



Kenya Union of Commercial, Food and Allied Workers v New KCC Limited (Employment and Labour Relations Cause E692 of 2020) [2025] KEELRC 2881 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2881 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E692 OF 2020
HS WASILWA, J
OCTOBER 23, 2025**

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS CLAIMANT

AND

NEW KCC LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 28th October 2020 and prays that this Court finds that:

the action of termination meted on the following Salesmen: - Justus Kathara, Majaliwa Simba, Jack Goko, Antony Njuguna, Evelyne Malala, Joseph Maina, Petronilla Maingi, Nicholas Mwanja, Sammy Cheruiyot, David Mudhune, Lewis Bore, Robert Itegi, Daniel Mwangi, Moses Nderitu, Loreen Otiende, Edward Njoroge, Zakayo Paul Chege, Martin Juma Omunde, Peter Chula, Joseph Wambua, Bernard Owour and Evelyn Mumbi — the conciliation clerk was unfair and unlawful and order and award for:-

- i. Reinstatement with no loss of benefits and earnings and where in the opinion of the Court the reinstatement is not favourable we pray: -
- ii. That the Hon. Court Award and Order for: -
 - a. One-month salary in lieu of notice as per clause 26 of the Parties Collective Bargaining Agreement as computed in appendix PN2.



- b. Release of ¹/₂ salaries for the period of suspension in accordance with Section 25 (ii) of the parties Collective Bargaining Agreement as computed in appendix PN 2.
- c. Unpaid salaries for days worked prior to suspension as computed in Appendix PN 2.
- d. Pending leave days as computed in Appendix PN 2.
- e. Maximum compensation for Unfair and Unlawful termination and earnings as computed in Appendix PN 2.
- f. Issuance of Certificate of service in accordance with Section 51 of the Employment Act, 2007.

Claimant union's Case

2. The Claimant union states that the issues in dispute is the unfair/unlawful termination of Majaliwa M. Simba and 25 others namely: Jackson Kiungu; Peter Chula; Jack Goko; Anthony Njuguna; Joseph Wambua; Evelyn Malala; Joseph Maina; Bernard Owuor; Martin Juma; Petronila Maingi; Nicholas Mwania; Sammy Cheruiyot; David Mudhune; Lewis Bore; Zakayo Chege; Justus Kithara; Lawrence Kanyenje; Robert Itegi; Daniel Mwangi; Loreen Otiende; Patrick Mutuma; Edward Njoroge; Moses Nderitu; Evelyn Mumbi; and Peter Ajuoga; who are the grievants in the matter.
3. The Claimant union states that it is a trade union registered in accordance with the Labour Relations Act and it has a valid Collective Bargaining Agreement (CBA) which regulate the Respondents and grievants relations.
4. The Claimant union states that the grievants were employed on diverse dates and subsequently they were issued with show cause letters on allegations of conspiring with reconciliation clerks to defraud the company. The Respondent's actions were informed by an Audit report carried out in sales depot covering the financial year, 2016/2017.
5. The Claimant union states that the grievants responded to the show cause letters and explained that their work was supervised and cleared on daily basis so as to be issued with products for daily sales, therefore, they are not privy to the alleged cumulative loss.
6. Subsequently, the Respondent suspended the grievants' employment on allegation of unsatisfactory responses.
7. The Claimant union states that on 12th October 2017, the Respondent invited the grievants to a disciplinary hearing which they contend that the hearing was not free and fair.
8. The Claimant union states that during the hearing, the grievants individually pleaded to be supplied with the audit report for financial year 2016/2017 in vain.
9. After the disciplinary hearing, the grievants were issued with terminal letters dated 31st October 2017. Thereafter, the grievants invoked the provisions of clause 27 of the CBA and appealed against the decision to terminate them and to be issued with copies of the alleged audit report. However, the appeal was denied.
10. The Claimant union states that on 12th February 2019, the Claimant union again wrote to the Respondent informing it that its disciplinary meeting was not fair and violated Section 41 & 43 of



the Labour Relations Act, since the grievants had been denied the alleged audit report for an informed hearing.

