



**Kenya Union of Commercial, Food & Allied Workers v Kenya Breweries Limited
(Cause E021 of 2023) [2025] KEELRC 3030 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3030 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E021 OF 2023
JW KELI, J
OCTOBER 30, 2025**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD & ALLIED
WORKERS CLAIMANT**
AND
KENYA BREWERIES LIMITED RESPONDENT

JUDGMENT

1. Vide an amended memorandum of claim dated the 9th of January 2024, the Claimant sued the Respondent and sought the following Orders-
 - A.
 - i. Declare that the suspension, show cause and eventual termination of the grievant's services was unfair, wrongful and unlawful.
 - ii. Order the Respondent to honour the findings and recommendations by the Conciliator dated 5th January 2022 by unconditionally reinstating the grievant to his previous position.
 - iii. Order the Respondent to treat the services of the grievant, upon reinstatement as continuous and as if the same were never interrupted.
 - iv. Order the Respondent to pay the grievant, upon reinstatement, maximum compensation for unlawful, wrongful and unfair termination.
 - v. Grant any relief found fit and just to meet the ends of justice.
 - vi. Costs of the suit be granted to the Claimant.

OR



- B. In the alternative and where the court does not grant prayers under “A” above:-
- i. Issue and order directing the Respondent to pay the grievant for the remainder of his years of service to retirement on 8th August, 2034 a period of 13 years and six months based on his last gross pay.
 - ii. Award maximum compensation to the grievant for the unlawful action against him.
- OR
- C
- i. Order the Respondent to treat the grievant as having been declared redundant, and
 - ii. Order the Respondent to pay the grievant benefits under Clause 27 (i) –(ix) of the parties’ Collective Bargaining Agreement.
 - iii. Award payment of maximum compensation for the unlawful, wrongful and unfair termination.
 - iv. Award costs of the suit to the Claimant in quantified amount as the Claimant acts by himself and cannot benefit from the Advocates Remuneration Order.
- D.
- i. That the Respondent be ordered to settle from their own funds all loans and interest which the grievant has been unable to service as a result of the unlawful termination in alleviating this burden on the grievant; or
 - ii. An order for general damages be granted for violating the grievant’s Constitutional and Labour rights.
- E. That in awarding prayers A, B, C and D above, this Honourable Court be pleased to grant any other relief found fit, just and proper to meet the ends of justice.

2. The Claimant in support of the claim filed their amended list of witnesses; amended witness statement; and amended list of documents with the bundle of documents attached, all dated 9th January 2024.
3. The Respondent entered appearance through the law firm of Ann Babu & Company Advocates and filed a memorandum of response and counterclaim dated 16th May 2024. In support of the said statement of response, the respondent filed a witness statement of Julius Anami dated 5th June 2024, a list of documents of even date with the bundle of documents attached, a supplementary list of documents dated 31st October 2024, and a witness statement of David Rithaa dated 30th October 2024.

Hearing and evidence

4. The claimant’s case was heard on the 11th February 2025 with the grievant Micheal Lipesa testifying on oath as CW1. He adopted his witness statement dated 9th January 2024 and produced the filed bundle of documents under amended claimant’s list of documents dated 9th January 2024. CW1 was cross-examined by counsel for the Respondent, Mr. K’ogangah, and re-examined by the Union Representative, Mr. Nyumba.
5. The respondent’s case was heard on 29th May 2025. RW1 was Julius Anami, who testified on oath as a witness of fact, adopted his witness statement dated 5th June 2024 as his evidence in chief, produced documents under the list of documents dated 6th June 2024, and a supplementary list of



documents dated 31st October 2024, which were marked as R-exhibits 1-29. RW1 was cross-examined by the Union representative, Mr. Nyumba, and re-examined. The respondent's 2nd witness was David Rithaa, the lead internal investigator, who testified on oath on the same date and adopted his witness statement dated 30th October 2024 and relied on R-exhibits 1-29 as his evidence in chief. He was cross-examined by the union representative, Mr. Nyumba. Both witnesses were re-examined by the respondent's counsel Mr. K'ogangah.

The Claimant's case in summary

6. The Claimant's case is that the Grievant, MICHAEL LIPESA, was employed by the Respondent on 5th September 2005 as a Technical Operator vide a letter of appointment dated 25th August 2005. His starting salary was Kshs. 47,714/=. After ten (10) years of service, the Grievant was promoted, on 5th November 2011 to the position of Senior Technical Operator, earning a salary of Kshs. 104,185.76 plus a housing allowance of Kshs. 28,385.32. The Grievant worked in shifts which he alternated with a colleague, Mr. Wilfred Oloo. On 2nd December 2020, the said Wilfred Oloo fell ill and was quarantined for fourteen days during which period the Grievant worked alone on a 12-hour night shift, from 7.00 pm to 7.00 am. During the Grievant's normal working hours, he handled two keg lines, of which Keg line 1 produced 400 keg barrels per hour, and Keg line 2 produced 800 keg barrels per hour. His role as a technical/senior technical operator included: maintenance of the machines in cases of break down, operating the machine, supervision of the fork lifts while receiving goods and discharge to the warehouse, supervision of about eight process clerks and four machine operators, writing reports and picking of KRA stamps from the safe to the process, acting as a team leader coordinating the process and keeping management updated, and clearing the lines and ensuring the right supply of utilities e.g. air, steam, carbon dioxide, water, beer and electricity, to ensure there is no failure.
7. The Grievant explains that on 4th December 2020, he reported for the night shift at 7.00 pm as usual. He and his team were tasked with producing "Senator Dark" which requires certain inputs including KRA Revenue Stamps/stickers, cable ties, and caps. The Grievant, and indeed, any employee of the Respondent who used Kenya Revenue Stamps was issued with a KRA handling Procedure-work instructions which detailed the procedure for picking up stamps for use at the keg lines, the procedure for issuing of stamps to production, amongst other procedures. On 2nd December, 2020, while producing "Senator Lager", there was balance of 404 stamps which were in the safe. On the night of 4th December 2020, the Grievant received 760 KRA Revenue Stamps from one David Chege, who was the Technical Operator for team C, which worked during the day shift. The stamps were received at the production floor.
8. The Grievant accessed the safe room twice to withdraw KRA Revenue Stamps for "Senator Dark" and once to withdraw 1000 KRA stamps for "Senator Lager". Specifically, at around 4 am on 5th December 2020, the production changed from "Senator Dark" to "Senator Lager" hence the Grievant accessed the safe room to withdraw the 404 surplus "Senator Lager" KRA Revenue stamps which had been returned on 2nd December 2020. At the same time, he withdrew 1000 KRA stamps for "Senator Lager" for use during the remainder of the shift. By 4.00am, therefore, the Grievant had in his possession 1,404 KRA Revenue stamps for "Senator Lager". After he had completed production from 4.00am to 7.00am on 5th December 2020, the Grievant had a surplus of 850 KRA Revenue stamps for "Senator Lager". The Grievant avers that he handed over the said 850 KRA Revenue stamps for "Senator Lager" to David Chege, leader of team C, which was starting the day shift at 7.00am on 5th December 2020, per the KRA handling procedure Ref. No. 7c Revision No.002 of 31st July, 2018.
9. The Grievant states that there were about ten Technical Operators and two Managers who were authorized to access the safe room which housed the safe for keg KRA Revenue stamps and safe for



canning line KRA Revenue Stamps. The Keg KRA safe also housed “Tusker keg” Stamps, “Senator Lager” stamps and “Senator Dark” stamps. The safe for keg KRA stamps could be accessed by six (6) Technical Operators and two line managers. At the material time, the Respondent had not developed a standard operating procedure for handing over KRA stamps for kegs which any employee with the right of access was required to follow. The revised KRA handling procedure-work instructions, came into effect after the Grievant’s suspension.

