant avers that in terminating the contract of employment, the Respondent acted unfairly in breach of the Employment Act,2007.*

.....

b]. Terminating the contract without regard to fair procedure."

75. It is very difficult for one to understand what procedural unfairness was suffered in the process leading to the summary dismissal of the Claimant as pleaded. For instance, no sense can easily or at all be made out of the averment on the disciplinary process as mentioned in paragraph 6 mentioned above. Further Paragraph 9[b], was coached in a very broad way without particularity. All these would constrain a reader to venture into the realm of speculation, and this Court is not prepared to.

76. As regards the issue of notice as was pleaded in paragraph 6. It can only be stated that the same is with due respect out of ignorance of the relevant provisions of the law and more specifically section 44[1] of the Employment, Act 2007, given that the separation was as a result of a summary dismissal. The section stipulates;

"Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled by any statutory provision or contractual term."

77. There is no contestation that the Claimant was issued with a suspension letter dated 24th December 2015, the letter read in part;

“On the 30th November 2015 you were assigned duty as a driver for Juliet 39, with your colleagues, you replenished KCB Uchumi Langata ATM and upon retrieval of the residues on the 4th December 2015 a shortage of Kshs. 500,000 was realised. The management has therefore decided to suspend you from duty pending investigation into the matter.

.....

In line with the existing company procedure on disciplinary matters, I have attached herewith notice of disciplinary Enquiry/Hearing form [GD3] duly filled for your information and action.”

78. There is no doubt in my mind that the contents of this letter were very clear on what the Claimant was to be investigated on and what accusations were to be the subject matter of the disciplinary hearing.

79. In his testimony in court, the Claimant asserted that he was not served with the Notice of Disciplinary Hearing, I find that the Claimant was not candid on this. At page 35 of his bundle of documents presented to Court, the notice obtains. I have considered the contents of the same and find that it clearly stipulated the Charge/offence. The same was received on the 24th December 2015. Considering that it is undisputed that the disciplinary hearing did take place on the 6th January 2016, I am prepared to hold that the time was adequate for the Claimant to prepare for his defence.

80. The Claimant vaguely asserted that he was not heard, looking at the minutes of the disciplinary hearing, hearing which he admitted he was in attendance of, it will be difficult for the Court to find that he was not heard. The minutes are clear on what he said in response to the charge, I have no reason to doubt the minutes which were even signed by the Claimant.

81. In the upshot, I find that the Claimant was informed of the allegations that were being levelled against him, was heard and given an opportunity to defend himself against the allegations, and that his representation on the same were considered before the decision for dismissal was made. The fair process components of information, hearing, and consideration were present in the process that led to his termination.

82. By reason of these premises I hold that the summary dismissal was procedurally fair.

Whether the dismissal was substantively unfair.

83. Section 43 of the Employment Act places a duty upon an employer to prove the reason or reasons for termination of an employee’s employment. A failure on the part of the employer to discharge the burden under this provision will have a consequence of the termination being deemed unfair pursuant to the provisions of section 45 of the Act. From the onset the Respondent was clear on the accusations it had against the Claimant. The accusations formed the basis for the charge against him during the disciplinary hearing and became the subject matter of the summary dismissal.

84. Section 43[2] of the Act provides for what would constitute a reason or reasons contemplated under sub-section one. Thus;

“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”. I have carefully considered the circumstances of this matter, including that there is no dispute that the Claimant was among the crew that were charged on the two days hereinabove mentioned to load the Respondent’s Client’s ATM, that there was no evidence that the machine was faulty at any time between the two dates, that the Kshs. 500,000 would not be accounted for, and that the money apparently got lost during that period when the Claimant and his colleagues were charged with the responsibility as hereinabove mentioned, and conclude that the Respondent would genuinely believe that the money got lost as a result of the Claimant and his colleagues negligent performance of their duty.

85. From the material placed before this court I am able to firmly state that the Respondent proved the reason for the dismissal.

84. In order for an employer to successfully demonstrate that the termination was substantively fair, he or she shall have to go beyond discharging the burden under section 43. Section 45 bestows upon the employer a further burden of proof. That of proving that the reason[s] was valid and fair.

85. It is imperative at this juncture to state that the Employment Act does not provide a formula for determining the validity and fairness, put in other words, appropriateness of a termination of an employee's employment or summary dismissal of an employee. However, that is not to say that there is a complete void, Courts have been able to use principles of law that have developed over time to address the issue.

86. In **Evans Kamadi Misango v- Barclays Bank of Kenya Ltd [2015]eKLR**, the Court rendered itself, thus;

*"To my mind, the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to determine the employment of an employee. The **Hulsbury's Law of England [4th Edition Volume 16]**, at page 482 expands this principle as follows:*

"In adjudication on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts. It must make a wide inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach [the range of reasonable test] is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take another; the function of a tribunal whether in the particular circumstance of each case the decision to dismiss the employee fell within the bond of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair but if it falls outside the band, it is unfair."

