



**Ochieng v G4S Kenya Limited (Appeal E068 of 2024)
[2025] KEELRC 2747 (KLR) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2747 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E068 OF 2024
JK GAKERI, J
OCTOBER 8, 2025**

BETWEEN

ARTHUR OONGO OCHIENG APPELLANT

AND

G4S KENYA LIMITED RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. V. Adhiambo delivered on 23rd October, 2024 in Kisumu MCELRC No. E034 of 2024, Arthur Oongo Ochieng V G4S Kenya Ltd.
2. The brief facts of the case are that the appellant was employed by the respondent from 1st July, 2008 to 16th January, 2023 when his employment was terminated. At the time, the appellant was a courier driver at the Kisumu Branch.
3. The respondent alleged that the claimant had made a racist remark to a client on 16th December, 2022.
4. The appellant acknowledged that a client on route D4 called him incessantly about the delivery of his parcel, which he did and apologised for the delay.
5. According to the appellant, the respondent had no reason to terminate his employment as neither the client confirmed the alleged racist remark nor was evidence of the alleged remark adduced and the appellant had a clean track record as an employee.
6. According to the respondent its Regional Manager for the Western Region received a complaint from a client on 16th December, 2022 and investigation revealed that the offensive words had been uttered by the appellant during an argument with the client.
7. After considering the respective cases urged by the parties and submissions by counsel, the trial court found that the appellant had not proved his case on a balance of probabilities and dismissed the same with costs to the respondent.



8. This is the judgment appealed against.
9. The trial court is faulted for having:
 1. Ignored and/or misapprehended the totality of the appellant's defence, pleadings and evidence.
 2. Ignored or misapprehended the totality of the circumstances of the appellant's case that there was no sufficient evidence to justify the summary dismissal.
 3. Misapprehended the facts of the case and making declarations of fact neither pleaded, alleged or proved.
 4. Erred in law and fact by upholding termination of the appellant's employment.
 5. Taken into account extraneous matters and failing to take account relevant matters.
 6. Misapprehended the applicable laws and principles thereby reaching wrong conclusions on the termination of the appellant's employment.
 7. Failed to consider that no valid or lawful reason for termination of employment had been disclosed.
 8. Erred in law and fact by not finding that the appellant was entitled to the reliefs sought.
10. In a nutshell, the appellant is challenging the trial court's appreciation and application of the evidence before it and the law.

Appellant's submissions

11. As to whether the respondent had a valid and fair reason to terminate the appellant's employment, counsel for the appellant cited the provisions of Section 45(2) of the *Employment Act* to urge that the respondent did not investigate the allegation as to whether the alleged utterances were racial/ethnically offensive and the client's complaint was not adduced as evidence and none was served on the appellant including the Investigation Report.
12. Reliance was placed on the decision in *Ojwang V Kenya Power & Lighting Co. Ltd* [2025] KEELRC 2068 (KLR), *Gombe V Agricultural Finance Corporation* [2023] KEELRC 2449 (KLR), to urge that non-availability of evidence impaired the appellant's right to a fair trial.
13. The decision in *Josephine M. Ndung'u & Others V Plan International Inc* [2019] eKLR was cited to submit that all the employee was required to prove was a prima facie case of an unfair or unlawful termination of employment for the burden of proof to shift to the employer.
14. That none of the respondent's witnesses was aware of the phrase used by the appellant including the investigator and the phrase used by the appellant was not racial and Mr. Baraza did not testify.
15. Reliance was also placed on *Hosea Akunga Ombwori V Bidco Oil Refineries Ltd* [2017] eKLR and *Mwai V Bollore Transport & Logistic (K) Ltd* [2024] KEELRC (KLR) to urge that the alleged racial remark by the appellant was not proved.
16. As to whether the dismissal met the threshold, reliance was placed on the Court of Appeal decision in *Pius Machafu Isindu V Lavington Security Guards* [2017] eKLR to submit that the provisions of Section 41 of the *Employment Act* were mandatory.