10. On 5th December 2020, between 10.00 am and 11,00 am, the Grievant received a telephone call from David Chege informing him that there were missing stamps. David Chege informed the Grievant that his clerk, one Albine Mulando, had informed him that he (David Chege) had opened a new reel yet the old one had not been depleted. David Chege queried whether the Grievant had finished the old reel and the Grievant informed him that the remainder of KRA senator lager stamps were in the safe. In order to get to the bottom of the issue, the Grievant returned to the company premises and spoke to David Chege in person, who now informed him that the reel from which he had taken 1000 “Senator Lager” stamps on the early morning on 5th December 2020 was missing. The Grievant confirmed that the said reel was actually missing, yet there was no security report over the missing stamps, no breakages, and there was no CCTV report (footage) to assist in establishing how the reel went missing. There was also no physical security report at the gate over the missing reel. The Grievant later received the report that about six thousand six hundred and thirty five (6635) KRA “Senator Lager” stamps went missing from the safe.
11. The allegation was that the Grievant unwound the said six thousand six hundred and thirty five stamps from the reel, pocketed them, and removed them from the Respondent’s Premises. The Grievant denies the allegation as the number of missing stamps would be too bulky to carry. The G4s security personnel who carried out physical checks at the Respondent’s exit gate certainly did not find the missing stamps on the Grievant or any of the team members.
12. The Grievant’s position is that it is the responsibility of the Respondent to carry out system audits to ensure the safety of safes and the safe room so that any loopholes which could lead to pilferages could be plugged. The safe room is within the canteen area where the safe room key is also kept. The Grievant questions the safety of the Respondent’s biometric systems which were installed in the safe room.
13. Following the revelation that the subject reel was missing, the Grievant called his line manager and informed her of the alleged incident. The Grievant reported back to work on the night of 5th December 2020, and also worked on 6th December 2020 whereby he cleared his shift block (three days, three nights and three off days). After the night shifts, the Grievant proceeded on his three off days on 7th, 8th and 9th December 2020, as scheduled. He was required to resume his next shift block on 10th December 2020 starting with day shifts for three days. On the morning of 11th December 2020, the Grievant together with Daniel Chege were informed by the chief Shop Steward that he (the Chief Shop steward) had been instructed to inform them that they were required to record statements with the Respondent’s Security Manager on the missing KRA Revenue Stamps. Between 10 am and 11 am, the Grievant recorded a statement with the Security Manager particularizing what he knew about the KRA keg stamps, what he had collected, what he had used and what he had handed over to his colleague. He was not given a copy of his said statement. While recording his statement, the Grievant indicated that he had accessed the safe room twice. But as the interrogation continued, he stated that he had accessed the safe room three times, but he was not double sure about this and stated as such in his response to the show cause letter. This is because he did not have a print out of the biometric data and so the memory lapse must be understood in that context. In any event, there is no instruction on how many times the Grievant was required to access the safe room.



14. On the afternoon of 11th December 2020, the Grievant and his colleague, David Chege, were directed by the Security Manager to go to Kasarani Police Station to record statements on the missing KRA Revenue Stamps, and they complied. On his way home from the police station, the Grievant received a telephone call from the HR Partner, one Pascaline Njoroge, who informed the Grievant that he was suspended for thirty days from 11th December, 2020. He later received a letter of suspension. David Chege who received the surplus of the KRA keg stamps from the Grievant on the material day, and who continued headed the shift immediately after the Grievant's was also suspended on 11th December 2020. However, David Chege was recalled before the lapse of his suspension period and continued working.
15. The Grievant and David Chege were both later issued with show cause letters. The Grievant's was issued on 11th January 2021, alongside a letter extending his suspension period. On 13th January 2021, the Grievant responded to the Show Cause letter. The Grievant was invited to a disciplinary hearing scheduled for 29th January 2021, vide a letter dated 25th January 2021. During the hearing, the Grievant was not given evidence and/or witness statements to prove the allegations against him, and neither were any witnesses presented. After the hearing, the Grievant was not given minutes of the disciplinary hearing. On 22nd February 2021, the Grievant received a telephone call from one Njeri Njenga informing him that he was terminated from employment. A termination letter was later sent to him via email. Although the Grievant appealed against his termination from employment, his appeal was unsuccessful.
16. The Grievant points out that his colleague, David Chege who was also implicated, responded to his notice to show cause, and was subjected to disciplinary proceedings as he continued working. He did not undergo the lengthy suspension that the Grievant was subjected to. The police investigating officer made a report which pointed at David Chege as the guilty party and recommended that he be charged with the offence of stealing by servant. The said David Chege was indeed charged in court but attends his court sessions while working, whereas the Grievant was terminated from employment on the same accusations as that of David Chege. It is the Grievant's case that the Respondent began the process of removing him from their employment even before the Appeal against his termination had been determined. The Appeal was a mere formality. The Grievant states that no training was carried out by the Respondent on the new KRA handling process.
17. The dispute on the Claimant's unfair/wrongful termination from employment was reported to the Ministry of Labour and a Conciliator was appointed. A conciliation meeting was scheduled for 12th May 2021. By a letter dated 5th May 2021 the Respondent sought opportunity to resolve the dispute through the grievance procedure. The Conciliator allowed the Respondent's request through a letter dated 25th May 2021 and instructed them to engage with the Grievant and report to her the progress of such engagement. On 2nd June, 2021, the Union/Claimant addressed the Respondent on their request to engage on this matter and proposed a meeting to take place either on 16th or 17th June, 2021. The Union sent a reminder dated 7th July 2021 proposing that a physical meeting takes place on 13th July, 2021. The engagement did not bear any fruit, and so on 6th July 2021 the conciliator convened another conciliation meeting to take place on 23rd July 2021 at 10.00am. The meeting convened by the Conciliator to take place on 23rd July 2021 did not take place, and was adjourned to 30th July 2021. In the meantime, the Federation of Kenya Employers got involved in the matter and convened a meeting between the parties on 5th August, 2021. The Union attended this meeting and another meeting took place on 12th August 2021, but no agreement was reached. In their engagement with the Conciliator, the Union proposed that the Grievant be reinstated or in the alternative he be deemed to have been declared redundant to benefit from the Redundancy Clause. The Respondent presented



their memorandum/proposals to the Conciliator on 22nd October 2021, but according to the Grievant, they were intent on frustrating him and were not keen on reaching any meaningful resolution.

18. On 5th January 2022, the Conciliator issued the parties with a Conciliation Report wherein she made findings and recommended that: the Grievant's services be reinstated and he be transferred to any station without loss of any benefit; or in the alternative the Grievant be paid for the remainder of years he should have served to retirement had his services not been terminated, and he be paid maximum compensation for unfair and wrongful termination. By a letter dated 7th January 2022, the Union accepted the report to form the basis of settlement. The Respondent, however, rejected the report following which a Certificate of Unresolved Trade Dispute was released to the parties.
19. The Grievant complains that his services were terminated for no reason. It is only in redundancy where the services of an employee may be terminated for no fault of his own, hence this justifies the claim that he be deemed to have been declared redundant. The Grievant also complains that his benefits were remitted to the Sacco Society without his consent; the Respondent violated clause 8 of the parties' Recognition Agreement on grievance handling procedure; the Respondent violated the Grievant's right to fair trial as envisaged under Article 50 of *the Constitution*; the Respondent violated sections 3.4 (c), 3.5 (5) (a) and 3.8 (8) of their own disciplinary policy; the Respondent violated Section 5 of the *Employment Act*, 2007 on discrimination in Employment; the Respondent subjected the Grievant to double punishment by terminating his services and subjecting him to criminal trial all at the same time; the Respondent violated the Grievant's right to procedural fairness under Section 41 of the *Employment Act* 2007; the Respondent falsely accused the Grievant with the intention to damage his career and paint him negatively before the public with far reaching damages; the Respondent failed to take into account the Grievant's length of service ; and his financial commitments including loans which he had taken on the basis of his employment contract are now threatened.

