

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E858 OF 2022**

**RYAN MUGERA**

**BULUKU.....CLAIMANT**  
**T**

**VERSUS**

**SURGE ENERGY LIMITED....**  
**.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed this suit through a Memorandum of Claim dated 23<sup>rd</sup> November, 2022, alleging unlawful/unfair termination and non-payment of terminal dues. He seeks the following reliefs as against the Respondent:
  - i. 1 month salary in lieu of Notice
  - ii. Equivalent of 12 months' salary as compensation for unfair termination
  - iii. Leave days not taken in 5 years
  - iv. A certificate of service
  
2. The Respondent filed a Statement of Response to the Memorandum of Claim dated 8<sup>th</sup> December, 2022, and

subsequent thereto, the Claimant filed a reply to the Statement of Response on 26<sup>th</sup> January, 2023.

3. The matter was first heard on 5<sup>th</sup> July, 2024 before Hon. Justice James Rika. The Claimant testified in support of his case and adopted his witness statement dated 23<sup>rd</sup> November, 2022, and produced his list and bundle of documents of even date as exhibits in the matter and were marked as Claimant's exhibits Nos. 1-5.
4. The Respondent's case was heard on 24<sup>th</sup> April, 2025 when the Respondent's witness Mr. Lee Ngugi testified in support of the Respondent's case. He adopted his witness statement dated 8<sup>th</sup> May, 2022 and produced his list and bundle of documents dated 8<sup>th</sup> December, 2023 as exhibits in the matter and were marked as Respondent's exhibits Nos. 1-14.
5. Both parties filed submissions in the matter.

### **The Claimant's Case**

6. The Claimant's case is that he was permanently employed as a Team Leader-Mechanical Maintenance earning monthly salary of Kshs.109, 347 having been employed as such from the 16<sup>th</sup> March, 2017.
7. The Claimant states that at all times while working for the Respondent, he demonstrated high levels of professionalism, discipline and competence which saw his employment formalized on the 1<sup>st</sup> October, 2020 through

signing of a contract of employment. He avers that the Contract of employment acknowledged the period of his employment at the Respondent company as from the 16<sup>th</sup> March, 2017.

8. The Claimant avers that on 8<sup>th</sup> November, 2021, and under unclear circumstances the Respondent unprocedurally terminated his employment without any prior notice as was required from the Respondent in accordance with the Employment Act No. 11 of 2007.
9. The Claimant further contends that the said termination was improper and based on unfair reasons, since he was not given a chance to be heard through a disciplinary process before his employment was terminated, and that the termination was illegal, ill advised, procedurally unfair and motivated by other extraneous facts and matters not at all concerned with his employment.
10. It is the Claimant's case that the Respondent has since failed, neglected and/or refused to compute and pay him his terminal dues.

### **The Respondent's Case**

11. The Respondent's case is that the Claimant was in their employ as a Team Leader - Mechanical Maintenance pursuant to a Contract of Employment dated 1<sup>st</sup> October 2020. It avers that the Claimant was employed for a period of Two (2) years which was subject to automatic renewal at the discretion of either party to the contract.

12. The Respondent states that the Claimant's personal conduct and demeanour was unprofessional and unbecoming for a person serving in his capacity. It states that the Claimant was arrogant, rude, and brash when addressing other and his superiors, whom he would even shout at, and that he was fussy, irritable, and aggressive when called upon to undertake a task or account for his actions.
13. The Respondent states that the Claimant was generally nonchalant towards his work and his conduct was unsatisfactory, and he would challenge the directives of his superiors or supervisor to the extent of engaging in physical altercations.
14. The Responder avers that the Claimant would at times abscond work or fail to account for his actions, and when confronted, he would occasionally pass blame for his own wrongdoings, inactions and/or failures to other colleagues to evade culpability.
15. It is the Respondent's case that whenever the Claimant requested to be allowed to proceed for his annual leave or sick leave, the Company would approve the leave application.
16. It states that sometime in the month of October 2021, it came to the attention of the Company, that the Claimant had absented himself from duty without permission from

the Human Resource Office or his immediate supervisor. It avers that it was reported that the Claimant had absented himself from work on 8<sup>th</sup> October 2021 without any lawful cause.