17. Counsel submitted that the fact that the appellant was expected to respond to the notice to show cause by the end of the day was too short and unreasonable.
18. According to counsel, while the notice to show cause had only one charge, the hearing elicited 3 charges namely, contravention of company values, use of racial/ethnic language and failure to report an incident.
19. Reliance was placed on the sentiments of the court in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and *National Bank of Kenya V Samuel Nguru Mutonya* [2019] eKLR as decisions the court should consider in finding that a termination of employment was unfair and unlawful.
20. That the appellant admitted that his statement was unprofessional.

Respondent's submissions

21. As to whether the respondent had a justifiable reason to terminate the appellant's employment, counsel relied on the provisions of Section 43(2) and 45(2)(b)(1) of the *Employment Act* as well as the Court of Appeal decision in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others* [2019] eKLR, to urge that the burden of proof was on a balance of probability that the employer had reasonable basis to genuinely believe that it had a reason to terminate the employee's employment.
22. Reliance was also placed on the sentiments of the court in *Robert Kenga & another v Ocean Sports Resort* [2015] eKLR on the subjectivity of the test under Section 43(2) of the *Employment Act* as well as those in *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* [2013] eKLR, *Joseph Onyango Aseve V Brookside Dairy Ltd* [2016] eKLR and *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* [2014] eKLR, to urge that the respondent accorded the appellant procedural fairness and none of the reliefs sought was merited.

Analysis

23. The basic facts of the case are largely uncontested. The appellant is contesting the findings of the trial court based on the facts before it and the relevant principles of law. Analogous to the suit before the trial court, the instant appeal turns on the congruency evidence on record.
24. This being a first appeal, it is incumbent upon the court to re-consider, re-evaluate and reanalyse the evidence on record and arrive at its own conclusions as to whether the appeal is merited or not bearing in mind that it did not see or hear witness and thus make due allowance as held in *Selle & another V Associated Motor Boat Co. Ltd* [1968] EA 123, as well as *Peters V Sunday Post* [1958] EA 424, *Gitobu Imanyara & 2 others V Attorney General* [2016] eKLR and *Kenya Ports Authority V Kutson (Kenya) Ltd* [2009] 2 EA 212 among others.
25. It is common ground that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason to terminate the employee's employment and conducted the termination in accordance with a fair procedure.
26. Simply put, there must have been a substantive justification and procedural fairness, as held in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR and *Walter Ogal Anuro V Lavington Security Guards Ltd* (supra).
27. The 1st issue for determination is whether the trial court misapprehended the evidence before it as regards the reason for termination of the appellant's employment.



28. The trial court reasoned that the words the appellant allegedly uttered to a client on phone were not only unprofessional, a fact the appellant admitted on cross-examination, but additionally violated the provisions of the Respondent's Code of Conduct and Ethics for being racial/ethnically offensive and the respondent had a justification to dismiss the appellant in the manner it did.
29. The notice to show cause dated 17th December, 2022, accused the appellant of having told a client that "he should go back to India" contrary to the respondent's values. The appellant received the letter on the same day and a response was required by "the end of day today" but tendered no evidence of a response.
30. The letter of termination of employment was unambiguous that the summary dismissal was occasioned by the use of racial/ethnic offensive language towards a client contrary to the Respondent's Code of Conduct.
31. It is the respondent's case that after the complaint was made by the alleged client, whom the appellant acknowledged having had an argument with earlier, it investigated the matter and the appellant recorded a statement on the incident.
32. The respondent's investigation report dated 30th December, 2022 identified the complainant as "Ima Distributors" whose management met the respondent's and Mr. Dipen had narrated his experience in the hands of the appellant which culminated in the remark which the investigator found to have been established.
33. The appellant admitted having dealt with Mr. Dipen of Ima Distributors who was following up a parcel for delivery. From his statement to the investigator, it is discernible that the appellant was incensed by the incessant calls from Mr. Dipen and argued with him before making the unpalatable remark to the client, which was uncalled for.
34. It is unclear to the court why the appellant made reference to India as he appear to have been certain that Mr. Dipen was of Indian decent without regard to whether he was indeed Kenyan.
35. Instructively, in his statement, the appellant apologised for the offence and promised not to repeat the same. Clearly, the appellant was aware that his remarks to the client was disconcerting and patently unwelcome and admitted in court that it was not professional.
36. Was the appellant's remark towards Mr. Dipen a proportionate response to Mr. Dipen's statement that he would lock up the appellant in his shop? The court is not so persuaded.
37. The foregoing explains the appellant's assertion that he went overboard.
38. Since the appellant was serving the respondent as a courier, which included contact with clients or their agents or representatives, he by the remark in question exposed himself as not being customer centred to the detriment of the respondent's business.
39. Needless to underscore, in the service industry, argument with a customer in frowned upon, let alone the making of unpalatable remarks to a customer. This is underpinned on the mantra that the "customer is king" or "paramount" or "sovereign".