Respondent's case in brief

20. The Respondent admits that an employer-employee relationship existed between the Grievant and the Respondent. Vide a Letter of Offer dated 25th August 2005, the Respondent offered, and the Grievant accepted, employment in the position of Technical Operator, effective 5th September 2005, at a consolidated monthly salary of Kshs. 47,714/= . Vide a letter dated 15th April 2011, the Grievant was promoted to the position of Senior Technical Operator, effective 1st May 2011, at a basic salary of Kshs. 104,185.76/= . As at the date of his termination from employment, the Grievant earned a gross monthly salary of Kshs. 568,670.89. As a Senior Technical Operator, the Grievant's main duties and responsibilities included inter alia: maintaining and operating the key production and utility plan in the operating brewery; professionally executing all processes associated with the provision of products/ services to ensure a high level of productivity; and ensuring that the activities/processes are delivering their intended outputs.
21. The Respondent explains that manufacturers of excisable goods, such as the Respondent, are required to affix tax stamps on excisable goods under Section 28 of the *Excise Duty Act*, 2015 and the Excise Duty (Excisable Goods Management System) Regulations. The Kenya Revenue Authority (KRA) supplies tax stamps and installs Excisable Goods Management System (EGMS) equipment on the manufacturer's production lines. The EGMS activates tax stamps and provides a live feed to KRA on the manufacturer's production of excisable goods for accounting for excise duty.
22. On 5th December 2020, following the Grievant's night shift, a report was received by the Respondent regarding 6,635 KRA tax stamps that had gone missing from the keg line safe. The report was followed by an email confirmation regarding the loss of the stamps, whose value was Kshs. 9,952.50 with an additional excise duty exposure of Kshs. 770,180.80. The Respondent immediately



commenced internal investigations into the matter and reported the loss to the Directorate of Criminal Investigations (DCI). The Grievant was one of the 2 people in charge of the safe office at the material time. Due to the sensitivity of the matter, his supervisory role, and close association with the activities that occurred on the night of 4th December 2020, the Grievant was suspended vide a letter dated 11th December 2020 to pave way for the investigations. On 11th December 2020, the Grievant together with his colleague David Ndichu, recorded statements at the Kasarani Police Station regarding the incident. The Grievant was in charge of the shift from 1900hrs to 0700hrs, while David Chege Ndichu was in charge of the shift from 0700hrs to 1900hrs. Upon conclusion of the investigations by the Respondent on 23d December 2020, a decision was taken to commence disciplinary proceedings against the Grievant with regard to the loss of the 6,635 KRA tax stamps for the following reasons, among others:-

- i. Information concerning stamp usage is normally fed into the EGMS, which keeps track of the stamp balance and stamp serials consumed in production;
 - ii. On 5th December 2020 at about 0900hrs, a check on the EGMS was conducted to confirm the number of stamps which had been used and the balance, and it was detected that the Grievant's shift had a balance of about 6,635 stamps for "Senator Lager", which had not been used;
 - iii. The stamps are stored in a safe, which requires a key and biometrics to access and the system collects data of all persons who accessed the safe;
 - iv. The biometric data showed that the Grievant entered the safe room at 0446hrs and was the last person to handle the lost stamps. He was also the only person left in the safe room where the stamps were stored;
 - v. The biometric data indicated that the Grievant had entered the safe room thrice during that shift but he insisted that he had only entered twice. He could not explain or account for what he was doing in the safe the third time;
 - vi. The Grievant was the team leader. The stamps got lost when he was on duty, and he failed to account for the loss despite being given an opportunity to do so.
23. The Respondent is adamant that the loss or theft of tax stamps is consequential for the reasons that these stamps can be used in the illicit trade market, posing health risks to consumers since the stamps can be affixed to illicit/counterfeit products which do not conform to prescribed standards; it leads to loss of revenue by the government and undermines legitimate trade; and according to Regulation 14(2) of the Excise Duty (Excisable Goods Management System) Regulations, 2017 ('the Regulations'), a manufacturer, such as the Respondent, is required to account for every tax stamp failure to which KRA shall levy penalties on the manufacturer. According to the Respondent, as a result of the Grievant's actions and/or omissions, the Respondent is liable for a fine of Kshs. 893,421.33 for the product in question, namely "Senator" beer in keg (Lager). Furthermore, according to Regulations 34 and 35, any person who fails to comply with the provisions of the regulations commits an offence and is liable, on conviction, to a fine not exceeding One Million and Five Hundred Thousand Shillings (Kshs. 1,500,000/=) or to imprisonment for a term not exceeding three (3) years or to both.
24. The Respondent is requited under Section 23(1) of the [Tax Procedures Act](#) to: (b) maintain any document required under a tax law so as to enable its tax liability to be readily ascertained; and (c) subject to subsection (3), retain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law. Accordingly, the Respondent may be found liable to pay the above fines pursuant to regular audits conducted by the



- Kenya Revenue Authority over the course of five (5) years during which the relevant stamp records are maintained.
25. Due to the above, and in accordance with the East African Breweries Limited (EABL) Disciplinary Policy and the provisions of the *Employment Act*, 2007, on 11th January 2021, the Respondent requested the Grievant to show cause why his employment should not be terminated for reasons that: he was found to have been the last person to access the KRA tax stamps safe room on 5th December 2020 at 0458 hrs as per the extracted biometric record, and he was the last person to handle the lost KRA tax stamps; this entry was witnessed by a third party resource person who left the Grievant in the safe room after having issued her with 1,000 tax stamps; contrary to his statement, the extracted biometric data indicated that the Grievant had accessed the safe room three times on 4th and 5th December 2020; he was negligent in handling company property by failing to account for the 6,635 tax stamps that went missing during his shift and which had been placed under his care as the person in charge of the shift; he contravened the Respondent's Code of Business Conduct and his contractual obligations to the Respondent; and he exposed the Respondent to financial loss of Kshs.9,952.50/= incurred while purchasing the stamps and additional excise duty exposure of Kshs.770,180.80/= to be paid to KRA, and reputational damage.
 26. On the same day, and in accordance with Clause 3.2.2 of the EABL Disciplinary Policy, the Respondent extended the Grievant's suspension for a further period of one (1) month to allow for the conclusion of the disciplinary process. The Respondent denies that the extension of the Grievant's suspension was a disciplinary action, but rather states that it was done to allow for the conclusion of the disciplinary process, at the absolute discretion of the Respondent. The Respondent admits that the Grievant responded to the notice to show cause on 13th January 2021, denying all the allegations against him, but after consideration of the Grievant's response, the Respondent resolved to invite the Grievant to a disciplinary hearing, which they did vide a letter dated 25th January 2021. The invitation informed the Grievant of his right to call witnesses and to be accompanied by a colleague of his choice. The hearing proceeded as scheduled, with the Grievant attending in the company of the Chief Shop Steward and another shop steward. After the hearing, the Respondent considered the Grievant's written and oral responses and reached a decision that he had failed to exonerate himself and diffuse any element of culpability in the matter. Consequently, on 22nd February 2021, the Grievant was terminated from employment on the grounds of gross misconduct in the performance of his duties, culminating in the loss of the 6,635 KRA tax stamps. The Grievant exercised his right of appeal vide a letter dated 26th February 2021 which appeal was considered but found lacking in any new evidence or facts to warrant the waiver or reconsideration of the issued termination. The termination was, therefore, upheld vide a letter dated 19th March 2021.
 27. In addition to the foregoing, on the strength of DCI's recommendation, on 30th April 2021, the Grievant, together with David Chege Ndichu, were charged with stealing by servant contrary to Section 281 of the Penal Code and conspiracy to commit a felony contrary to Section 393 of the Penal Code Criminal Case No. E1933 of 2021-R v Michael Nabibya Lipesa (the Grievant) v David Chege Ndichu. Contrary to the averments made by the Grievant, David Chege Ndichu has since also been terminated from the Respondent's employment. It is the Respondent's position that the criminal charge proves that there were reasonable grounds for suspecting the Grievant of committing an offence warranting summary dismissal.
 28. On the conciliation process, the Respondent admits that on 14th April 2021, the Claimant reported a trade dispute between itself and the Respondent in relation to the Grievant to the Ministry of Labour and Social Protection and a conciliator was appointed. It is their view that the escalation of the matter to conciliation was contrary to Clause 8 of the parties' Recognition Agreement, which required all



