



**Barasa v Weson Investment Limited t/a Shell Radiant Service Station (Employment and Labour Relations Cause E100 of 2024) [2025] KEMC 26 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEMC 26 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E100 OF 2024  
PA NDEGE, SPM  
MARCH 4, 2025**

**IN THE MATTER OF UNFAIR AND UNLAWFUL TERMINATION OF  
EMPLOYMENT UNDER THE EMPLOYMENT ACT NO. 11 OF 2007 LAWS OF KENYA**

**BETWEEN**

**CHRISTOPHER SIMIYU BARASA ..... CLAIMANT**

**AND**

**WESON INVESTMENT LIMITED T/A SHELL RADIANT SERVICE  
STATION ..... RESPONDENT**

**JUDGMENT**

1. This is a claim for unfair and unlawful termination. The claim stems from the summary dismissal of the claimant, Christopher Simiyu Barasa, on 26/05/2023, following an incident that is alleged to have occurred on the 09/05/2023, where there was a shortage of 3,208 liters of petrol. At the time of the dismissal, the Claimant was working for the Respondent, Weson Investment Ltd T/a Shell Radiant Service Station, serving as a service attendant, earning a salary of Kshs. 18,900/- per month. The Claimant filed this claim vide a Memorandum of Claim dated 16/05/2024, wherein he is seeking inter alia: -
  - i. A declaration that the summary dismissal of the Claimant was indeed wrongful, unlawful and grossly unfair termination.
  - ii. Damages for unlawful and unfair termination of employment equivalent to 12 months, dues/ salaries unpaid, housing allowance not paid over 150 months, leave days not taken, monthly contribution savings and 1 month's salary in lieu of notice to the tune of Kshs. 4,596,657.81,
  - iii. Interest on the above amount at court rates till payment in full,
  - iv. Certificate of service,



- v. Costs of this suit,
  - vi. Interests on (ii) above.
2. It is the Claimant's case that he has always discharged his duties with diligence and has never received any warning nor suffered any form of disciplinary measure from his employer. That having worked for over 13 years with utmost loyalty and discipline, he was surprised when he was summarily dismissed after allegations of loss of fuel yet no solid reasons were put forth and as such the dismissal is to be considered wrongful and unfair termination. That the company instead of instituting investigations on the matter, caused his arrest and detention at Nakuru Central Police Station, until he secured his release on 11/05/2023 through a cash bail. That the investigating officer commenced investigations as from 10.05.2023 until 30.06.2023 when they established that there were no grounds to sustain a charge and thus no charges were pressed against him. That he was thus summarily dismissed on 23/05/2023, while the investigations were still ongoing. That he was made to work as per the work demands which often ran into the wee hours of the night and contrary to the 40-45 hours per week stipulated by the law. That his salary was not increased as per the terms of the engagement. Further that he was required to work from 7.30 am to 9.00pm on weekdays, weekends and public holidays without any compensation for overtime. That additionally, he was never granted leave in the entire period he worked for the Respondent and neither was he ever compensated. That he therefore worked 7 days per week without any rest day. That the manner in which he was terminated from employment constituted a breach of the provisions of Article 41 of *the Constitution* of Kenya, 2010 and the *Employment Act*, 2007. He pleaded the particulars of the Unfair Labor Practices he complains about in Paragraph 15 of the Memorandum of Claim as follows: -
- i. Underpaying the Claimant contrary to the provisions of the Regulation of Wages (General) (Amendment) Order, 2022
  - ii. Refusing to pay the Claimant for the additional roles undertaken
  - iii. Refusing to issue and later issuing the Claimant belatedly with an employment contract dated 1<sup>st</sup> January, 2014
  - iv. Refusing to assess and revise the Claimant's starting salary
  - v. Subjecting the Claimant to inhumane working conditions including working overtime and on public holidays without any compensation
  - vi. Refusing to grant the Claimant leave days and refusing to compensate the Claimant in lieu of leave
  - vii. Prior to termination of the Claimant's contract of employment, he was not subjected to any disciplinary proceedings nor given any reasons for the termination,
  - viii. The respondent failed to issue the Claimant with a notice of termination as required by law
  - ix. The Claimant's termination was unfair and unlawful since no explanation for the decision to terminate him was given to him, nor did his actions warrant such termination
  - x. The Claimant was subjected to a 7-day shift of 84 hours of work with no compensation for the same.
  - xi. The Respondent has failed to observe the termination notice period stipulated by the law when they terminated the Claimant but instead he was unfairly terminated.