40. As submitted by the respondent's counsel, the test under the provisions of Section 45(2) of the Employment Act is partly subjective as held by the Court of Appeal in *Kenya Revenue Authority V Reuwel Waithaka Gatahi & 2 others* (supra) as follows:

The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons that "it genuinely believed to exist" causing it to terminate the employee's services.

That is a partly subjective test"

41. See also *Bamburi Cement Ltd V William Kilonzi* [2016] eKLR and *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR as well as the *Halbury's Laws of England* 4th Edition, Vol. 16(1B) para 642 on the "range of reasonable responses test" which offers essential guidelines in adjudicating issues on whether an employer had a valid and fair reason or justification to terminate an employee's employment.
42. Flowing from the foregoing, it is discernible that analogous to the learned trial magistrate, the court is satisfied that the respondent demonstrated that the appellant's remarks towards Mr. Dipen were of a racial/ethnic character and thus contrary to the respondent's Code of Conduct and Ethics and qualified as gross misconduct under Section 44 of the Employment Act and was a substantive justification for the appellant's summary dismissal.
- The court is in agreement with the findings of the trial court on this issue.
43. On procedural fairness, the trial court relied on the provisions of Section 41 of the Employment Act to find that the procedure employed by the respondent was consistent with the law and the summary dismissal was procedurally fair.
44. The appellant faulted the findings of the trial court on the grounds that: the appellant was accorded insufficient time to respond to the notice to show cause, and the respondent did not avail any evidence including the investigation report, thus undermining the appellant's right to a fair trial.
45. Evidently, the trial court did not interrogate the import of these two procedural flaws.
46. It behoves this court to determine whether the foregoing reasons are sufficient to persuade the court to arrive at a conclusion or finding different from that of the trial court.
47. It is not in contest that respondent issued the appellant with a notice to show cause dated 17th December, 2022 and was accorded a few hours to respond.
48. It is trite law that a person against whom allegations have been made is entitled to particulars of the allegations he/she has to confront and sufficient time to respond to the allegations. Response to the notice to show cause is critical in determining the next course of action against the person as it could bring the proceedings to an end if the accuser is satisfied that the allegations have been explained satisfactorily or push the disciplinary process to the next stage.
49. In *Lucy Serem V Tourism Regulatory Authority & 3 others* [2023] KEELRC 429, the court declined to interfere with internal disciplinary proceedings on account the Petitioner had inter alia not responded to the notice to show cause before filing the suit.

See also *Tire World Ltd V Beryl Agatha Jarra* [2023] KEELRC 2031 (KLR).