disputes to be determined first in accordance with the internal grievance procedure. The Respondent opposed the reference to conciliation and the conciliator allowed parties to first pursue an amicable settlement amongst themselves. A meeting was facilitated at the Federation of Kenya Employers' premises, during which the Claimant made excessive and unreasonable demands that had no legal basis and were unconscionable to the Respondent, hence the negotiations were ultimately unsuccessful. The dispute reverted to conciliation, whereupon the Claimant, vide its Memorandum dated 2nd August 2021, reiterated its proposals for settlement which were excessive and unjustified. The Respondent responded vide its Memorandum dated 22nd October 2021. Vide a Trade Dispute Report dated 5th January 2022, the Conciliator made recommendations and settlement proposals which had no legal basis, were excessive and biased, and fully ignored the facts and the Respondent's submissions. Consequently, the Respondent, vide a letter dated 19th January 2022, was left with no choice but to reject the Report and maintain its position that the Grievant's termination was substantively and procedurally fit. A Certificate of Unresolved Trade Dispute dated 31st January 2022 was issued.

29. The Respondent is categorical that it complied with substantive and procedural fairness in the termination of the Grievant's employment; it did not abolish the Grievant's position from its structure in order for him to claim that he was declared redundant; and it treated the Grievant equally and fairly in accordance with the Respondent's policies.
30. The parties filed written submissions after the close of the respondent's case.

Determination

Issues for determination

31. The court, having heard the case and perused the submissions of the parties, finds the issues for determination to be:
 - i. Whether the Respondent had valid reasons for terminating the employment of the Grievant;
 - ii. Whether the Grievant's termination was procedurally fair and lawful;
 - iii. Whether the Grievant is entitled to the reliefs sought.

Whether the Respondent had valid reasons for terminating the employment of the Grievant;

The claimant's submissions

32. The grievant, Mr. Michael Lipesa, served the Respondent from 5th September, 2005 starting as a technical operator. Exhibit "3" at pages 57-59 of the Claim 2. On 5th November, 2011, he was promoted to the position of a Senior Technical Operator, a position he held upto the date of his termination on 22nd February, 2021 thus serving the Respondent for fifteen (15) years and five (5) months of continuous service. Exhibit "18" at pages 108-109 of the Claim. In a normal week of six (6) days, the Respondent operate three shifts as follows: - (a) Day Shift: 07.00hrs -19.00hours and runs for three days (b) Night Shift 19.00hrs -07.00hours and runs for three nights, (c) off duty Shift: refers to three days of off duty. The Shift staff will then alternate with staff on day shift taking over night shift duties and those on night shift taking over day shift duties. After every six days comprising of a three-day shift and three night shifts, production staff would then proceed on three days off duty to rest and then restart shift work all again. The three days off duty is always referred to as the third shift.
33. Further, the Respondent would operate: - (a) Keg Line - producing Senator Dark (SD), Senator Larger (SL) and Tusker Keg, and (b) Canning line - which produces canned bear - The grievant did not work in the canning Line. However, the two lines work alongside each other (c) There were also other lines



producing other brands. There are also three teams, team A, B & C on the Kegline. On 4th December, 2020 teams A & C alternated between day and night shifts while team B was on off duty as already explained under paragraph 5 above. Keg Line operates two lines and would have two team leaders each day and each night, making four team leaders in total in a twenty-four-hour period and they worked as follows: - (a) Mr. Lipesa, the grievant herein, was a team leader in the Keg line and would normally work with his colleague, Mr. Wilfred Oloo (b) His other colleague in the same Keg Line was Mr. David Ndichu (Chege) who would normally work with Mr. Isaac Kapuru The Canning Line was managed by one team leader and one Manager and other production staff. The said manager also manages Keg Line. In effect therefore there were six team leaders and a Manager who had access to line 3 (keg line) safe room and with biometrics to access the safe room and the gate itself or a total of six (6) people from keg and canning Line alone. Mr. Titus Njuguna was in charge of restocking KRA Tax Stamps in the safe. Equally, there were two other line managers, Ms. Tereshia Wangeci and Samuel Chebii who would restock stamps in the safe in the absence of Mr. Titus Njuguna. In total therefore, there were about six (6) staff and three (3) managers or a total of nine (9) people with the right to access Line 3 Keg line safe whose biometrics would open the safe room and who had the password, being a mobile phone number, to open the safe. They would also obtain the key to access the safe where stamps were kept. The safe is opened using a password and a key. Just like a briefcase lock, anybody who has a code or password can open such a briefcase. Similarly, once a password is entered and a key is accessed, the safe will be opened. The password was not individual or personal to each team leader. It was a common mobile number known to all team leaders and a manager. The key to the safe was kept in a common area open to all team leaders and the manager. It was not kept in the team leader's office at the production floor. This explains why Mr. Titus Njuguna accessed the safe on 4th December, 2020, at 19.53hours past handover time, which is 19.00hours. There is no evidence that Mr. Lipesa handed over the key to him at 19.53 hours.

34. There was no instruction in all the documents produced by the Respondent requiring a team leader to have custody of the key to the safe in his office at all times.
35. Events of December 4th and 5th, 2020—During the night of December 4th and early morning of December 5th, 2020, the grievant was working his usual night shift as the leader of Keg Line Team "A." Although he was supposed to work with Mr. Wilfred Oloo, he worked alone because Mr. Oloo had been quarantined since December 2nd after being suspected of contracting COVID-19. COVID-19 was real, and the situation required all doors and windows, including sliding windows, to be kept open. These sliding windows made it easy to access the safe room, and with a key and password, anyone could access the safe for malicious purposes. According to the Respondent's Biometric Report (Annexure 4 of the Respondent's Supplementary List of Documents dated October 31, 2024), the grievant accessed the line 3 Keg Line safe three times at 10:37 PM, 1:56 AM, and 4:58 AM. Other individuals also visited the line 3 Keg Line safe on December 4th and 5th, 2020, including: (a) Stephen Njagi at 12:52 AM and 5:46 AM; (b) Titus Njuguna at 9:56 AM and 7:53 PM; (c) David Ndichu (Chege) at 10:14 AM, 2:45 PM, 7:12 PM, and 8:52 AM the following day. It is important to note that team leaders could access the safe at any time when needed, without any specific limit on the number of accesses. Furthermore, the grievant clarified his access to the safe room in the minutes provided by the Respondent (Respondent's List of Documents dated June 6, 2024, at Exhibit "12," pages 33-38), which are the alleged minutes of the disciplinary hearing held on January 19th, 2021. Page 035 of the unsigned minutes states under "employee opening remarks":- "Employee Opening Remarks the employee reiterated that at the time he was writing his statement in the presence of Simon Ondeng, the Chief Shop Steward, he informed the investigator that he wasn't sure how many times he had accessed the safe.' Bulletin 1.3 at page 36 of the said minute's states thus: - "1.3 You deliberately failed to disclose information to the investigator that you had accessed the KRA stamps safe room three times on the night of 4th December, 2020. In