17. The Respondent states that the Company was constrained to issue a letter requiring the Claimant to show cause on why he had absented himself from work without any lawful and/or justifiable cause. It states further, that although the Claimant gave a response to the allegations levelled against him, the Company did not find his response satisfactory and it issued him with a formal warning letter.
18. It is the Respondent's case that again in the month of November 2021, specifically 1<sup>st</sup> November, 2021, it came to the attention of the Company, that the Claimant had once again absented himself from duty without permission from the Human Resource Office or his immediate supervisor. It avers that it was also reported that the Claimant had engaged in an unlawful assembly within the Company's premises in open and blatant defiance of the Company's Rules and Policies.
19. The Respondent states that again, a Notice to Show Cause letter dated 3<sup>rd</sup> November 2021 was issued and sent to the Claimant through his email address. It avers that in response to the Notice to Show Cause letter, the Claimant denied the allegations levelled against him vide an email sent on 4<sup>th</sup> November 2021.

20. It is the Respondent's case that after giving due consideration to the Claimant's response to the reasons for contemplating disciplinary proceedings against him, the response was considered unsatisfactory which necessitated a disciplinary hearing, and accordingly, vide a Memorandum dated 6<sup>th</sup> November 2021, the Company constituted a disciplinary panel to hear and determine the Claimant's case on 8<sup>th</sup> November, 2021 pursuant to Section 41(2) of the Employment Act, 2007.
21. It is the Respondent's case that the Claimant was afforded an opportunity to table evidence and defend himself before the Respondent's Disciplinary Panel either through oral or documentary evidence. It states that the Claimant was afforded an opportunity to call employee(s) of his choice to support his representations.
22. The Respondent states that the Claimant failed to honour the summons to present himself for the hearing on 8<sup>th</sup> November 2021 constraining the Respondent's Disciplinary Committee to proceed with the hearing in his absence, and consequently, the Respondent's Disciplinary Committee concluded that the Claimant's actions amounted to gross misconduct as provided for under section 44 of the Employment Act of 2007, and was relieved of his duties and which was done vide a letter dated 8<sup>th</sup> November 2021.

23. It is the Respondent's case that after explaining to the Claimant of the reasons and grounds for his termination, the Company computed his terminal dues, but the Claimant declined to accept the same. It states further that the Claimant was also furnished with a Certificate of Service dated 8<sup>th</sup> November 2021, but he declined to accept.
24. The Respondent states that the dismissal of the Claimant was lawful in all respects and within its contractual mandate as provided for under the Contract of Employment.
25. The Respondent prays that the Claimant's claim be dismissed with costs.

### **The Claimant's Submissions**

26. It is the Claimant's submission that his termination was unfair as the Respondent violated the provisions of the Employment Act, 2007 and the contract of employment signed by both parties.
27. The Claimant submits that 6<sup>th</sup> November, 2021 was on a Saturday, and therefore, the Respondent sent an email to the Claimant on Saturday requiring him to appear before a disciplinary committee on Monday. He submits further that the Respondent violated the rules of natural justice and fair labour practice as the notice was maliciously short.

28. In support of his foregoing assertion, the Claimant sought to rely in ***Sabina Mutua v Amedo Centre Kenya Limited [2017]*** for the holding that: -

***“Ultimately, section 41 and 44 of the Employment Act, 2007 require that where an employee has misconducted herself or grossly misconducted herself, there must be a hearing and at such hearing, there are mandatory safeguards to be guaranteed...***

***.....Procedural justice thus requires that the employee accused of gross misconduct even over matters that warrant summary dismissal be accorded due process. Such an employee must be given notice and allowed a hearing in the presence of a fellow employee of her choice and even where the employee should make representations in defence.”***

29. It is the Claimant’s submission that the Respondent was bound by the provisions of Sections 41 and 44 of the Employment Act, 2007 which demand that even though it thought or felt that the Claimant had misconducted himself, the Respondent was legally required to serve him with an adequate notice for disciplinary hearing. He submits further, that the Respondent was contractually bound to give the Claimant at least 7 days from the date of the email for the memorandum to be deemed to have been properly served.

30. The Claimant submits that the purported Memorandum did not furnish him with the charges that he was facing to enable him prepare accordingly. He placed reliance in the case of ***Frederick Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR*** to buttress this position.
31. It is his submission that the whole process undertaken by the Respondent was a sham, and only aimed at making a predetermined finding and thus the same should be condemned harshly by this Honourable Court.
32. It is his further submission that prior to being served with the summary dismissal letter dated 8<sup>th</sup> November, 2021, he was not informed of the reasons for his termination, but instead, the Respondent only gave him the summary dismissal letter and asked him to sign the same.
33. He submits that the two allegations in the summary dismissal letter were not substantiated. It is his submission that he has proved on a balance of probabilities that the Respondent in terminating his employment blatantly violated the provisions of Section 41, 43, 44(2) and 45 of the Employment Act 2007, hence the impugned termination was procedurally unfair and unlawful.
34. The Claimant finally submits that he is entitled to the reliefs sought.