3. There was Response to the Memorandum of Claim dated 26/06/2024, wherein the Respondent insisted that the Claimant herein was involved in the loss of 3208 liters of petrol. That it held a disciplinary hearing meeting with the Claimant and in the presence of the Executive Director, manager and another employee – Victor Odhiambo, at its company on 10/05/2023 where he was afforded an opportunity to respond to the issue of the missing liters of petrol. That during the meeting, review of the pre-discharge and offloading sequence checklist showed that no dips were taken after offloading to establish the quantity offloaded, contrary to offloading procedures. That the salary earned by the Claimant was above the minimum wage requirements pursuant to the Regulation of Wages (General) (Amendment) Order, 2022 and as such, there was no case of underpayments as alleged. That it has cleared all the dues owed to the Claimant herein and the Claimant is therefore not entitled to any of the reliefs sought.
4. During the hearing, the Claimant testified as his sole witness, while the Respondent called its Executive Director, RW1, Titus Wesonga Lusaka. Both relied on, and adopted, their respective statements filed herein as their evidence-in-chief.
5. The Claimant in his evidence-in-chief (CW1), denied being involved in the loss or theft of the fuel. That his role did not even include offloading of fuel. That he was dismissed together with the supervisor and the manager, but that the manager was later reinstated. He denied ever going for leave during the period of his employment.
6. In cross-examination he stated that they used to work in 2 shifts. That each shift lasted from 6.00am to 6.30pm. That he used to work for 7 days a week. He confirmed that he was called to explain for the loss of the fuel.
7. RW1, Titus Wesonga Lusaka, stated that CCTV recordings were reviewed which showed one of the employees – Victor Odhiambo, storing 2 metal pails of fuel in the offloading chamber box. That during the meeting, Victor Odhiambo stated that he had drawn the fuel from the truck to assist his colleague, the Claimant herein. That the CCTV recording at around 8.15 pm further showed the Claimant removing one of the pails full of fuel from the offloading chamber and giving it to an unknown person. That as a result of the disciplinary meeting, which was held on 10/05/2023, he decided to report the matter to the police as it was apparent that the Claimant and his colleague were involved in the fuel loss. That the matter was reported under OB 91/10/05/2023 at 4.48 pm vide OB Extract which was produced herein as REXH. NO. 2. That it was further decided that the Respondent terminates the Claimant's employment summarily in accordance with the provisions of section 44(4)(g) of the *Employment Act*, via a letter dated 26/05/2023 setting out clear reasons for the termination. The letter was produced as REXH NO. 9. That the procedure leading to the summary dismissal was regular and lawful in the circumstance. That the only pending dues owed to the Claimant are his voluntary savings to which he was notified to avail himself to receive the same. He stated that the shifts used to work from 8.00am to 3.30 pm and from 3.30pm to 10.00pm and again from 6.00am to 8.00am. That the Claimant was also entitled to 1 off day every week. That the Claimant signed attendance sheet at the end of each month, confirming the attendance for the whole month.
8. In cross-examination he confirmed that the Claimant was being paid a consolidated salary of Kshs. 18,900/= at the time of his dismissal. He also confirmed that the Claimant was serving as a pump attendant and that his role did not include offloading of fuel. That he conducted disciplinary proceedings which included a verbal show-cause to the Claimant.
9. At the close of hearing, the counsel for both parties herein filed and, I do believe, exchanged their written submissions. Learned counsel for the claimant submitted that no valid reason for dismissal was presented before this court. That further, there is no evidence that the Claimant was accorded a fair



hearing and invited this Court to find that the dismissal of the Claimant was unfair and unjustified and declare so as provided for under Section 45(2) of the *Employment Act* 2007, and award the prayers sought.