- the statement that you recorded on Toth December, 2020, you indicated that you accessed the stamps safe room two times while the Biometric records shows you accessed the safe room three times on the said night. That the employee did indicate on the statement at the police station that he accessed the safe room three times That the information he had given to the investigator while at work indicating he had accessed the safe room twice instead of three times was a result of fatigue That the employee had no bad motive when writing the statement. The Claimant points out that the grievant's Statement allegedly recorded on 10th December, 2020 in the presence of Mr. Simon Ondeng, the Shop steward as captured in the said minutes, is not availed to Court by the Respondent.
36. It is immaterial on how many times the grievant accessed the safe room and the safe itself. What is important is that he used his biometric data to access the safe room and the safe itself as recorded in biometric data records. Further, what is important is that after the grievant's last access at 04.58 hours, Mr. David Ndichu (Chege) accessed the safe two times at 08.52hours and 11.00hours. According to the Respondent's own evidence, the alleged loss of 6635 KRA Tax stamps was discovered at 11.00am and it is after the alleged discovery that the grievant was called on cell phone by the said Mr. David Ndichu (Chege) on the alleged missing reel . This is besides the fact that the alleged discovery was revealed by a materials clerk, Mr. Albine Omullando, who's one of the staff activating the used stamps using Packaging Data Records from form PDR. However, on this matter, he opted to use EGMS Records instead of the raw data which are PDR Form 44. Mr. Ian Opeyo Owino was the grievant's materials clerk, whose name appears in the EGMS records (Exhibit 4 of the Respondent's List of Documents dated 6th June, 2024.) He did not make a report about a missing reel neither was he asked to record a Statement before this Court. He equally did not inform the grievant of any missing stamps during his shift as there were none. It is unfortunate that a materials clerk, Mr. Albine Omulando, who was not the grievant's material clerk, made the discovery but was not presented in Court to give evidence and thus did not record a Statement whose veracity would be examined and evaluated.
37. Further the packaging Data Records availed in Court cannot add upto 17365 activated stamps as evidence that indeed 6635 KRA Tax Stamps were missing. III. PACKAGING DATA RECORDS (PDR) FORM 44 IV. 31. The Respondent has produced copies of stamp issuance book as recorded in the PDR form 44 (Annexure "1" of Respondent's Supplementary List of Documents dated 31st October, 2024). For senator Lager, the grievant had withdrawn 1000 stamps and there were also 404 stamps brought forward from the previous production. He accounted fully for what were used for production and what he handed over to the incoming shift. There were no issues raised over withdrawn stamps, what was used for production and the balance at the production floor. The grievant was required to enter such records only in the Packaging Data Records. There is no other form in which after issuance of stamps from the safe, the balance left in the safe would be recorded.
38. There was no requirement for any staff withdrawing stamps from the safe to record the balance in the safe and such records, if any, have not been produced by the Respondent Standard Operating Procedure (sop) Or Kra Handling Procedure -work Instruction. The standard operating procedure applicable between 31st July, 2018 and 5th December, 2020, the grievants last working day, is found at Exhibit "5" at pages 61-64 of the Claim. It is revision No.002, Ref. No 7c 37. Bulletin 5.4 (e) (Reconciliation and stock take) in the standard operating procedure detail how KRA tax stamps are handled and provides thus: - "5.4 Reconciliation and Stock take (e) Number of damaged stamps, nature of damage and serial number of the damaged stamp. The operator shall sign against each shift's report and handover the remaining stamps to the next shift (Emphasis ours) After every 24 hours, the process clerk shall reconcile the stamp stocks against damaged stamps and production number. Any discrepancy shall be brought to attention of the Line Manager Keg and Can, Asset Care Manager Keg and Can or the Packaging Manager who shall give guidance on next steps Internal stock take shall be done on a weekly basis Monthly stock shall be led by Finance, Process Clerks and Tax Team



8. In the standard operating procedure referred to herein above, there was no requirement at all for recording of stamp balances at the safe after every issuance as what was handed over were balances at the production line. 39. There is no evidence produced by the Respondent that all other team leaders or any other staff with the right of access to the safe recorded stamp balances left in the safe after every issuance to prove that it is the grievant only who ignored such a requirement, none at all. The revised standard operating procedure (KRA) handling procedure - work instructions) dated 18th December, 2020 came into effect after 4th & 5th December, 2020, these being the last days the grievant worked in the production line. It is found at Exhibit "7" at pages 67-70 of the Claim. The revised provision at bulleting 5.3 now provides as follows: "5.3 stamp handover between production shifts. A handover will be done for any stamp balances already issued to the line and for all the stamps in the safe. (Emphasis Ours) The handover will be done as follows: - For the stamps already issued to the line the out coming and incoming KRA clerk shall count and confirm the balances of the stamps. The two will then record the balances and sign off in the stamp's issuance book as a confirmation. For the balances in the safe-the out coming and incoming technical operator/team leader shall count and confirm the balances of the stamps. The 2 will then record the balances and sign off in the Stamps balances record book as a confirmation." (emphasis Ours). The alleged stamp balances record book to record stamp balances at the safe has not been availed or produced by the Respondent to prove that it existed during the grievant's tenure. KRA EGMS REPORT. The Respondent's Witnesses relied on Annexure "4" in their List of Documents dated 6th June, 2024 to alleged THAT: a) Out of Reel No.RO60002002520248 of 24,000 KRA Tax stamps, 17,365 KRA Tax stamps were activated, or used in the production, and b) 6635 KRA Tax stamps were not activated, unknown or not used and were thus missing. From this Annexure, the action dates are indicated as between 1st - 3rd December, 2020. The Respondent's Witnesses, both of them, failed to identify actions on 4th & 5th December, 2020, these being the dates when the said 6635 KRA Tax Stamps are alleged to have gone missing from the safe. KRA Stamps Reconciliation Done On 06th December, 2020. As further proof of malicious accusation, the Respondent produced Annexure "2" in their Supplementary List of Documents dated 31st October, 2024 to allege that 6635 KRA Tax stamps were unknown or not in the safe. From this Annexure, reconciliation for Senator Lager Production was done from the 30th November, 2020 and from the same Reel No.248, it is alleged that 6635 KRA Tax Stamps were unknown. However, the said document does not show when exactly from 30th November, 2020, the said 6635 KRA Tax stamps went missing from the safe. The other date in the said document is 29th November, 2020 which covered reconciliation for Senator Dark Production. In short, there is no reconciliation record covering 4th & 5th December, 2020 in the said reconciliation allegedly done on 6th December, 2020, this having been after 4th & 5th December, 2020 and should have formed part of the days covered in the reconciliation report.