11. The Respondent responded vide a letter dated 6th March 2019, and informed the Claimant union that it was handling the appeals and would appraise the Claimant union of the outcome.
12. However, the Claimant union learned through the grievants on 1st April 2019 that the appeals did not yield to much since the alleged Audit report was not availed to them and so was the respective invoices or breakdown of the alleged loss.
13. It is the Claimant union's that it made deliberate effort to have the matter given a fair address did not bear fruits due to frustrations and indifference on the part of the Respondent.
14. The Claimant union states that on 23rd May 2019, it invoked the provisions of Section 62 of the Labour Relations Act and reported the matter as a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection.
15. The Cabinet Secretary accepted the dispute on 3rd July 2019 and accepted Mr. Nelson Kimeu to act as conciliator. The union then filed its memorandum on 22nd January 2020 and thereafter, the conciliator invited the parties to a conciliation meeting of 23rd September 2020 vide a letter dated 31st August 2020.
16. The Claimant union states that while enroute to the conciliator's office on 23rd September 2020, it received a telephone call from the Respondent informing it that they were not attending the meeting and that they had written to the conciliator informing him as such and pleading for another later date. The union expressed its frustrations with effort to postpone the meeting coming in the very last minute and the dispute having taken too long to resolve.
17. It is the Claimant union's case that it learnt of a planned disciplinary meeting of 24th September 2020 and wrote and requested that workers representatives be allowed to attend. Thus, the conciliation meeting did not take place.
18. The Claimant union states that the it therefore moved this court in accordance with Section 5 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016, therefore, the suit is properly placed for adjudication and determination before this court.
19. The Claimant union states that the matter is classified into two categories of employees i.e. salesmen and reconciliation clerks. The salesmen being Justus Kithara, Majaliwa Simba, Jack Goko, Antony Njuguna, Evelyne Malala, Joseph Maina, Petronilla Maingi, Nicholas Mwanja, Sammy Cheruiyot, David Mudhune, Lewis Bore, Robert Itegi, Daniel Mwangi, Moses Mwangi (Moses Nderitu), Loreen Otiende, Edward Njoroge, Zakayo Paul Chege, Joseph Wambua, Peter Chula, Benard Owour and Martin Juma Omundhe.
20. It is the Claimant union's case that the Respondent alleged that following it audit for the 2016/2017 financial year, the 21 grievants, individually, conspired with reconciliation clerks to be issued with stocks at a lower price as opposed to current prices and that the reconciliation clerks altered the prices from the SAP computer system.
21. The Claimant union contends that the Respondent's accusations are faulty, therefore a nullity since the process of ordering for products, the marketing and filling of returns entailed: -
22. The Process of receiving the products
 - a. Getting in touch with customers for their orders through telephone, emails and LPOS.



- b. Tabulating all orders received and forwarding them to Depot Supervisor who would amalgamate all the grand depot orders raised by all the Salesmen and forwarding them to the Production department for specific production.
- c. From there, a Salesman (grievant) would visit the finished goods stores for collection of the order (products) initially raised.
- d. At the finished products stores, a clerk would prepare a detailed loading sheet on all the products granted and hand it over to the loaders who would, using the loading sheet remove the products from the stores and place them at the loading bay for the Salesman's counter checking and signing together with the security guard- present, supervisor on duty and the issuing clerk.
- e. From there, the loader would load the products to a waiting sales vehicle.
- f. Upon confirmation of loading as per the loading sheet, a salesman would take the loading sheet to the finished product issuing clerk who would issue the salesman with a delivery note and feed the data in the computer system following which a salesman would sign the delivery note and take it to the security guards for confirmation of whether the information contained in the delivery note corresponds with the records which he happened to have taken earlier on at the loading bay-paragraph (d)

The delivery note is in triplicate: the stores clerk retains the book copy and the salesman receives 2 copies, one is left with the company guards stationed at the point of exit-gate and the other is retained by the salesman for use after the sales during the daily reconciliation.

- g. Upon receipt of the delivery note paragraph (f), a salesman would go to the invoicing clerk who a salesman would give details on which customer wants what from products in the delivery note.
- h. This would be followed by the invoicing clerk feeding the orders in the SAP system which automatically produce invoices for each and every customer. The invoices happen to be in triplicate.

23. Physical Sales and Marketing

- a. Upon leaving the Respondent's premises with products and respective invoices, a salesman would deliver specified products to customers purely on the strength of the respective invoices.
- b. Upon customers' receipt of goods he would sign and stamp the invoices as an acknowledgement of receipt of products. He would retain the original copy of the invoice while a salesman would return to the Respondent with 2 copies of the signed and stamped invoices.

24. Daily reconciliation

- a. In returning back to the respondent with the 2 signed and stamped copies of the invoices, a salesman would use one copy for individual reconciliation as follows: -the respondent avails a reconciliation sheet, on which a salesman indicated the specific products received, attach a copy of the delivery note and the signed and stamped copy of the invoice and take it to the assigned reconciliation clerk for confirmation that the products issued as per the delivery note attached signed and stamped copy of invoice attached correspond.