10. For the Respondent, it was submitted that there are justifiable grounds for summary dismissal of the Claimant herein. That lawful procedure of terminating the Claimant was fully adhered to and thus the termination was fair, legal and procedural in the circumstances. That the Respondent had already incurred losses through the Claimant's acts of theft. That the Respondent upon investigating the matter and allowing the Claimant to respond made a reasonable decision in the circumstances to terminate the Claimant summarily, following due procedure. It was therefore submitted that the Claimant's claim be dismissed with costs to the Respondent.

### **Analysis and Determination**

11. I have carefully considered the pleadings, the evidence by the parties, and the submissions led by their Counsels, and the following issues emerge for determination: -
  - a. Was the Claimant's summary dismissal from employment unfair? And;
  - b. Is the Claimant entitled to the reliefs sought?

### **Was the Claimant's summary dismissal from employment unfair?**

12. Called upon to interrogate whether or not a summary dismissal of an employee was fair, as this Court has been, the Court must consider two statutory aspects, procedural fairness and substantive justification. As stated by Justice Ocharo-Kebira in *Abong v Safaricom Limited (Employment and Labor Relations Cause 419 of 2018) [2024] KEELRC 2656 (KLR) (31 October 2024) (Judgment)*, these two aspects were never in the pre-2007, employment and labor relations regime. The new regime however aims at ensuring employment security for employees. Employment security properly understood refers to the existence of explicit or implicit rules and provisions putting a leash on the ability of the employer to terminate employees' employment at will<sup>1</sup>.
13. The *Employment Act* expressly prohibits unfair termination of employees' employment and provides what in the eyes of the law amounts to fair termination. Section 45 (1) and (2) of the *Employment Act* 2007 provide that:
  - (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason— (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.
14. Inarguably, for a termination of an employee's employment to pass the fairness test, it must be demonstrated that the same was for cause, premised on a valid and fair reason[s], and arrived with regard to procedural fairness. Addressing this, the Employment and Labor Relations Court in the case of *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR* held that:

<sup>1</sup> See *Abong v Safaricom Limited (supra)*



.... For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.

15. Section 41 of the *Employment Act*, 2007 sets out a mandatory procedure that must be followed by the employer contemplating terminating an employee's employment or summarily dismissing an employee from employment. The ingredients for due process are: Notification- the employer must inform the employee that they intend to take action against him or her and the reason[s] the basis thereof; the hearing – the employer must afford the employee affected an adequate opportunity to make representations on the reasons. Interwoven with this right is the right of accompaniment. The employee should be allowed to be accompanied by a colleague of choice, or a trade union representative where applicable to the hearing. Lastly, the consideration- the employer has to consider the representations by the employee before making a final decision. See also, Pius Macha Isunde vs-Lavington Security Guards Limited [2017] eKLR.
16. Perhaps one of the most common criminal offences committed by employees is theft and fraud. This may often involve misappropriation of company funds, embezzlement, or manipulation of financial records for personal gain. When criminal offences do occur at the workplace, it is recommended that employers report them to the relevant legal authorities and it has been proved herein that the loss of the fuel herein was duly reported to the police.
17. Section 41 of the *Employment Act*, 2007 also provides for the process of termination where there are grounds of misconduct by the Employee. In *Machanga Mwachanya vs Operation 680 Limited* [2013] eKLR, Radido, J. summarized the principles in section 41 as follows;
  - a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
  - b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation.
  - c) That the employer has heard and considered any explanations by the employee or their representative;
  - d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.
18. It is now trite law that the procedure provided for under section 41 of the Act is mandatory and must be followed by employers even in instances where an employee is accused or suspected of committing a criminal offence i.e. stealing.
19. In the case of *Fredrick Saundu Amolo suing through the Executive Secretary KUPPET Kajiado County Branch –V- Principal Namanga Mixed Day Secondary School & 2 Others* (2014) eKLR Mbaru, J. observed as follows;

..... First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a prima-facie case, Secondly, there is some objectively justifiable reason to deny the employee access to the work place based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict.



