



REPUBLIC OF KENYA



KENYA LAW
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**Ithelu v Proto Energy Limited (Cause E529 of 2020)
[2025] KEELRC 2744 (KLR) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2744 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E529 OF 2020
NJ ABUODHA, J
OCTOBER 8, 2025**

BETWEEN

IRENEAUS MUOKA ITHELU CLAIMANT

AND

PROTO ENERGY LIMITED RESPONDENT

JUDGMENT

1. The Claimant through a Memorandum of Claim dated 10th September, 2020 pleaded inter alia as follows: -
 - a. The Claimant averred that on or about 27th June, 2018, the Respondent offered the Claimant employment as an ICT Officer Business Systems with a starting salary of Kshs 350,000/=.
 - b. The Claimant averred that he offered his services diligently to the Respondent until 6th December, 2019 when he was unlawfully and unprocedurally terminated from employment following trumped up charges levelled and or brought against him to which he was not accorded an opportunity to defend himself against the charges that formed the basis of his termination.
 - c. The Claimant averred that the Respondent proceeded to suspend him from work vide a letter dated 5th November, 2019 and invited him to a disciplinary hearing vide a letter dated 25th November, 2019 without laying down particulars of the trumped-up charges made against him to accord him a fair hearing as provided for under section 41 of the *Employment Act* and Article 50(1) and 2(c) of *the Constitution*.
 - d. The Claimant averred that the Respondent made a false report to the police station at Kabati causing him to be wrongfully arrested and maliciously detained in the police cells but no charges were preferred against him.



- e. The Claimant further averred that the Respondent refused to pay him his dues as a result he instructed his advocates to issue demand letter but the Respondent neglected to pay his terminal dues.
2. The Claimant in the upshot prayed for the following against the Respondent: -
 - i. A declaration that the Claimant's termination was unfair and unlawful.
 - ii. The Claimant be paid his terminal benefits and compensation of Kshs 4,200,000/= which was 12 months compensation with costs and interest.
 - iii. Certificate of service as per section 51 of the *Employment Act*.
 3. The Respondent in response filed its Response to the Memorandum of Claim dated 4th June 2021 and averred inter alia as follows: -
 - a. The Respondent admitted that the Claimant was its former employee having been initially employed as an ICT Officer Business Systems effective 9th July,2018 subject to a 6-month probation period.
 - b. The Respondent averred that the contract provided terms which were binding including safeguarding and promoting interests of the company without doing anything detrimental to those interests, to be just and loyal giving a true account of transactions and a termination clause.
 - c. The Respondent further averred that the Claimant's employment was subject to Respondent's Information Security Policy which provided for back -up and Recovery standard at clause 1.0.
 - d. The Respondent averred that sometime in the second half of 2019 the Respondent's Officers, the Claimant excluded undertook an audit investigation as it had been discovered that there were various transactions that had been deleted from the Respondent's electronic SAP System.
 - e. The Respondent averred that the deletions were aimed at obstructing the Respondent's Operations as the deleted logs would ordinarily enable concerned persons investigate any systems abnormalities and suspicious activities both internal and external.
 - f. The Respondent averred that the investigation unearthed that owing to this unauthorized deletion there were no system logs prior to 10th June,2019, beginning 10th June,2019 there were 1132 profile changes from users already existing in the system, there were also profile changes for users who had no access rights and there were profile changes for users that were not profiles in authorized users list.
 - g. The Respondent averred that as investigations were ongoing on 5th November, 2019 the Claimant's supervisor was locked out from and blocked from accessing the system and a upon a further prompt it was indicated that the system was being debugged by user IMUOKA which was the Claimant's User name on the SAP system.
 - h. The Respondent averred that the debugging was in breach of clause 3.1 of the Security Event Monitoring and Incident Management Sub-Policy within the Respondent's Information Technology Policy as well as its Human Resource Policies and Procedures Manual under clause 3.1.17.
 - i. The Respondent further averred that the debugging was in breach of its ICT policy in its HR Policy which prohibited mutilation and unauthorized destruction or distortion or deleting



of official records which would render any such employee liable to summary dismissal under clause 3.1.17.