- b. In the event a product is not accounted for as a possible result of damage, the reconciliation clerk would debit the individuals trading account following which he/she would issue the salesman with a clearance form indicating the shortage.
 - c. Upon receipt of the daily clearance form salesman would take it to the depot accounted for his opinion and signature.
 - d. At this point the depot accountant would decline clearance until the debit raised by the reconciliation clerk is settled.
 - e. Normally the depot accountant would demand this settlement within a period of 7 working days.
 - f. During this period no salesperson would be issued with products until the individual account is reconciled to zero.
 - g. But upon successful clearance by both the reconciliation clerk and the depot accountant. A salesman would then take the clearance form to the respondent's sales supervisor who would equally sign the clearance form, which a salesman would take to the regional sales manager and finally the depot manager.
 - h. With this final clearance a salesman would be issued with a copy of the clearance form which he/she would take to the depot supervisor to enable him process any order a salesman/person place.
25. It is the Claimant union's case that a depot supervisor would in no way process any salesperson order unless he has received a clearance form raised and signed by the reconciliation clerk, the depot accountant/ sales supervisor/ regional sales manager/ and or the depot manager.
26. The Claimant union asserts that with these elaborate and closely supervised process of ordering for products and reconciling them it is not possible to have incurred the alleged loss and neither is it possible for the grievants to have committed the alleged offence.
27. It is the Claimant union's case that the grievant made deliberate effort to have the details of the accusations provided to them including the invoices, audit report and the breakdown of the alleged loss, however, they were frustrated all through during the show cause, the hearing and even during the appeals.
28. The Claimant union states that the Respondent's deliberate failure/refusal to explain the alleged offence to the grievants by way of breaking down the alleged loss which appeared not to recognize or consider the requirements of and compliance to daily clearance/reconciliation disenfranchised the grievants the right and capacity to present the requisite defence.

Respondent's Case

29. In opposition to the claim, the Respondent filed a Statement of Response dated 26th March 2024.
30. The Respondent denied that the Claimant union it has a valid collective bargaining agreement which regulates the relationship between the itself and the grievants.
31. The Respondent admitted the employment details of the grievants provided by the Claimant union but denied the payment schedule contained in appendix PN 2 at page 75 of the claimant's bundle of documents.⁴



32. The Respondent states that the grievants were employed on diverse dates between the year 2006 and 2017; majority were employed as sales staff save for Everlyn Mumbi and Peter Ajuoga who served as reconciliation clerk and invoicing clerk respectively.
33. The Respondent states that sales staff duties included receiving company products for sale as well as regularly receiving price lists for all the products. The price lists were meant to ensure that products were invoiced by the reconciliation clerks at the correct prices and the sales staff were to refer to the price lists to ensure that products were issued and sold at the correct trade prices.
34. The Respondent states that despite having the price lists, the salesmen colluded with the reconciliation clerks and allowed themselves to be issued with stock at lower prices as opposed to the correct prices. The salesmen then intentionally sold the products at the correct market prices and thereafter reconciled the same at the lower prices as per the underpriced invoices.
35. The Respondent states that in aiding the fraud, the reconciliation clerks in conspiracy with the salesmen, manipulated the SAP system prices with resultant price undercharge during the invoicing process. They issued the salesmen with underpriced invoices enabling them to access stock at lower prices and sell at trade prices and on return, the clerks reconciled the accounts at lower prices leading to loss of company revenue.
36. It is the Respondent's case that duties of the invoicing clerk entailed preparing daily financial sales reports, supervising cashier and reconciliation clerks, general handling of cash at the depot, and verifying stock in the system against standard prices and quantities, among others. The invoicing clerk was thus mandated to detect the fraud by the reconciliation clerks and the salesmen but failed to do so.
37. The Respondent states that it issued the grievants with show cause letter on grounds of fraud on diverse dated in July 2017. All the grievants responded to their show cause letters and were invited for disciplinary hearings before a decision was reached to terminate their employment.
38. The Respondent states that some of the grievants appealed against the termination and were further invited for a hearing. The appeals were considered and the termination decision was upheld.
39. The Respondent states that it played its part and fully cooperated during the conciliation process.
40. It is the Respondent's case that the instant suit is sub judice in view of four similar and separate suits filed by four of the grievants in this case. These are Kericho ELRC No. 5 of 2020: Sammy Cheruiyot Korir v New KCC, Nairobi CMELRC No. E733 of 2020: Lawrence Weru Kanyenje v New KCC, Nairobi ELRC NO. 488 of 2020: Patrick Mutuma M'rintauga v New KCC, and Nairobi CMELRC No. 776 of 2020: Peter Omondi Ajuoga v New KCC.
41. It is further the Respondent's case that each of the grievants earned a gross salary not exceeding Kshs. 80,000, therefore, in line with Gazette Notice No, 6024 Vol,CXX-No.74 of 22nd June 2018, the competent court to hear this matter is the Chief Magistrates Court.
42. The Respondent asserts that the salesmen and the reconciliation clerks were involved in a well-orchestrated fraudulent scheme whose sole purpose was to enrich themselves at the expense of the Respondent.
43. It is the Respondent's case that the grievants' employment contracts were terminated in line with proper procedure and on valid reasons as required by the law. Additionally, the grievants were addressed self-explanatory show cause letters and supplied with all relevant documents ahead and during the hearing.