39. Internal Investigation. Clause 23 (a) of the parties Collective Bargaining Agreement provide as follows:- 23: Suspension (a) Where an employee is suspected of having committed an offence he shall be suspended pending full investigations. The investigations shall be carried out by the Company. In the case of a Unionisable employee statements shall be recorded in the presence of a Shop steward. Any statements recorded in the absence of such Union representative shall be null and void (Emphasis Ours) The suspended employee shall be paid his wages up to and including the date of suspension. Further he shall be paid his full house allowance. According to clause 8 of the parties Recognition Agreement covering Grievance Procedure Internal Investigation is obligatory and compulsory in case an employee is suspected of having committed an offence which would warrant suspension. It is reproduced herein below at paragraph 61 of this submission. There is no evidence that any investigations, meaningfully so, were carried out internally, noting that: - (a) The next shift team "C" leader Mr. David Ndichu (Chege) accessed the safe at 8.52hours and at 11.00hours and went straight to open a new reel. (b) He had also visited the safe on the previous day, 4th December, 2020, during his day shift at 10.14hours,



14.45 hours and at 19.12hours, noting that his normal day shift hours ended at 19.00hours and so what he went to do at the safe room at 19.12 hours is extremely suspect. Mr. Titus Njuguna also visited the safe room at 19.53 hours when the grievants shift had just began and there is no report about what he was doing in the safe room at timed that his working hours having ended at 19.00hours. He was also not restocking the stamps at that late hour (d) So to suspect them as having been used in a Scheme to undermine the grievant cannot be a misplaced suspicion. (e) Whereas the grievant handed over the remainder of KRA Tax stamps at the Production Line and the said Mr. David Ndichu (Chege) visited the safe at 8.52 hours and at 11.00hours, he alleges NOT TO HAVE discovered that the remainder of KRA Tax Stamps from the reel in question were missing. (f) It is Albine Omullando, who was not the grievant's material clerk who made the discovery at about 11.00am or thereabout. He allegedly made the discovery through the EGMS Report which Mr. Ian Opeyo Owino would also have seen in the grievant's team. This was not the case, why him and not Opeyo begs answers. (g) Unfortunately Mr. Albine Omullando was not questioned, neither was he a Witness in this Court on this matter yet he was a witness in the grievant's Criminal Trial, another suspicion that he was also being used in this unfortunate scheme (h) Other production staff had also accessed the safe on 4th December, 2020 as can be seen from the Biometric Report as stated herein at paragraph 20 of this Submission. It came out clearly during a trial in this Court that Mr. David Ndichu (Chege), although issued with a suspension letter, was reinstated immediately and worked while attending criminal Court trial in the Chief Magistrates Court at Makadara in Criminal Cause No. E1933 of 2021. He was only terminated upon filing this claim and upon serving the pleadings where discrimination between the two technicians was pointed out by the Claimant. The grievant's services were terminated on 22nd February, 2020, and the grievant went through a criminal trial while out of employment.

The respondent's submissions

40. The legal threshold for a lawful termination as set out in Sections 41 and 43 of the *Employment Act* is valid and fair reason and due process. For an employer to justify the termination of an employee's employment, they must demonstrate valid reasons for the termination. Under Section 43(2) of the *Employment Act*, the employer must demonstrate the reasons that were genuinely believed to exist at the time of termination. Such reasons must be matters that the employer believed to be true and that caused the employer to take the action of dismissal. Section 44 (4) of the Act identifies categories of gross misconduct of summary dismissal, including; "Any of the following matters may amount to gross misconduct justifying summary dismissal, but this does not preclude an employer or employee from disputing whether the facts or other matters constitute lawful grounds for dismissal; (g) An employee commits, or is reasonably suspected of committing a criminal offense against or to the substantial detriment of the employer or the employer's property. In this case, the reasons for the termination as listed out in the termination letter dated 22nd February 2021, Respondent's Exhibit 13, at page 39 of the Respondent's bundle dated 6th June 2024, include: a. The Grievant was involved in the event that occasioned the loss of 6635 KRA Stamps, which occurred on 4th December 2020 while carrying out his duties; b. He was the last person to access the safe that housed the stamps; c. He remained by himself in the saferoom after issuing the third-party resource with 1000 Tax stamps; d. During investigations, he could not accurately account for how many times he accessed the safe room; e. He breached his duty of care and was grossly negligent in handling company property by failing to account for the 6,635 Tax stamps that went missing during his shift and had been placed under his care as the person in charge of the shift.
41. It is undisputed that the Grievant, a Senior Technical Operator, was responsible for safekeeping the KRA stamps in a safe at the safe room. The incident occurred during the Grievant's night shift on 4th December 2020. The email sent on 5th December 2024, Respondent's Exhibit 5, at page 8 of the Respondent's bundle dated 6th June 2024, provides the chronology of events; On the morning



of 5th December 2020, the leader of the incoming day shift opened a new reel, yet according to the EGMS system, KRA tax stamps were missing and could not be accounted for from Rim Number R060002002520248. A new reel had been opened even though the previous one had not been depleted. The previous reel was the one that the Grievant handled at around 4 AM, as stated in his witness statement. The keg team leader, Mr. David Ndichu, was called by the material clerk on duty (Mr Albine Omullando), who usually activates the used stamps and asked why they were opening a new Rim (R060002002520266), yet the other rim, which was previously in use, Rim Number (R060002002520248), had not been exhausted according to the EGMS. The day shift team leader, Mr. David Ndichu, contacted the Grievant, who confirmed that he had used the reel and returned the balance to the safe. e. However, upon inspection, the stamps were found missing. The Grievant's own witness statement (at paragraphs 21 and 22) confirms that, in his cellphone conversation with Mr. David Ndichu, he informed him that there were KRA Senator Lager tax stamps remaining at the end of his shift, which he returned to the safe. However, they were later found to be missing. This contradicts the Claimant's submission that the tax stamps might have gone missing on 3rd or 4th December 2020. In addition, the Grievant stated that he returned to the company after receiving a call and that the stamps from the reel he had earlier accessed were indeed missing.

42. The respondent's witness, RW-1 Mr. Julius Anami, explained during his evidence-in-chief that KRA tax stamps have unique serial numbers. At the end of each shift, in line with the KRA handling procedure (clause 5.3, claimant's exhibit 5), activation is done in the EGMS system. This requires the clerk to input the serial numbers of the first and last stamps used during the shift and reconcile them against the number of barrels produced, the number of damaged stamps, and the remaining balance of tax stamps recorded in the stamp issuance book/PDR 44 (respondent's exhibit 24, page 1 of the respondent's supplementary list of documents dated 31st October 2024), which is also maintained. Activation is carried out at the end of every shift in accordance with the KRA Handling Procedure. This eliminates any possibility of unaccounted-for stamps from one shift carrying over to the next, thereby negating the Claimant's averment that the stamps might have gone missing at any time between 1st and 3rd December 2020 or even earlier in November 2020. This is the Claimant's attempt to challenge the screenshot of the EGMS report-which could not capture the entire month-as well as the reconciliation report dated 6th December 2020, which was prepared with the participation of the Grievant. Therefore, using the unique serial numbers, it is possible to determine how many stamps were used, how many were damaged, how many were handed over at the production floor, and the remaining balance in the safe through the EGMS system. As the team leaders for their shifts, only the Grievant and his counterpart, Mr. Ndichu, were authorized to access the stamps in the safe and, at the material time, they were the only ones who had accessed and opened the safe where the stamps were stored. It should not be lost that the safes are kept in a saferoom, and this was well explained by the Respondent's RW-2 Mr. Rithaa, during his evidence-in-chief while relying on the Claimant's Exhibit- 8- Layout of Keg line Office when he stated as follows: i. The safe room has two (2) safes, which are marked as C and K on the layout. ii. Saferoom is accessed using biometrics, and the record is sent to the control room (See Extract of the Biometric Report - Respondent's Exhibit-27, page 9 of Respondent's Supplementary list of documents dated 31st October 2024) ii. Access to the safe has two levels of security; you must have a physical key and a password. iv. One can access the safe room but not the safe itself without both the key and the password.
43. RW-2 further stated that no third party could have accessed the safe, because for the safe to be opened, one needed to have a physical key and a password. The same was corroborated by RW1 Mr. Julius Anami in his evidence in chief, cross-examination and re-examination. The Grievant and Mr. Ndichu were the custodians of the key to the safe. This fact was admitted by the Grievant in his statement at the police station recorded on 11th December 2020 (Claimant's Exhibit-9) specifically on page 6