- j. The Respondent averred that the Claimant who was well aware of the ongoing audit having been informed via email on 6th August,2019 ought not to have undertaken debugging as this served to sabotage the ongoing investigations. That the Claimant was initially interviewed by the Respondent's Assistant Chief Security officer and his supervisor and he initially denied any involvement in the deletion but he then turned around and admitted that he debugged the system albeit mistakenly after being shown a screenshot of the SAP system taken on 5th November, 2019 when his supervisor could not gain access.
 - k. The Respondent averred that the Claimant was immediately placed on suspension owing to the suspicious conduct on 20th November,2019 and during the disciplinary hearing his explanation was found wanting leading to termination effective 6th December, 2019. That the termination letter was erroneously dated 6th November,2019 instead of 6th December,2019 as a typing error.
 - l. The Respondent averred that the Claimant was paid all his dues and duly cleared with it. That the termination was just, lawful and done in accordance to procedure, rules of natural justice and the law.
4. The Respondent in the upshot prayed as against the Claimant that the Claimant's suit be dismissed with costs to the Respondent.

Evidence

5. Both the Claimant's and Respondent's case was heard on 11th March,2025. The Claimant herein (CW1) testified and adopted his witness statement dated 10th September 2020 together with the bundle of documents filed in court as his evidence in chief.
6. CW1 testified that he was employed in 2018 as IT Officer, Business System in charge of ASAP to ensure the business process runs smoothly. That he was supposed to report to IT Manager. That he worked for one year 6 months. He stated that in November 2019 he was called by security officer and told he was needed at the headquarters at Riverside since he was at Kabati. That in the car to Nairobi there was a security officer, IT Officer and police officer and he was not informed of the mission.
7. He further stated that he met Mr. Mobin CIO and Mr. Abbas one of the directors. Mr. Mobin asked him if he was aware of any wrong doing which he said he was not aware. Mr. Mobin started asking him random questions and what the previous IT Manager was doing which he denied. He was shown a screenshot and he was told he was suspected of interfering with system logs which he said he was not and that was not his area.
8. CW1 testified that he returned to Kabati and worked until 5.00pm but while leaving he was confronted by someone who said he was a police officer and he was arrested. He was asked to drive his car to police station. That he asked for the offence he was arrested for but was not told.
9. CW 1 testified that he was told that the Respondent had reported him and he was to be held overnight to be produced in court the following day. That he was suspended when he left police custody which suspension was extended.
10. CW1 testified that he was invited for disciplinary hearing which he attended and he was not informed of the offence. That what was said was that they suspected that the system was debugged and he was the one responsible. That he was thereafter terminated.



11. In cross examination CW 1 confirmed that he was aware of the Respondent's security policy as it guided his work. CW1 confirmed that he was to ensure system logs were protected from unauthorized modifications. That he was in charge of ASAP and ERP which was used to record all transactions. That the system was critical for record keeping.
12. CW1 confirmed that he was reporting to CIO Mr. Mobin. That if there was any issue with system it would be reported and if approved he would execute. That approval was by CIO.
13. CW1 confirmed that the screenshot he was shown for debugging of the system showed it was debugged by IMUOKA and that was not his account as his account was I-MUOKA.
14. CW1 confirmed that he was suspended and thereafter invited for disciplinary hearing where he was informed of his charges to respond to. He further stated that he was able to respond to the charges at the hearing but he was not given the details of the charges. That the termination letter gave reasons for the termination and also outlined his terminal dues which were also paid.
15. In Re-examination CW1 clarified that monitoring of security logs was not his responsibility as he was in charge of ASAP which was ERP. That he was unable to tell the source of the screenshot. He further clarified that the particulars of the charge were not detailed in the letter of invitation nor was he given a list of what was deleted and was tampered with. That the screenshot was shown to him before conclusion of investigations
16. The Respondent on the other hand called one witness Donald Oganda (RW1) an IT professional. RW1 adopted his witness statement and the Respondent's documents as his evidence in chief. In cross-examination RW1 confirmed that SAP system is hosted in cloud and hosted by third party. That he was not aware if the host had access to security logs. He further stated that he had in his possession the changes made by the Claimant and that the system showed changes were made but did not show who made them.
17. RW1 confirmed that the system could put a hold on debugging if there was deletion and that there was hold on the debugging by Imuoka as the per the screenshot. That the audit report was not before the court.
18. RW1 confirmed that at the time of suspension investigations may not have completed but he was not sure but needed to confirm. He was not aware if the Claimant was issued with a show cause letter.
19. RW1 testified that the Respondent lost a huge sum of money and that the Claimant was tampering with the system by accessing security logs without authority.
20. RW1 confirmed that the source of the screenshot was from Respondent's system and further that the charges were highlighted in the suspension letter and the letter of invitation.
21. RW1 confirmed that the screenshot showed that the CIO was trying to access the security log but was logged out.
22. In Re-examination RW1 clarified that the debugging was by Imuoka. That CIO could not access the system.