44. The Respondent further contend that the relief of reinstatement is not available to the grievants having left employment more than 3 years ago and that the prayer for unpaid salaries, pending leave days and one month's salary in lieu of notice is not supported and cannot issue in the circumstances.

Evidence in Court

45. The Claimant's first witness, Justus Mwirigi Kithara (CW1) adopted his witness statement as his evidence in chief and produced his filed documents as his exhibits.
46. CW1 testified that he has authority to testify on behalf of his colleagues and that the evidence he will give relates to the other grievants.
47. During cross examination, CW1 testified that he worked as a salesperson and prior to going to the field to get orders, the prices were already in the system. He was only to get orders and give to the invoicing clerk, however, he has not produced such evidence in court.
48. CW1 testified that the deposit supervisor got the orders and then handed it to the product supervisor; from there, he handed the orders to the processing to the clerk. The reconciliation clerk was given a signed and stamped copies.
49. CW1 testified that he dealt with many reconciliation clerks including Everlyne Mumbi and Rose Nyambura.
50. CW1 testified that he did not complain that he did not receive the audit report.
51. CW1 testified that as per the CBA, he is allowed one representative and there was a shop steward at the shop floor.
52. The second witness, Everlyne Mumbi Njagi (CW2) adopted her witness statement as her evidence in chief and produced her filed documents as her exhibits. She further produced the authority to give evidence on behalf of the other grievants who are not in court.
53. Upon cross-examination, CW2 testified that between 2010 and 2015 she did not apply for leave; she only went for maternity leave in the year 2015.
54. CW2 testified that after 2015, she changed her password so no one else could use it. She denied making changes to her account in 2017.
55. CW2 testified that she did not have access to the system remotely.
56. The Claimant's third witness, Martin Juma (CW3) adopted his witness statement dated 8th November 2024 as his evidence in chief.
57. CW3 testified that he was on leave between 10th November 2016 and 14th November 2016.
58. The Claimant's fourth witness, Zakayo Paul Chege (CW4) adopted his witness statement and filed documents dated 8th November 2024 as his evidence in chief.
59. The Claimant's fifth witness, Peter Nzui Chula (CW5) adopted his witness statement and filed documents dated 8th November 2024 as his evidence in chief.
60. The Respondent's witness (RW1) Michael Mukopi stated he is the Respondent's head of employee relations. He adopted his witness statement dated 26th March 2024 as his evidence in chief and produced his filed documents and further lists of documents dated 26th March 2024 and 21st November 2024 as his exhibits 1-36.



61. During cross examination, RW1 testified that employees did not have capacity to fix prices, they are fixed at management level and communicated down to the sales team and the clerks.
62. RW1 testified that sale clerks could not change prices at will, it could only be changed with collusion with accounts.
63. RW1 testified that he has no evidence that the grievants received goods at lower prices and sold them at market price then reconciled this later.
64. The Respondent's second witness, Victor Muigai (RW2) adopted his witness statement dated 27th May 2025 as his evidence in chief.
65. During cross-examination, RW2 testified that the Respondent did an internal audit done by the Head of Audit, Mansoi Muigai and he came to review the same and took ownership of the said audit.
66. RW2 testified that the delivery notes prepared by the clerks are system generated and the salesman does not generate it. The delivery notes that come up in the matrix under page 510 are from the ones with invoices which have not been filed in court.
67. RW2 testified that under pages 506, 523, 533 and 536 of the matrix, George Bosire, Kenneth Aseto, Peter Kavits and Rodgers Mayiaka were mentioned but they were not terminated, they are still in employment.
68. RW2 testified that the grievants had no right to access the sub system and manipulate prices.
69. RW2 testified that the price list is a daily working tool and the salesman is aided by the same.
70. RW2 testified that the grievants altered the price list all the way from 2010; under page 377 of the Respondent's documents, the price was to be Kshs. 50 but they changed it to Kshs. 19. The clerks then generated the print out.