20. Based on the case above, the general steps that employers may take include conducting a preliminary investigation into the alleged criminal offence. This process may involve gathering evidence, interviewing relevant parties, consulting and reporting to law enforcement authorities where necessary. This process was done to my satisfaction.
21. Once preliminary investigations have been carried out and there are reasonable grounds to believe that an employee has committed a criminal offence, the Employer will be required to give the employee written notice of the alleged offence and outline any steps the Employer intends to take. I find no evidence tendered herein that this notice was made.
22. Depending on the severity of the allegations, the Employer may consider suspending the employee with full pay to conduct further investigation. The suspension period must be objective and enforced in order to protect the integrity of investigations and ensure a fair process. The Claimant herein was nether suspended, nor interdicted.
23. On conclusion of all relevant investigation, an employer will be required to issue the employee with a notice to attend the disciplinary hearing. The notice should indicate the time and place of the hearing and give the employee an opportunity to submit their written response. In addition, the employee should be provided with any reports/or supporting evidence which may have been discovered during investigations. This is to give the employee an opportunity to prepare their response and call in either a fellow employee or a representative in support of their case. I find no evidence of a disciplinary hearing having been conducted herein.
24. After the employer has reviewed all the evidence and has heard and considered any explanations by the employee or their representative, they can then proceed to make an informed decision on whether to terminate the employee. Where the employer opts to proceed with termination, he/she must ensure that such decision and the reasons for termination have been communicated and explained to the employee in a language the employee understands.
25. So the question herein is whether the Respondent complied with these cannons of procedural fairness in dismissing the Claimant from employment. I fear not duly. Whereas there is an indication that an impromptu meeting was held soon after the discovery of the loss of the fuel, in which some preliminary investigations were done, I do believe that that meeting does not qualify to be a disciplinary meeting. Firstly, no show-cause letter was issued to the Claimant and neither was he invited for a disciplinary meeting. He was thus not informed in time of the allegations against him and afforded sufficient time to prepare his responses. Secondly, he was not accorded an opportunity to attend a disciplinary meeting accompanied by at least a colleague of choice. Thus the meeting that was held by RW1 soon after the discovery of the loss, does not qualify to be called a disciplinary meeting. It was at best a preliminary inquiry and not a disciplinary meeting as it lacks all the facets of fairness i.e. notice, opportunity to prepare and make a defence, and accompaniment by a colleague of choice. By reason of the foregoing, I hold that the summary dismissal against the Claimant was procedurally unfair.
26. I now turn to consider whether the Summary dismissal was fair. Section 44 of the [Employment Act 2007](#) stipulates when summary dismissal can occur:

44. Summary dismissal

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



- (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
- (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
27. What happened in the circumstances of this matter was a summary dismissal against the Claimant. However, whether or not the conduct of the Claimant was one that fundamentally breached his obligations arising under the contract, I shall delve into, shortly hereinafter.
28. Section 43 of the *Employment Act* places an obligation upon the employer to prove the reason[s] for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45 of the Act.
29. Section 44[4] of the Act, provides actions and inactions of an employee that may amount to gross misconduct to justify the sanction of a summary dismissal. However, it is pertinent to note that the list is not exhaustive. An employer can summarily dismiss an employee on a ground outside those in the catalogue for as long as the ground has the characteristics such as I will demonstrate shortly.
30. The Claimant was dismissed on suspicion of having participated in theft at the Respondent's premises. The Respondent reported to the police station via REXH. NO. 2. The extract does not however confirm whether the Claimant herein was suspected or not. The CCTV footage that is alleged to have shown the Claimant herein while stealing the fuel has also not been availed or produced herein. Those notwithstanding, I do find that the Respondent must have had reasons to suspect the Claimant as it did. The Claimant was actually arrested but not charged. The Claimant therefore was not a paragon of virtue as he asserts and could have been dismissed as he was. The law provides under Section 43 of the *Employment Act* that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45(2). The Section provides further that 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. There were no doubt reasons for dismissal it is only that the Claimant was not accorded the requisite procedural fairness.
31. To summarise, this first line of case law establishes that the question of dishonesty provides just cause for dismissal, for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, Courts have held that factors such as the nature and degree of the misconduct, and whether it violated the essential conditions of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.
32. I have considered the circumstances in this matter, including but not limited to the industry in which the Claimant was working, the position in which he was working within the Respondent's enterprise, and I find that the dismissal was on valid and fair reasons. Consequently, I hold that the summary dismissal against the Claimant was substantively fair.