of the statement (Full copy filed by the Respondent separately as the Claimant's copy omitted the Statement), where he stated, "that on my shift and as a team leader am responsible for the safe keys and issuing of stamps." The Grievant's statement at the police station, which forms part of his evidence before this Court, contradicts his position during his evidence-in-chief where he claimed that access to the safe required a key and a password, which was a phone number known to everyone, and that the key was left on top of a table and could be accessed by anyone. He further stated that this was during the COVID-19 period when most doors were left ajar. During cross-examination, he denied being responsible for the safe keys and the safe, which is contrary to the statement he recorded at the police station and adduced as evidence in court. During cross-examination, the Grievant admitted that he had no evidence showing he was seen returning the missing tax stamps, nor any evidence that he had in fact returned them, despite insisting that he had placed them in the safe, whose key and password were in his custody. He further admitted that there had been no previous instances of KRA tax stamps going missing. He acknowledged that the EGMS system could capture the quantity of tax stamps in a particular rim, and made contradictory statements regarding how many times he had accessed the safe room where the safe was kept. Regarding the biometric report, during the cross-examination of RW-1, Mr. Anami, the Claimant sought to rely on the fact that the report indicated the safe room had been accessed by Mr. Titus Njuguna and Mr. David Ndichu prior to the Grievant's three entries-at 22:37pm on 4th December 2020, and at 01:56 am and 04:58 am on 5th December 2020. The Claimant argued that this raises the possibility that either of these individuals could have taken the missing tax stamps. However, both RW-1 and RW-2 clarified that the safes could only be accessed using a physical key and a password. Therefore, while one could access the safe room, the safe itself could not be accessed without the physical key and password, which were in the custody of the two Technical Operators-Mr. Ndichu and the Grievant. As such, it is the two Technical Operators who were accountable for the missing tax stamps, as the Grievant had handed over the key to Mr. Ndichu at the end of his shift. The tax stamps went missing sometime between the evening of 4th December 2020, during Mr. Lipesa's shift, and the morning of 5th December 2020, when Mr. Lipesa handed over the shift to Mr. Ndichu. In addition, the safe, marked as "C," was designated for the canning line and was accessed separately by other Technical Operators using a different key and password. The tax stamps in question went missing from the Keg Line safe, marked as 'K,' as shown in the Claimant's Exhibit 8 - Layout of Keg Line Office. RW-2, Mr. Rithaa, stated during his evidence-in-chief that if the Grievant left the physical key to the safe in a common area accessible to anyone, or shared the password with anyone other than his colleague, Mr. Ndichu, then such actions amounted to negligence. RW-2 explained that the tax stamps are not bulky and could easily be concealed on one's body. He added that the Respondent's plant spans over 50 acres, and it was therefore not necessary for the Grievant to have left the premises with the tax stamps on the same day he failed to account for them. In light of Section 43(2) of the Employment Act, the relevant inquiry is whether the employer genuinely believed, based on the circumstances at the time, that there was sufficient ground for misconduct. Courts have consistently upheld this interpretation. In *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] KECA 300 (KLR), the Court of Appeal emphasized that the standard of proof required of an employer under Section 43 is not akin to criminal proof beyond reasonable doubt but rather on a balance of probabilities. The court underscored that; It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services." Accordingly, when determining whether a termination was valid, the proper question is whether the employer had reasonable and sufficient grounds to suspect misconduct. The "reasonable employer test" as emphasized by the Court of Appeal in *Reuben Ikatwa & 17 Others v*



Commanding Officer British Army Training Unit Kenya & British Army Training Unit Kenya [2017] KECA 274 (KLR) requires that, the court must not substitute its own decision for that of the employer but instead ask whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer. Your Lordship, B O Manani in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] KEELRC 323 (KLR) articulated the reasonable man test under Section 43 as follows: In terms of section 43 of the *Employment Act*, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination. Applying the above tests to this case, we submit that the Respondent needs to establish that at the time of the termination, it genuinely and reasonably believed that the Grievant was responsible for the missing tax stamps. The evidence shows that; a. The Grievant was the last person to handle the missing stamps; b. The safe required both a key and a password to access; and c. The Grievant had exclusive custody of the key and was responsible for both the key and the issuance of stamps at the material time, as he admitted in his police statement.. As such, the Grievant had a duty of care which he breached by failing to ensure the stamps were secure and accounted for. Being the last person to access the safe, the Grievant was reasonably suspected of being linked to the disappearance of the tax stamps, justifying the employer's decision to investigate him. 48. During the investigations, the Grievant gave contradictory statements regarding the number of times he accessed the safe room. While the biometric records reflect three entries, he initially claimed to have accessed it only twice. It was only upon being shown the biometric report that he admitted to a third entry. This inconsistency raised further suspicion about his credibility. Additionally, the Grievant was alone in the safe room at one point at the material time. This was a crucial detail, given that the disappearance occurred within that timeframe. The only two people who had access to the safe were the Grievant and Mr. Ndichu. While the Grievant Claims to have left the stamps in the safe, Mr. Ndichu denies finding them. No third party accessed the safe. As per Mr. David Rithaa's testimony, it is not true that several other people could access the safe, as claimed by the Grievant. The witness testified that there is a distinction between the safe and the safe room. The safe room housed the safe, while the safe housed the KRA tax stamps. To access the safe room, one needed to use the biometrics system. On the other hand, to access the safe, one needed to have a key to the safe and a password. Only the Grievant and Mr. Ndichu were the custodians of the key to the safe and were therefore the only ones who could access the stamps. Even if it were true that other people could access the safe room, they could still not access the stamps because such access required a key and a password, which keys, the two team leaders were in custody of. It was on this basis that both the Grievant and Mr. Ndichu were terminated. We submit, and urge this Honourable Court to find that on balance of probabilities, and applying the reasonable employer test, it was entirely rational for the Respondent to conclude that the Grievant and Mr. Ndichu had been negligent. Moreover, the findings of the internal investigation and the inconsistency in the Grievant's statement reinforced the Respondent's reasonable and genuine belief in the existence of the misconduct. Section 44(4)(g) further empowers an employer to dismiss an employee who is reasonably suspected of committing a criminal offence detrimental to the employer's interest. In this case, the Grievant was subsequently charged with stealing by servant, a charge that stemmed from reasonable suspicions following internal investigations. We therefore submit that the Respondent has not only demonstrated that it had genuine and reasonable grounds for suspecting the Grievant of gross misconduct, but also acted within the bounds of a reasonable employer, faced with



such serious loss that could have greater implications beyond financial loss. The Claimant's argument that the Grievant's termination was unfair because he was acquitted in the criminal case has been addressed severally by courts. Rika J in *James Mugeru Igati v Public Service Commission of Kenya* [2014] KEELRC 735 (KLR) established a clear demarcation between a disciplinary process, which is a private process between an employer and an employee and a criminal trial, which is a public process carried out by the state. He stated as follows; The two processes are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process. There is no provision in the old or the new *Employment Act*, which makes it necessary for employers to follow police investigations, or findings, or indeed criminal court decisions, in resolving employment disputes based on cross-cutting facts. Similarly, the court in *David O. Owino V Kenya Institute Of Special Education* [2013] Keelrc 409 (KLR) cited with approval the holding of the Court of Appeal in *Nelsangi Kibe v Attorney General* [2003] KECA 194 (KLR) and held as follows: in the case of *Kibe v Attorney General (Civil Appeal No 164 of 2000)* the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair. 60. In light of the above, we urge this Honourable court to find that the Respondent has satisfied the legal burden under Sections 43 and 44 of the *Employment Act* and has established that the termination of the Grievant was on valid reasons.

Decision

44. The claimant brought the instant suit after lack of agreement between the parties at conciliation, alleging the grievant, their member was wrongfully dismissed from employment. The The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(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.”
- To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (*Walter Ogal Anuro v Teachers Service Commission*[2013]eKLR).
45. The prove of claims under employment disputes is according to section 47(5) of the *Employment Act* to wit- '47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”



Substantive fairness

46. The burden of proof of the a valid reason of termination of employment, upon evidence of termination by the claimant and the claimant having laid basis of a claim of unfair termination, is on the employer as stated in section 43 of the *Employment Act* to wit- ‘43. Proof of reason for termination (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.’”