Claimant's Submissions

71. The Claimant submitted that the parties are in a formal relationship and have concluded several CBAs governing unionisable employee's terms and conditions of service. The applicable CBA in place at the time of the grievants termination covered the period 1st July 2017 to 30th June 2019.
72. The Claimant submitted that it is not in doubt that the grievants were employed by the Respondent on different dates and were subsequently terminated vide letters dated 31st October 2017.
73. The Claimant submitted that vide Chamber Summons dated 8th November 2024 and 28th November 2024, it ceased acting for five grievants who opted to file individual suits namely: Jackson Kimathi Kiungu – Milimani CMELRC E734 of 2020; Lawrence Weru Kanyeynje – Milimani CMELRC E733 of 2020(Consolidated with Kericho ELRC Cause Nos. 5 of 2020 and 8 of 2020); Patrick Mutuma Mrintaugu – Nairobi ELRC Cause No. E488 of 2020 and Peter Ajuaga – Milimani CMELRC E776 of 2020. The suit involving Jackson Kimathi Kiugu and Sammy Cheruiyot were finalized and their judgment delivered.
74. The Claimant submitted that the allegations levelled against the remaining 21 grievants are the same and touch on the alleged conspiracy with reconciliation clerks to be issued with stocks at a lower price leading to loss of money. Since the nature of the allegation was the same, the grievants authorised Justus Mwirigi, Everlyne Mumbi, Martin Omudhe, Zakayo Chege and Peter Chula to give evidence on their behalf.



75. The Claimant submitted that the grievants were suspended from duty between 9th May 2017 and 3rd July 2017 and their services were terminated by letters dated 31st October 2017 to take effect from 12th July 2017.
76. It is the Claimant union's submission that the grievants' suspension was in breach of clause 25 of the CBA which provides that an employee's suspension shall be on half pay and shall not exceed three consecutive months. The suspensions exceeded three consecutive months with no explanation for the extended period.
77. The Claimant union submitted that in breach of clause 25 of the CBA which provides for half pay during suspension unless an employee is suspended over matters before the police or court; the grievants were not paid half pay during the period of suspension. The grievants were not subjected to police investigation
78. The Claimant submitted that the revised CBA produced by the Respondent came to effect on 1st July 2019 for a period of four years on 30th June 2023. Unfortunately, the grievants were not covered by it, though clause 28 is not different from the applicable CBA.
79. The Claimant submitted that the matter was subjected to conciliation, however, the conciliator failed to release his findings and recommendations. This necessitated the filing of an affidavit under Rule 5(2) of the ELRC Procedure Rules 2016 which was in force at the time of filing the claim.
80. The Claimant submitted that the grievants did not have any capacity and/or any SAP user rights to fix prices of goods or even alter prices. The prices were computer generated as already fixed and posted by the Respondent's top management. Some institutions had negotiated special prices with the Respondent's management, and in such circumstances, such prices were computer fed.
81. The Claimant submitted that salesman/driver had the duty to: collect orders from customers; compile such orders, prepare a loading sheet and obtain a delivery note; and handover the sales orders, the loading sheet and the delivery note to an invoicing clerk to bill customers. The salesman/ driver must pass through daily clearances where the loading sheet is prepared and signed by the salesman, security guard and dispatch clerk. The Regional Manager has to clear the salesman/driver before loading products to the market. Additionally, there was no anomaly pointed out in the stocks issued to any of the salesman/driver sales or unsold products.
82. The Claimant submitted that the depot accountant confirms that the invoices in the system application and products (SAP) and that the products as shown tally with the revenue as indicated. The salesman/driver had no user rights to access the SAP system at all.
83. The Claimant submitted that each salesman would be given products according to his delivery note so that he is able to account for his stock. A salesman's trading account was for accountability purposes to shoe the quantity of products received, the quantity sold and the after sales balance.
84. It is the Claimant's submission that the reconciliation clerk relies on a breakdown for every customer, a loading sheet and a delivery note submitted by a salesman and signed by a security guard and dispatch clerk. The Claimant contends that the delivery notes and loading sheet notes must tally for the invoice to be generated and that a reconciliation clerk did not have any right in the SAP system to assign product prices as this was done by top management only.
85. The Claimant submitted that role of a reconciliation clerk is similar to a cashier or teller in a supermarket whose role is only to scan or key in product codes and prices are automatically generated.