Claimants' Submissions

23. The Claimant's Advocates Solonka & Solonka Advocates LLP filed written submissions dated 5th May 2025.



24. On the issue of whether the Claimant's termination was substantively fair, counsel relied on Section 43 (1) and Section 45 of the Employment Act on proof of reasons for termination failure to which, the termination would be deemed unfair. Counsel further relied on the case of *Mwende vs Interstrat Limited t/a Big Square Employment Labour Relations Cause No.616 of 2018* among other cases to submit that in justification to Section 43, it is not enough that the employer proves reasons for the termination but the employer must go further to demonstrate that the reasons are fair and valid.
25. Counsel submitted that the Respondent in their letter dated 5th November 2019 notified the Claimant that he had been suspended from duty to enable investigation on allegations of unauthorized access to security logs, unauthorized deletion of security logs and tampering with security logs while the CITO was conducting investigations.
26. Counsel submitted that the allegations were outlined in the Respondent's letter dated 25th November 2019 and that the allegations were not particularized. He further contended that from the minutes of the disciplinary hearing, there was no cogent evidence to prove the allegations made against the Claimant.
27. Counsel submitted that the Respondent failed to prove valid reasons for terminating the Claimant's employment and could not claim that based on the purported screenshot of the analysis of security audit log it could be deemed that the Respondent genuinely believed that the Claimant had breached the Respondent's security policy while there was no evidence supporting the allegations.
28. Counsel submitted that the burden of proving that a termination was unfair was on the employee while the burden of justifying the termination rests on the employer and that the Respondent failed to justify the reasons of termination were valid hence the same failed the test of substantive fairness.
29. On the issue of whether the Claimant's termination was procedurally fair, counsel submitted that the Respondent's actions leading to the Claimant's termination of employment were not only substantively unjustified but procedurally unfair and unlawful and that the dismissal was effected in breach of the rules of natural justice and in violation of the Claimant's constitutional rights.
30. Counsel submitted that the Respondent failed to adhere to the procedural requirements set out in section 41 of the Employment Act which mandates that an employee must be notified of the allegations made against them and accorded an opportunity to respond in the presence of another employee or a union representative.
31. Counsel relied on among other cases, the case of *Jonathan Chepkwony v George Makatato Acting Chief Executive Officer Export Processing Zone Authority (EPZA) & 2 Others (2021) eKLR* to submit that a show cause letter which had to contain clear and adequate information of the allegations made against an employee. Counsel further relied on the case of *Walter Ogal Anuro vs Teachers Service Commission* among other cases on requirement for both substantive justification and procedural fairness to be proved.
32. Counsel submitted that the Claimant was unlawfully and procedurally terminated from employment following trumped up charges levelled against him, was wrongfully arrested and maliciously detained at Kabati Police Station with no charges being preferred against him and was suspended and invited to a disciplinary hearing vide a letter dated 25th November 2019 without laying down particulars of the charges levelled against the Claimant.
33. On the issue whether the Claimant is entitled to reliefs sought, Counsel relied on Section 49 of the Employment Act on remedies available to Claimant whose employment has been unfairly terminated



and further relied on the case of Kenfreight (E.A) Limited vs Benson K. Nguti (2016) eKLR where the Court of Appeal upheld an award of 12 months' salary as compensation for unlawful termination.

34. Counsel submitted that the Claimant did not contribute in any way to his termination. The Claimant offered his service diligently and had an expectation of continued employment until he was unlawfully and unfairly terminated from employment.
35. Counsel relied on Section 51 of the *Employment Act* on entitlement of the Claimant to a certificate of service upon termination of employment regardless of the reason.

Respondent's Submissions

36. The Respondent's Advocates Munyao Muthama & Kashindi Advocates filed written submissions dated 20th July 2025.
37. On the issue of whether the Respondent had fair and valid reasons to terminate the Claimant, Counsel relied on Section 43 (2) of the *Employment Act* which required that the reason(s) for termination of a contract were the matters that the employer at the time of termination believed to exist and which caused the employer to terminate the services of the employee.
38. Counsel further relied on the case of Kenya Revenue Authority v Reuvel Waitthaka & 2 others [2019] eKLR to submit that the standard of proof is on a balance of probabilities to establish the validity of reasons for termination of employment.
39. Counsel relied on the Court of Appeal in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR to submit that the court is not entitled to substitute its own decision for the employer especially where the employer has exercised its discretion properly and in the best interests of the company.
40. Counsel submitted that in the disciplinary hearing on 28th November 2019, the Claimant admitted that he accessed the system while addressing a taxation issue, and the system was in debugging mode at the time. He initially claimed that it was impossible to log in to the SAP simultaneously with another user, but this was rebutted by two other staff from the ICT Department who proved the contrary.
41. Counsel submitted that the Respondent had reason to believe that the Claimant had irregularly interfered with SAP system which was against internal policies. Counsel relied on the case of Kioko Muindi v United Aryan (EPZ) Limited (Cause 239 of 2017) (2022) KEELRC 882 (KLR) (Employment and Labour) (8 February 2022) (Judgment) on having fair and valid reasons for terminating the Claimant.
42. On the issue of whether the termination was in accordance with fair procedure, counsel relied on Section 45(2) of the *Employment Act* that provides that the termination of an employee is unfair where the employer fails to prove that the employment was terminated in accordance with fair procedure.
43. Counsel submitted that the Respondent followed due process in taking disciplinary action against the claimant and duly complied with the provisions of the *Employment Act* and its own internal policy.
44. Counsel submitted that the Claimant was placed under suspension to allow for investigations up to the 20th November 2019 and that he was invited to a disciplinary hearing via a letter dated 25th November 2019 which indicated the purpose of the disciplinary hearing and the charges to be brought against him. The letter also indicated that the Claimant had the right to be accompanied by an employee representative.