### **The Respondent's Submissions**

35. It is the Respondent's submission that it has proved on a balance of probabilities that there was substantive justification for instituting the termination process, and was therefore compliant with Section 43 (2) of the employment Act.
36. The Respondent submitted that it is not for the Court to substitute its own 'reasonable grounds' for those of the employer, and further argue that it was able to show that it genuinely believed that by absenting himself from work on 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> days of November 2021, there were reasonable and sufficient grounds to suspect that the Claimant had committed gross misconduct in his employment.
37. It is its submission that it duly complied with the tenets of fair process espoused in the case of ***Postal Corporation of Kenya vs. Andrew K. Tanui [2019] eKLR***. It submits further that the Claimant was adequately furnished with the reasons for which the Respondent was considering action.
38. Citing various precedents from this *court* one being, the case of ***Feroz Ali Omar v ECU Worldwide Limited [2018] eKLR***, the Respondent submitted that the Claimant's case fell on all fours as he squandered the internal grievance handling mechanism provided under the Contract of Employment.

39. The Respondent finally submitted that it has ably demonstrated that it genuinely believed that there were reasonable and sufficient grounds to suspect that the Claimant had committed gross misconduct in his employment and had done acts which were substantially detrimental to Respondent and therefore, his case is without merit and should be dismissed with costs.

### **Analysis and Determination**

40. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues that fall for determination are:-

- i. Whether the Claimant was wrongfully dismissed
- ii. Whether he is deserving of the remedies sought.
- iii. Who bears the costs of the suit?

41. The Claimant's position is that he was permanently employed as a Team Leader-Mechanical Maintenance earning monthly salary of Kshs.109, 347, having been employed as such from the 16<sup>th</sup> March, 2017. On its part, the Respondent contends that the Claimant was employed on contractual basis.

42. Clause 1.2 of the employment contract between the parties herein states: -

***“This appointment is effective 1<sup>st</sup> October 2020 as a renewal of the employment that commenced 16<sup>th</sup> March 2017 and replaces all former employment agreements, whether oral or written...”***

43. The said employment agreement proceeds to provide the term of employment as follows:-

***“This agreement and the employee's employment hereunder is for a period of two (2) years and is subject to an automatic renewal.***

44. By dint of the foregoing, it is clear that the Claimant was on a two-year renewable contract as at his dismissal. The Claimant's assertion that he was permanently employed by the Respondent is therefore unfounded and untrue.

45. This said, it is evident that the Claimant's two year contract commenced on 1<sup>st</sup> October, 2020 and was to lapse on 30<sup>th</sup> September, 2022 if the same was not renewed. The Claimant's case is that he was dismissed - summarily so, on 8<sup>th</sup> November, 2021, within his contract period without prior notice, and hence the issue of whether the dismissal was wrongful.

46. The Employment Act, 2007, demands that an employer shall not terminate the services of an employee unfairly, and by this provision, the Act obligates an employer to initiate various fair procedure mechanisms of discipline in

the work place to ensure fairness. Failure by an employer to adhere to the stringent requirements of the law in respect of a termination/dismissal, amounts to unfair termination/wrongful dismissal.

47. Section 41 of the Employment Act, provides thus on procedural fairness: -

***“41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”***

48. On the show cause notice that resulted in his dismissal, the Claimant was only allowed half a day to respond to the show cause as the same is dated 3<sup>rd</sup> November, 2021 and the response was expected by 4<sup>th</sup> November, 2021. Further, the letter inviting the Claimant to appear before the disciplinary committee was equally short, having been issued just two days to the said hearing, and which days were evidently a weekend. It is also clear that the Claimant was summarily dismissed on the same day of the hearing.

49. In the case of ***Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*** the court had this to say on disciplinary timelines:-

***“This Court held that for a disciplinary process to pass the fairness test set out in Section 41 of the Employment Act, the charges made against the employee must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.***

***38. In handling the Claimant's case, the Respondent failed to avail her adequate time to prepare her defence and for this reason, the Court finds the dismissal unfair for want of due process.”***

50. In the Claimant’s case, the notice period (one-day) was manifestly inadequate, especially since 6<sup>th</sup> November 2021 was a Saturday, giving the Claimant no reasonable time to prepare for the hearing.

51. Further, the Claimant’s employment contract expressly provided for a 7 days’ notice, hence the notice given to the Claimant fell grossly short of that required under his contract of employment.