- Where need arises to deviate from the system, the top management must be involved to sanction the change otherwise the system will not allow the entry.
86. The Claimant submitted that upon the salesman/driver's return from the market, a reconciliation clerk receives invoices duly signed and stamped by customers together with a salesman's after sale summary sheet and a copy of a delivery note raised from the loading sheet. Thereafter, the clerk keys in the after sales report which the system automatically tallies products received and sold.
 87. It is the Claimant's submission that in the event the sale does not tally with products received, the reconciliation clerk will point out the difference in the pre-clearance form showing the indebtedness on the part of the salesman. Then a pre-clearance form is submitted to the Depot Accountant/Supervisor for a decision and the salesman will not receive any products for sale until the indebtedness is cleared. In the instant suit, there is no evidence of any clearance issue ever raised against the grievants on the after sales report.
 88. The Claimant submitted that there were no cash transaction as customers would either use a paybill number or draw cheques in the Respondent's name. There is no evidence that the grievants obtained financial gain from the alleged under-priced goods allegedly having been sold at the current prices and different pocketed by the grievants.
 89. The Claimant submitted that Ms. Everlyne Mumbi proved in her testimony that she was on maternity leave between 23rd May to 30th June 2015 and she was on leave between 25th August to 17th September 2015 when her password was used to access the SAP system without authority. She complained of the misuse of her password vide a letter dated 24th September 2015 but the results of the investigation were never revealed to her.
 90. The Claimant submitted that Mr. Martin Omudhe testified that when he was on off duty for four days beginning 9th to 13th November 2016, his trading account was used on 10th and 11th November 2016 when he was away and the sales credited to his account. Similarly, he was transferred from Sotik to Dandora and was cleared on 6th June 2017 without any question regarding his trading account.
 91. The Claimant submitted that Mr. Zakayo Chege testified that he was on leave between 5th to 25th October 2016 which was approved, however, on 18th and 20th October 2016, one Nathan Okumu was assigned his trading account in his absence. Additionally, the delivery notes dated 10th, 18th and 20th October 2016 were issued to Mr, Nathan Okumu but the invoice dated 11th October 2016 for Kshs. 86,332 was issued against his name to settle yet he was on approved leave.
 92. The Claimant submitted that Mr. Peter Chula testified that he cleared his work at the end of each sales day and got clearance at the end of each day. Therefore, he was surprised that he had an underpayment of Kshs. 182,320.50 arising from the allegation that he was issued with under-priced goods but no evidence was produced to the effect to prove the allegation.
 93. The Claimant submitted that Mr. Chula, in fear of losing his job and following a summon by the sales manager at Miritini, Mombasa, he paid Kshs. 61,000 to the Respondent against his conscience as this was intended to pin him down on unproved and unverified underpayments.
 94. It is the Claimant's submission that there are several names in the pricing fraud matrix produced by the Respondent, are not grievants in this suit and there is no evidence of any action taken against them.
 95. The Claimant submitted that George Bosire, Kenneth Aseto, John Musau, Peter Kavita, Nathan Amayi, Rodgers Ateka and Morris Opondo were some of the persons assigned other employees' passwords and trading accounts to sell on behalf of top management and were protected after the



mischief. There is no mention of employees who were given trading accounts assigned to the grievants to sell products and later invoices were raised against the grievants.

96. It is the Claimant's submission that the pricing matrix must be a product of sales orders, delivery notes and invoices, however, they were not attached to the alleged matrix to prove its source and correctness.
97. The Claimant submitted that the Respondent's audit report for the financial year 2016/2017 carried at Dandora and other depots revealed serious allegations that required the grievants' to see its contents before appearing at the disciplinary hearing. This would have aided them to approach the disciplinary committee from an informed position. Thus, in the absence of the alleged audit report, the allegations qualify as hearsay and are without basis and foundation.
98. The Claimant submitted that Respondents' allegation on the losses are doubtful as RW1 confirmed that no criminal proceedings were preferred against him despite the alarming amounts allegedly lost as a result of his actions.