45. Counsel submitted that disciplinary hearing was held on 28th November 2019 and the Claimant attended, which was also attended by the Respondent's Senior Human Resources Officer, Human Resource Assistant, Finance, Working Capital Group, IT Manager and Assistant Chief Security Officer.
46. Counsel submitted that despite having been advised of his right to be accompanied by a fellow employee as a witness during the disciplinary hearing, the Claimant opted to proceed without a representative. During the hearing, the Claimant admitted that he accessed the system while addressing a taxation issue, and the system was in debugging mode at the time. He did not seek approval from the Chief Financial Officer to undertake this action. He stated it was impossible to log in to SAPMSM20 simultaneously with another user, as the other user would be locked out.
47. Counsel submitted that the claim above was rebutted by two other staff from the ICT, Mr. Josephat Rotich and Joseph Kamwara. That the staff also stated that where one wanted to make major changes, he had to inform other users or do so after work when other users were inactive. That it was not acceptable to debug on the security logs.
48. Counsel submitted that the findings of the disciplinary hearing led to the claimant's termination effective 6th December 2019. Counsel submitted that the Claimant was informed that he had a right to appeal but he chose not to exercise it and he was thereafter paid his dues and duly cleared by the Respondent.
49. On the issue whether the Claimant was entitled to the reliefs sought, counsel submitted that the Claimant's termination was fair and lawful according to section 45 of the Employment Act thus has no legal basis for compensation. That he was paid his terminal dues when he left employment and nothing was owing to him.

Determination

50. The court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by counsel and finds that the issues for determination to be: -
 - a) Whether the Claimant was unfairly terminated by the Respondent. b) Whether the Claimant is entitled to the reliefs sought. Whether the Claimant was unfairly terminated by the Respondent.
51. In this instant case, the Claimant alleged that he was terminated unfairly on trumped-up charges of interfering with security logs while the Respondent on the other hand alleged that they terminated the Claimant on grounds of gross misconduct for unauthorized access to security logs, unauthorized deletion of security logs and tampering with security logs while CITO was investigating. That the Claimant debugged the system and his supervisor could not access the same.
52. The standard of proof in employment cases is well governed by section 47(5) of the Employment Act where the employee has a duty to prove that termination which is unfair has occurred while the employer must justify the reasons for termination. In this case it is not in dispute that the Claimant was terminated on 6th December, 2019 as per the evidence in place.
53. It is also now a well-established principle that for termination to pass fairness test there should be both substantive and procedural fairness with a number of cases supporting this position including but not limited to the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.



54. Section 43 of the Act requires the employer to prove the reasons for the termination which reasons must be valid and fair and the employer must have believed to exist and to cause the termination of the employee. Failure to prove the reasons for termination of employee amounts to unfair termination under section 45 of the Act.
55. The courts have emphasized in several cases among them the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR that-
- Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.
56. The Respondent in support of the allegation of interfering with the security logs produced a screenshot of the analysis of security Audit Log which showed the user debugging the system was IMUOKA. There was no investigation report produced before this court to ascertain if the Claimant was the said user despite denying that it was not his account. The Claimant alleged that his username was IMUOKA. The Claimant did not as well tender any evidence to show that the user IMUOKA was not his. The court therefore wonders what a coincidence of names yet the Claimant claimed to have accessed the system while addressing some client's taxation issues but his supervisor was logged out.
57. The court notes that even though the Claimant was arrested and no charges were preferred against him. Criminal proceedings are however different from employer's internal disciplinary proceedings and failure or omission to mount criminal charges does not bar an employer from taking out disciplinary action against an employee on the same facts.
58. The court notes that so long as the employer had reasons they reasonably believed to have existed at the time of termination and which caused them to terminate an employee then the court would not interfere. In the case of *Bamburi Cement Limited vs. William Kilonzi* [2016] eKLR this Court expressed itself on the nature of proof required as follows:
- “The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds....”
59. In addition, in the case of *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] KECA 300 (KLR) the court had this to say:-
- It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.
60. The threshold for such a scenario is the court asking itself what any reasonable employer would have done faced with similar issue. The explanation by the claimant that he once logged into the system to query some tax issues was countered by other ICT staff members at the disciplinary hearing who also stated that debugging of security logs was unacceptable.
61. The court also notes that the system was interfered with, debugged and the Respondent's witness confirmed that the Respondent lost a huge amount of money. The screenshot shared showed the system debugged by the IMUOKA. This was not by coincidence. The Claimant should have tendered evidence that this was not his user name for the court to believe in his innocence.