### **Whether the Court should grant the prayers sought by the Claimant.**

33. The Claimant sought a compensatory reward under the provisions of section 49[1][c] of the *Employment Act*, 2007. He sought for 12 months' gross salary. Courts have held that an award under



this provision is discretionary. The extent of the award shall always depend on the circumstances of each case. In this case, I have considered that the dismissal was substantively fair, that the award which I will make herein is a result of a single procedural misstep, rendering the dismissal unfair, the conduct of the Claimant, and the general circumstances of the matter, and consequently find that a nominal award of one-half [1/2] of a month's gross salary will serve justice. The salary payable is as submitted by the learned counsel for the Respondent, that is Kshs18,900/- as I find no basis for the claim of underpayment herein.

34. Having found that the summary dismissal of the Claimant was substantively justified and considering the circumstances of the matter, I am not persuaded to hold that he could be entitled to notice pay under section 35 as read together with section 36 of the Act. His claim under this head is declined.
35. Section 31 of the Employment Act bestows upon the employee a right to house allowance, or reasonable accommodation by the employer. Therefore, under the provision, a corresponding duty is created on the employer to either pay house allowance or provide reasonable accommodation where house allowance is not provided. The Claimant contended that despite this statutory right, the Respondent did not at any time pay him a house allowance.
36. Resisting the claim under this head, the Respondent asserted that the salary earned by the Claimant was inclusive of house allowance. I have carefully considered the Employment Contract, CEXH. NO. 2, and note that it does not provide for a house allowance. As such, it is difficult to understand where the Respondent's argument that the Claimant was earning a gross salary, inclusive of house allowance flows from.
37. By reason of the foregoing premise, I hold that the Respondent did not at all material times, discharge its statutory obligation of paying the Claimant a house allowance. He should be compensated for this and I therefore find him entitled to the amount of Kshs. 425,250.00
38. On the claim for unpaid leave, I do find that the Employment Contract stipulated that the Claimant was not entitled to leave and I thus find him entitled to Kshs. 436,973.67 for annual leave days prohibited. I further find him entitled to Kshs. 150,000/- contribution savings as per his pay slip.
39. On unpaid public holidays, I have gone through the Attendance records produced by the Respondent herein REXH. NO. 5. They confirm, on a balance of probabilities that the Claimant worked during public holidays, including May 1<sup>st</sup>, 2023, and I do find that the Claimant is therefore entitled to the payment of Kshs. 249,699.24 as claimed herein. As submitted by the learned counsel for the Respondent, those were the only damages prayed for in the Memorandum of the Claim.
40. In the upshot, Judgment is hereby entered for the Claimant in the following terms: -
  - i. A declaration that the summary dismissal against him was procedurally unfair but substantively justified.
  - ii. Compensation for unfair dismissal pursuant to Section 49[1][c] of the Employment Act, KSHS. 9450.00
  - iii. Compensation for unpaid house allowance, KSHS 425,250.00
  - iv. Annual Leave Prohibited: KSHS. 436,973.24
  - v. Public Holidays: Kshs. 249,699.24.
  - vi. Certificate of Service
  - vii. Interest on the awarded sums above, from the date of this judgment till full payment.



viii. Costs of the suit.

It is so ordered.

**READ, DELIVERED AND SIGNED THIS...04<sup>TH</sup> DAY OF MARCH 2025**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of:

Claimant Counsel: Wanjir

Respondent's Counsel: Chepchirchir

Claimant: N/A

Chepchirchir: Praying for 30 days stay of executions

Wanjir: No objection

CT: 30 days stay granted.