Respondent's Submissions

99. The Respondents submitted on three issues: - whether this Honourable Court has jurisdiction to hear and determine this suit; whether the termination was proper; and whether the Claimant is deserving of orders sought.
100. On the first issue, the jurisdiction of the Magistrate's Court to handle employment and labour relations disputes arises from the power donated to the Chief Justice under section 29 of the [Employment and Labour Relations Court Act](#) to gazette magistrates to handle such matters. Pursuant to this power, the Chief Justice issued Gazette Notice No. 6024 of 2018 mandating magistrates of the rank of Senior Resident Magistrate and above to hear, with some exceptions, disputes arising from employment contracts where the employee's gross monthly salary does not exceed Kshs. 80,000.
101. The Respondent submitted that the grievants were earning a gross salary ranging from Kshs. 43,778 to 55,466, thus, the pecuniary jurisdiction referred to each grievant's claim and not the aggregate sum of the claims sought by all the grievants falls before the Magistrates Court.
102. The Respondent placed reliance in *Declan v Damacrest Group of Schools & 2 others* [2025] KEELRC 397 (KLR), where the Court opined that Section 7 of the Magistrates Act, donated to the Magistracy concurrent jurisdiction with this court to hear and determine employment disputes, where the gross monthly salary of an employee or grievant does not exceed Kshs 80,000.
103. On second issue, the Respondent cited Section 43 of the [Employment Act](#) which provides that an 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. The reason or reasons for termination of a contract are the matters that an 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.
104. The Respondent submitted that its reasons for termination are matters which existed/ genuinely believed to exist leading to the termination of the grievants. The letters for termination of the grievants' employment indicated the reasons for termination as negligence of duty and committing a criminal offence against or to the Respondent's substantial detriment or its property as grounded in the [Employment Act](#) Section 44 (c) and (g).
105. The Respondent submitted that vide a detailed audit report dated 14th June 2017, it uncovered the fraud and conspiracy between the reconciliation clerk and sale people and the loss of Kshs. 13,526,077.98.



106. The Respondent submitted that the grievants committed fraud and conspiracy whereby the salespeople obtained orders from various people then raised an order with the reconciliation clerk. The clerk confirms available stock and raises a product issue given to the sales person to salesperson. The reconciliation clerk then raises an invoice and delivery note given to the salesperson to enable him access the products and leave the premises with them; as the clerk does this, he keys in the date and quantity of the products requested.
107. It is the Respondent's submission that while the grievants did not have the capacity to fix and post process in the SAP system, they exploited control weaknesses in the system. It gave an example that when the reconciliation clerk keys in the year 2010 the price picked for product x is kshs 20/- however, since the invoice and delivery note is for the year 2016, the price year should be 2016 to allow the system to pick the current and correct price for product x being kshs 80/-.
108. The Respondent submitted that the reconciliation clerks conspired with sales people to issue stock at lower prices as opposed to current prices. While generating sales orders in SAP they would alter the pricing date by backdating it. In so doing, the system would automatically pick the older price of a given product as at the given date. Once the date is changed they are able to generate invoices at lower prices. However, after successfully adjusting the pricing dates, the clerk in question would then change back the pricing date to reflect the current date in order to conceal their activities.
109. The Respondent submitted that during the hearing, Peter Nzui, a sales person, testified during cross-examination that as a salesperson, he received the current price list of the products from the Respondent. Further, he also confirmed that sales people were able to see the prices on invoice once it was raised by the reconciliation clerk thus, he could clearly tell that the price list for the items had been altered. Despite this, they accepted underpriced products from the reconciliation clerks, without reporting any discrepancy to the Respondent and profited from the conspiracy.
110. The Respondent submitted that the reconciliation clerk, Evelyn Mumbi, the audit report indicated that the SAP system shows that on diverse dates between July 2016 and March 2017, she manipulated the system by changing pricing dates to the year 2010 so that she could generate sales orders and invoices based on old prices (2010). She was working with fifteen sales staff with whom, in a span of nine months, she was able to steal KSh. 13,526,077.98. Additionally, she admitted to sharing her password despite it not being allowed by company policy and that she went for maternity leave in 2015 and the audit was conducted for the period 2016 – 2017.
111. It is the Respondent's submission that an analysis of the grievants' conduct would lead any reasonable person to conclude that at the very least, they were guilty of dereliction of their duty, and at most, conspiracy to defraud the company. Either way, the Respondent had fair and valid reason to terminate the grievants' employment.
112. The Respondent submitted that all the grievants were issued show cause letters explaining the reasons for consideration of disciplinary action, and were subsequently invited to disciplinary hearings, and further hearings for those who appealed. A perusal of the minutes indicates the presence of union representatives at the hearings, and serious consideration of the employees' representations which led to the reinstatement of some.
113. The Respondent submitted that the show cause letters contained the information necessary for the grievants to defend themselves, and they were supplied with all relevant documents ahead and during the hearing. Therefore, the termination of the grievants was on valid grounds and proper procedure.
114. On the third issue, the Respondent submitted that the grievants were terminated from employment on valid grounds and on proper procedure and are thus not entitled to any redress. That notwithstanding,