50. From the foregoing, it is the finding of the court that the respondent's refusal to accord the appellant sufficient time to respond to the notice to show cause impaired his constitutional right to fair trial and vitiated the procedure employed by the respondent.
51. Relatedly, the respondent, as adverted to elsewhere in this judgment did not furnish the appellant with any evidence and more specifically, the investigation report, which contained his statement and those of other persons who had been interviewed by the investigator, and which the respondent relied upon as it bore the same date as the invitation to the notice to the disciplinary hearing slated for 10th January, 2023.
52. Strangely, the invitation notice made reference to neither the unsatisfactory nature of the appellant's response to the notice to show cause nor his refusal to respond to the notice and was arguably founded on the investigation report which recommended disciplinary action against the appellant.
53. Availment of a copy of the investigation report to the appellant would have facilitated in the preparation of an effective defence against the allegations he faced. He may have requested the production of Peter Baraza Co. No. 48478 or Stella Marube Co. No. 36996 or both as witnesses for cross-examination during the hearing. He may also have seen the need to have a witness or union representative, if any.
54. In a nutshell, the respondent's refusal to furnish the appellant with a copy of the investigation report undermined his ability to launch a formidable defense and violated his right to fair trial. The omission constituted a critical procedural flaw by the respondent and vitiated the entire disciplinary process.
55. See in this regard, *OI Pejeta Ranching Co. Ltd V David Wanjau Muhoro* [2017] KECA 329 (KLR), *Regent Management Ltd V Fred Ojiambo Oundo* [2018] eKLR and *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR.
56. It is immaterial whether the appellant requested for the report or not. The fact that it was not availed vitiated the process.
57. From the foregoing, it is the finding and holding of the court that termination of the appellant's employment by the respondent was procedurally flawed and thus unfair within the meaning of Section 45 of the *Employment Act*.
58. Having found and held as above, the court is satisfied that there is need to interfere with the exercise of discretion by the trial court as held in *Mbogo & another V Shah* [1968] EA 93 and *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* [2003] KLR 125.
59. In *Flyer Investment Ltd V Commissioner of Domestic Taxes & another* [2018] KECA 341 (KLR) the Court of Appeal stated:

As a general principle, this Court will not interfere with such discretion, save on narrow principles which are well settled. They were summarized by Madan, J.A in *United India Insurance Co Ltd & 2 Others V East African Underwriters (Kenya) Ltd* [1985] KLR 898 thus:

- "(a) The Judge misdirected himself on law; or
- (b) That he misapprehended the facts; or
- (c) That he took into account of considerations of which he should not have taken account; or



- (d) That he failed to take into account of considerations which he should have taken account of; or
- (e) That his decision, albeit discretionary one, was plainly wrong”.

- 60. In the instant case, the court is satisfied that the learned trial magistrate failed to take account of the fact that the respondent accorded the appellant a few hours to respond to the notice to show cause and most importantly, the fact that the respondent did not share the investigation report dated 30th December, 2022 with the appellant to enable him prepare for the disciplinary hearing.
- 61. Consequently, the appellant is entitled to reliefs for the unfair termination of his employment by the respondent such as declaration that termination of his employment was unfair for want of procedural propriety and compensation under the provisions of Section 49(1)(c) of the *Employment Act*.
- 62. The court notes that the appellant was an employee of the respondent for about 14 years and 5 months which is reasonably long, had no recorded warning or disciplinary proceedings, appealed the respondent’s decision to terminate his employment expressing his wish to resume duty but substantially contributed to the summary dismissal. The equivalent of two (2) months gross salary is fair.
- 63. A copy of the payslip for December 2022 reveals that the appellant’s salary was Kshs.29,463.35 which translates to Kshs.58,926.7.
- 64. The provisions of the *Employment Act* do not provide for a remedy in damages for loss of earnings in termination of employment. The claim lacks a legal basis and it is dismissed.
- 65. Similarly, the appellant did not adduce any evidence to demonstrate that he was discriminated by the respondent.
- 66. The mantra that he who alleges must discharge the burden of proof disentitles the appellant of any relief for the alleged discrimination. Issuance of a certificate of service by the employer is a legal imperative as the trial court ordered.
- 67. Finally, since the appellant was summarily dismissed vide letter dated, 16th January, 2023 salary in lieu of notice was not payable by dint of the provisions of Section 44(1) of the *Employment Act*.
- 68. In the upshot, the appeal is allowed and the decision of the trial court is set aside. The orders that commend themselves are:
 - i. Declaration that termination of the appellant’s employment by the respondent was unfair.
 - ii. Equivalent of two months gross salary, Kshs.58,926.70.
 - iii. Costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 8TH DAY OF OCTOBER, 2025.

DR. JACOB GAKERI

JUDGE

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 *Civil 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.