62. The Claimant's assertion that there was no evidence of the charges is not sufficient to this court as he confirmed during hearing that he was aware of the charges and he responded to them. In the circumstances the Respondent did what any other reasonable employer would do to protect its business upon such suspicion of grievous activities. The Respondent believed those actions to have existed which caused it terminate the Claimant hence the Respondent had valid reasons for the termination. At the end of the day trust was broken and once trust is broken then the relationship between parties became sour.
63. Regarding procedural fairness section 41 of the Act provides for notification and hearing before termination on grounds of misconduct which provides that the employee to be explained the reason for termination in language he understands and consider the representations by such an employee who should have an employee of his choice.
64. The Respondent has maintained that they dismissed the Claimant on grounds of interfering with security logs and they gave the Claimant a fair hearing. The Claimant's actions were in violation of the Respondents HRM policies and procedures and the employment contract which amounted to gross misconduct resulting to summary dismissal. The Respondent did not summarily dismiss the Claimant but gave him a chance to be heard.
65. The Respondent has also produced suspension letters given to the Claimant while investigations were going on, an invitation to disciplinary hearing dated 25th November, 2019 and minutes of disciplinary hearing of 28th November, 2019.
66. Whereas the time between the invitation and hearing was three days this court appreciates that the Claimant was all aware of the charges from the time he was suspended on 5th November, 2019. In *Kiilu v Isinya Resorts Limited (Cause E022 of 2021) [2022] KEELRC 13240 (KLR)* it was held that;

An employee is entitled to be given adequate notice to respond to a show cause letter and adequate notice to attend a disciplinary hearing/meeting. Minutes of a disciplinary meeting must be clear on the issues discussed thereat, and must clearly indicate whether the employee was given an opportunity to be heard, and what representation the employee and his fellow employee or union official made.

Issues to be discussed at a disciplinary hearing must be the same as in the show cause letter.

67. Whereas it is a requirement that the employer should give the employee a show cause letter outlining the charges as was held in *Vicky Kemunto Ocharo v Independent Policing Oversight Authority [2018] eKLR* that: -
- The formal disciplinary procedure starts with a "show-cause letter". The employee will be informed in writing by the supervisor of the nature of the complaint allegation. The employee will be required to submit his response within twenty one (21) days.
68. The court notes that even though the Respondent did not issue the Claimant with a show cause letter the charges were all well-known by the Claimant as the same remained the same in the suspension letter and invitation to the disciplinary hearing. He also attended the disciplinary hearing and defended himself on the same charges. Despite being notified that he should attend with another employee of the Respondent of his choice he opted not to.
69. This court takes the view that omission to issue a show cause letter ought not cause a whole process of disciplinary procedure to be illegal so long as the employer tried their best to give the employee a chance for a fair hearing besides as observed above, the claimant was all along aware of the allegations



against him. This was emphasized by the court in the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR that: -

Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

70. The Claimant was heard and a decision to terminate him reached. He was given a chance to appeal the termination verdict but he did not appeal the same. To this court the Respondent did just like any other reasonable employer would do in the circumstances.
71. In conclusion this court finds that the Claimant's termination was justified both substantively and procedurally.
Whether the Claimant is entitled to the reliefs sought.
72. It is not in dispute that the Claimant was paid his terminal dues after termination. He accepted that he was paid and the only prayer before court was compensation for unfair termination. Having established that the Claimant was fairly terminated the same prayer for compensation fails apart from him being issued with a certificate of service as per section 51 of the Act.
73. In conclusion the Claimant's claim is found without merit and is hereby dismissed with costs. The Respondent will however issue the claimant with a certificate of service.
74. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2025

DELIVERED VIRTUALLY THIS 8TH DAY OF OCTOBER, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