- the Claimant's prayer for reinstatement is unattainable pursuant to section 12(3) (vii) of the *Employment and Labour Relations Court Act* which states that "an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law..." The grievants were dismissed in 2017 and any reinstatement if effected will be contrary to the law as it is time barred.
115. The Respondent relied in the Court of Appeal case, *Joshua Rodney Marimbah v Kenya Revenue Authority* [2021] KECA 423 (KLR) where it held: "...With regard to the other ground namely that the learned judge erred in law and fact in failing to reinstate the appellant to his employment with full benefits and award of damages, the learned judge in declining to order reinstatement cited the provisions of Section 12 (3) (vii) of the *Employment and Labour Relations Court Act* which barred the court from granting that relief where three years have lapsed from the date of dismissal. In this case 3 years had lapsed from the date the appellant had been dismissed. The learned judge was therefore right in declining to order reinstatement."
 116. On leave days, the Respondent submitted that the grievants have failed to submit any evidence to indicate that they applied for leave and that the same was denied or declined by the Respondent. Thus, the prayer sought is not supported by any evidence and the same should not be granted.
 117. I have examined all the evidence and submissions of the parties herein. The grievants contention is that they were terminated by the respondent without valid reasons and while following a flawed disciplinary process.
 118. The grievants were terminated as per the termination letter for accepting under priced invoices hence picking products at lower prices and selling them at trade price leading to losses to the company. Before the termination, the grievants were invited for a disciplinary hearing on 10/10/2017 to 12/10/2017.
 119. I have looked at the minutes of the disciplinary hearing. At the hearing, there was a presentation by the internal audit team which indicated that reconciliation clerks colluded with salesmen/saleswomen by accessing SAP systems and backdating and having salesmen to access stocks at lower prices and sale at current prices and finally reconcile at underpriced prices thus defrauding the company.
 120. The grievants were then cross- examined on their involvement in the fraud that cost the company colossal amounts of money. After the hearing various recommendation were given including more investigations and having a systems auditor and internal auditor engaged in the matter to give professional input and any added information. The committee was to meet again after the audit investigation of the cases of mentioned staff are conducted and then make a final decision.
 121. From the proceedings there is no indication that the grievants were summoned again after the further investigations but were afterwards terminated vide letters of 31/10/2017.
 122. The grievants have contended that they were subjected to a flawed disciplinary process that was not free and fair. The grievants contend that the letter inviting them for disciplinary hearing did not adhere to the provision of section 41 of the employment and *labour relations act* 2007.
 123. I have looked the invitation letters which simply stated that the grievant was to appear on the stated date in order to be allowed to explain their case. They were not notified of the need to bring a witness or a union member to represent them. To this extent the hearing procedure violated this provisions. It is also true as per the evidence some of the grievants that they were on leave at the time of alleged fraud eg CW1 and CW2. The witnesses also indicated that they were given what to sell and the delivery note did not show the price but the quantity. CW3 indicated that the invoice showed the price prepared by the reconciliation clerk and he had no authority to change it.



124. RW1 admitted in cross examination that employees had no capacity to fix prices. He indicated that the sales clerk could only change price with collusion with accounts. CW1 said he had no evidence that grievants received goods at lower prices and sold at market price.
125. RW2 the auditor indicated that the delivery notes were prepared by a clerk and was system generated and not generated by the salesman/driver. He also indicated that the invoices had not been filed in court. He indicated that the grievants had no rights to access the sub system and manipulate prices. He averred that grievants altered price list.
126. From the evidence of the RW2 he seems to aver that the charges in prices of the products was done by the grievants but still argues that the sales clerks colluded with accounts to do so. He also argues that the grievants had no rights to access the sub system and manipulate prices. It then does not add up when he insists that the grievants did which they had no capacity to do.
127. The evidence as submitted by the respondents leaves room for doubt that the grievants indeed altered prices of goods and defrauded the respondents.
128. Section 43 of the *Employment Act* 2007 states as follows:
- (1) 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 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.
129. It is true that the respondents must demonstrate existence of valid reasons to warrant termination of an employee. With loopholes created by the doubt that the grievants changed the prices, it leads to the conclusion that there did not exist valid reason to warrant termination of the grievants.
130. Section 45(2) of the *Employment Act* 2007 states as follows:
- (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 employees 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
131. Given that there is no proof that valid reason existed to warrant termination of the grievants, I find their termination unfair and unjustified. In the circumstances, I find for grievants and direct that the grievants be paid as follows:
1. 1 month's salary in lieu of notice as per appendix PN2 at page 76 of the claim.
 2. Release of ½ salaries for the period of suspension as per appendix 2 of the claim.
 3. Pending leave days as computed in appendix PN2 at page 76 of the claim.
 4. 6 months' salary as compensation for the unfair termination.



5. Each grievant be issued with a certificate of service.
6. The respondents to pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF OCTOBER 2025.

HELLEN WASILWA

JUDGE