52. In my considered view, it is evidently clear that the Respondent was simply ticking boxes with full intent to terminate the Claimant's contract.
53. In the premise, I find and hold that the disciplinary process violated Section 41 and Section 44 of the Employment Act, 2007, and which renders the Claimant's dismissal procedurally unfair, and so I hold.
54. On whether the Respondent had valid, fair and justified grounds to dismiss the Claimant, the Respondent's position is that in the month of November 2021, it came to its attention that the Claimant had absented himself from duty without permission from the Human Resource Office or his immediate supervisor, even after being issued with a warning letter for similar reason in October of the same year. It avers that it was also reported that the Claimant had engaged in an unlawful assembly within the Company's premises in open and blatant defiance of the Company's Rules and Policies.
55. The Claimant's position on the reasons forming the basis of his summary dismissal, is that the Memorandum issued to him did not furnish him with the charges that he was facing to enable him prepare accordingly, and further contends that the two allegations in the summary dismissal letter were not substantiated.

56. During the hearing, and even through their submissions, the Respondent told court that the Claimant was technically present at work, but only to participate in the illegal strike. The Respondent maintained that had the Claimant worked on the day, the logs produced would have shown the time he clocked out. The Respondent's witness admitted that he was actually in the company premises on the day he was accused of absconding duty.
57. Sections 43, 45 and 47(5) of the Employment Act, require that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair, and prove that the grounds are justified. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee.
58. The Respondent told court that the Claimant was arrogant, rude, and brash when addressing other employees and his superiors, whom he would even shout at, and that he was also fussy, irritable, and aggressive when called upon to undertake a task or account for his actions. It is the Respondent's position that the Claimant was generally nonchalant towards his work and his conduct was unsatisfactory, and would even engage in physical altercations.

59. These allegations are no doubt monumental and would justify an employer's decision to dismiss. The court however, notes that none of these accusations were formally addressed to the Claimant as to allow him opportunity to respond. The Respondent instead, focused on the alleged one day absence which it also failed to prove based on the admission that the Claimant was at work on the day he is said to have been absent.
60. It is now settled that reasons for termination/dismissal ought to be clear and specific, hence the varied reasons for the Claimant's dismissal, some of which he was not allowed to respond to, lead me to the conclusion that the Claimant's summary dismissal does not meet the test of legality and reasonableness, and therefore the dismissal is substantively unfair. **(See *British Leyland UK Ltd v Swift (1981) I.R.L.R 91.***
61. In the end, I reach the finding that the Claimant's dismissal is both procedurally and substantively wrongful and unlawful.

### **Whether the Claimant deserves the Remedies sought**

62. The Claimant's claim is for payment of one month salary in lieu of notice, 12 months' salary equivalent for the unfair termination, leave days for the 5 years worked and an order for issuance of a certificate of service.
63. On the claim for notice pay, it is evident that the Respondent sat on the Claimant's disciplinary hearing (in

his absentia) on 8<sup>th</sup> November, 2021, and reached a decision to dismiss him, and the dismissal letter was issued the same day with no reference to notice or pay in lieu thereof.

64. It therefore goes without saying that the Claimant is entitled to the one month statutory salary in lieu of notice, and which is hereby awarded as prayed.
65. In respect of compensation for the wrongful dismissal, the finding of wrongful dismissal entitles the Claimant to compensation per Sections 49 and 50 of the Employment Act, 2007. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act. The Supreme Court in ***Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR*** noted as follows:-
- “When giving an award under Section 49 of the Employment Act, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”***
66. The Respondent raised a myriad of accusations against the Claimant, which even though were not substantively proved, are indication that the Claimant had a somewhat poor record of service especially going by the warning letters previously issued.
67. In the circumstances, and considering the guiding principles for remedies under Section 49, are to

compensate the Claimant and not to punish the employer, it is my view that the Claimant has not proved a case for maximum compensation, and is hereby awarded six (6) months' salary as compensation for the wrongful dismissal.

68. Finally, on the claim for leave not taken in the five years the Claimant was in the service of the Respondent, I note that the Claimant was dismissed on 8<sup>th</sup> November, 2021 and the instant suit lodged on 23<sup>rd</sup> November, 2022. It is settled that a claim for leave is a continuous injury and which under Section 89 of the Employment Act, is only valid for 12 months from the cessation of the injury.

69. This claim is therefore no doubt statute barred and is dismissed.

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70. In whole, Judgment is entered for the Claimant as against the Respondent as follows: -

- a) A declaration that the Claimant was wrongfully dismissed.
- b) Payment of Six (6) Months' salary in compensation for the wrongful dismissal at Kshs.656,082/-
- c) One month salary in lieu of notice at Kshs.109,347
- d) The Respondent shall bear the costs of the suit and interest on (b) & (c) above from the date of this judgment until payment in full.

71. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN  
COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER,  
2025.**

**C. N. BAARI  
JUDGE**

**Appearance:**

N/A for the Claimant

Mr. Mbugua present for the Respondent

Ms. Esther S- C/A

ORIGINAL