87. The band of reasonable response approach was enunciated by Lord Denning MR in **British Leyland Uk Limited v Swift [1981] 1RLR at 93:**

"Was it reasonable for the employer to dismiss [the employee]" If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have a reasonably dismissed him, the dismissal was fair."

88. However, it is imperative to state that this test has not gone without criticisms. It has been viewed as too subjective, giving the employer too much leeway to the employer, and constraining the Courts approach in adjudicating termination and dismissal matters. In **Sidumo vs- Prestonsburg Platinum Mines [2007]12BLLR 1097** the Constitutional Court of South Africa stated;

"There is nothing in the constitution and the statutory scheme that suggest that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the Commissioner is to determine the dismissal as an impartial adjudicator.....any suggestions by Supreme Court of Appeal that the differential approach is rooted in the prescripts of the LRA cannot be sustained."

89. The Court shall now turn to consider, the provisions of Section 44[3] and [4], of the Act, and what has been stated herein above regarding Courts' approach in determining fairness, as are relevant to this matter. Section 44 [4] sets out a list of acts and omissions that if proved by an employer, will and therefore able to attract the sanction of summary dismissal.

90. However, it is worth stating that it is not enough for an employer to state that an employee committed one or more of those actions obtaining in the list provided for in section 44 [4] of the Employment Act 2007, or its Human Resource Policy. An employee's misconduct does not inherently justify a summary dismissal unless it is "so grave" that intimates the employee's abandonment of intention to remain in employment. In **Laws -vs- London Chronicle Limited [1959] 2 ALL L.R. 285** the English Court of Appeal stated the following at page – 287.

"Since a contract of service is but an example of contracts in general so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable the question must be whether the conduct complained is such as to show the servant to have disregarded the essential conditions of the contract of service."

91. Whether an employee's misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances, the contextual approach –**Darius Kiseu Mwamburi -vs- Co-operative Bank of Kenya Limited [2021] eKLR.**

92. In **Mckinley -vs- BC Tel [2001]2 SCR 161, 2001SCC 38[CanLII]** the Supreme Court of Canada held:

“29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of the alleged insubordination within this analysis a finding of misconduct does not by itself give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such the employment relationship could no longer viably subsist.”

93. From the material placed before this Court it is not difficult to state that the following critical matters are not in contention;

I. *That the Claimant and his colleagues were tasked to load the Respondent's Client's ATM, with Kshs. 7,000,000 [Seven Million], on the two dates hereinabove mentioned.*

II. *That wasn't any other crew that was tasked to replenish the ATM between 25th November to 4th December, 2016, and in fact there wasn't any replenishment at any time between the dates.*

III. *That on the 4th December 2016, when the residues were picked from the ATM for the Respondent's main vault, and reconciliation of the amounts that were loaded and the residue, it was discovered that there was a deficit of Kshs. 500,000.*

IV. *That this sum was not accounted for at all.*

V. *That investigations conducted revealed that the ATM didn't have any fault at the time of loading all the way to the time the residue was picked, or at all.*

94. The Court has carefully considered the evidence by the Claimant, contrary to his counsel's submissions that he was not at all involved in the loading of the money, admitted that he assisted in the loading of the money after administering the combinations. It is not difficult to state that he was actively engaged.

95. The court has too considered his representations at the disciplinary hearing, the representations are in, support of the above-mentioned uncontested matters, and, in character in my view not sufficiently exonerating him.

96. Considering the standard of proof in matters like the instant matter, and based on the foregoing premises, I am convinced that the Respondent had a substantive justification to bring to an end the Claimants employment. Further, taking into account the industry in which the Respondent operates, the circumstances under which the money got lost and not accounted for, the work that the Claimants were employed to discharge, and the implications of conducts that the Respondent complained of would have on its business, I find that the conduct of the Claimant was in character, that contemplated under section 44[3] of the Act, so grave, going to the root of the relationship, making it impossible to viably subsist, and hold that the sanction of a summary dismissal was well merited.

97. In the upshot, I find that the summary dismissal was substantively justified.

Of the reliefs.

98. This Court has considered the reliefs sought by the Claimant, all of them are tied to the Claim that the summary dismissal was unlawful, wrongful and unfair. Having found in contrast as I have hereinabove, I am persuaded that he is not entitled to any of those reliefs he has sought.

Conclusion

99. In conclusion, the Court finds the Claimant's case lacking in merit, and it is hereby dismissed with costs.

READ AND DELIVERED VIRTUALLY THIS 28TH DAY OF MARCH 2022.

.....

OCHARO KEBIRA

JUDGE

In Presence of

Mr. Sheikh for Claimant

Ms. More for Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

.....

OCHARO KEBIRA

JUDGE



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