47. The employment and termination of the contract of service held by the grievant by the respondent were not in dispute. The claimant laid the basis of why it contended the termination was wrongful by calling the grievant as a witness to produce his witness statement, producing the Claimant’s exhibits as C-1-29, and was cross-examined by counsel for the respondent. The Respondent issued the grievant with a letter of termination of employment dated 22nd February 2021 and stated the reasons for the termination as follows-

‘You were involved in the event that occasioned loss of the 6635 Kenya Revenue Authority (KRA) Tax Stamps, which occurred on 4th December 2020 while carrying out your duties as a Technical Operator. This has been substantiated by the below-you were the last person to handle the lost KRA Tax stamps. That you were the last person to access the KRA stamps safe room on 4th December 2020 at 0446hrs as peryou remained by yourself in the safe room after issuing the third-party resource with 1000 Tax stamps.That you could not account how many times you accessed the safe room at the time you recorded a statement with the security team.That you breached your duty of care as an employee of the Company and you were grossly negligent in handling company property by failing to account for the 6635 Tax Stamps that went missing during your shift and had been placed under your care as the person in charge of the shift. You therefore failed to safeguard the property of the company.

Your actions as outlined above are contrary to the Company Code of Business Conduct (COBC, a breach of the EABL dolinary Policy and the Employment Act, 2007. In addition, your actions exposed the Company to:-

- 3) Financial loss of Ksh.9,952.50 incurred while purchasing the stamps and an additional excise duty exposure of Ksh. 770,180.80 to be paid to KRA and;
- b) Financial impact on stamps which is very punitive and impacts our reputation with not only the Revenue Authority but Kenya National Audit Office.
Reputational damage to the Company as the audit reports of The Kenya National Audit Office are made public and;
- d) Any counterfeit product bearing the missing stamps will be linked back to the Company eroding our reputation even further.

Consequently, the Company has reasons to believe that your actions amount to gross misconduct in the performance of urduties. Your actions have resulted in a breach of the trust which the Company had vested upon you.”

48. The court will focus on the said four reasons in its analysis of evidence placed before the court by both parties to establish whether the said reasons were true/valid.



49. On the reason of -You were the last person to handle the lost KRA Tax stamps. That you were the last person to access the KRA stamps safe room on 4th December 2020 at 0446hrs as per biometrics record and you were the last person to handle the lost KRA tax stamps you remained by yourself in the safe room after issuing the third-party resource with 1000 Tax stamps. That you could not account how many times you accessed the safe room at the time you recorded a statement with the security team. -The respondent's case is summarized above. I proceed to analyze evidence at the cross-examination of both parties' witnesses as relates to the validity of this reason. The grievant agreed he was on duty on 4th December 2020, the night shift. He was handed over 760 Senator Keg stamps and went to the safe to secure stamps. He said there was a standard procedure to get 1000 stamps at the safe house and that he handed over, as per the existing standard procedure, 850 stamps at the end of the shift(page 66 of the claimant's bundle was the form used to hand over and indicated 1000 issued and balance 850). The grievant relied the handover procedure on the KRA stamps approved on 31st July 2017. The grievant told the court that the revised instructions of 18th December 2020 were issued after the incident and the court found so. At cross-examination it was established the grievant was the team leader of the night shift. He confirmed his role included writing reports, picking KRA stamps and keeping the management updated. The grievant denied existence of a safe line.

50. The grievant agreed that the genesis of the dismissal was the respondent's email dated 5th December 2020 (Annexure 5 of the Response). The email read as follows- 'Today during the start of Keg Lines day shift (Team C), the team came to pick Keg stamps for keg line 1 Senator Lager as normally done, they opened a new Rim (R060002002520266) but later on the keg team leader was called by the material team(clerk on duty) who usually activates the used stamps and asked why they were opening a new rim and yet the other rim(R060002002520248) which was previous in use for Keg line1 Senator Lager had not been exhausted according to the EGMS. The day team leader contacted the Night team leader (Team A Lead)asking of the same about the previously rim they were using for KL1 SL, whom confirmed they had used it during their shift at around 5am and returned the balance to the safe.

Actions picked.

Tomorrow morning we will do a mass balance of Keg lines KRA stamps and identify if there is any issues around keg stamps reconciliation and will there after send a report of the same. This will be done by material team and keg line team and a conclusive report sent thereafter." The grievant confirmed that he accessed the used rim and said he returned it to the safe. That the matter was reported to the police. The grievant confirmed that the suspension letter informed him that he was unable to account for missing stamps. The claimant, in response to the show cause, stated that he learnt from Rithaa that he was the last person to access the safe. He confirmed he issued stamps to a third party and remained behind to keep the KRA stamps in the safe. He confirmed he has accessed the safe 3 times and not 2. The grievant agreed the access of 3 times was not in the police statement. The claimant agreed that in response to show cause he indicated he had informed the investigator he had accessed the safe 3 times and that at the hearing he told the panel he informed the investigator that he was not sure how many times. On this issue of access, the claimant stated that the contradiction was caused by fatigue and further in any case it was of no relevance as the employer had the records. The court on balance of probabilities finds the first 3 reasons were proved as valid.

51. Last reason- That you breached your duty of care as an employee of the Company and you were grossly negligent in handling company property by failing to account for the 6635 Tax Stamps that went missing during your shift and had been placed under your care as the person in charge of the shift. You therefore failed to safeguard the property of the company. -The claimant denied the foregoing. During the cross-examination the grievant agreed he stated he was remorseful and justified the same saying he was remorseful the incident happened. He was aware of the code of conduct. He was aware



that negligence was a gross misconduct. The grievant told the court the initial report of the police had cleared him, and later another report said he was charged. He was charged with the offence of stealing contrary to section 280 of the Penal Code. The offence charge of stealing related to the 6635 KRA stamps property of the respondent. (page 48 of the response bundle). The grievant told the court the case was ongoing. He admitted that he had not pleaded that since it was COVID period anyone could access the safe. He confirmed that the record indicated he accessed the safe 3 times (page 9 of the supplementary record of the respondent). He confirmed the access was via biometrics. He confirmed that he returned the KRA Stamps left in the rim before the handover of the balance of 850 stamps to David on the shop floor. On whether he had evidence of having left the stamps in the safe, he told the court it was a job and did not need to have evidence of the same. The court was left wondering what evidence the respondent envisaged the claimant to have, as it did not clarify. The grievant admitted he was the last person to access the safe before David Ndichu. He said there was no previous incidence of missing stamps. The grievant admitted he participated in the reconciliation (annex 2 supplementary by Respondent). He confirmed annexure 4 of the respondent bundle was extract of the EGMS systems which indicated 6635 stamps had not been activated. The grievant qualified that the documents indicated 3rd December and yet he reported on 4th December which position the court confirmed. The grievant agreed the conciliation was done on 6th December 2020. He had no evidence of missing stamps before 4th December 2020. The grievant told the court it was not his duty to protect the KRA stamps denying negligence. On discrimination, the claimant relied on the conciliator's report findings.

52. During re-examination the grievant told the court there was no procedure for accounting for the stamps in the safe. That he did not hand over stamps in the safe. The grievant told the court had no time had he denied he had accessed the safe three times. It was his evidence that he could not recall how many times he accessed the safe. The grievant told the court that there was CCTV in the safe area and was not shown the footage to confirm he was the last person to access the safe. He handed over the remaining 850 stamps to David Ndichu at the shop floor. That on 6th December, when the conciliation was done, the said 6635 were already said to be missing, hence nothing he could have done. That there was no way of knowing the rim was depleted and the rim is a big thing. He said he was discriminated in comparison with Ndichu as they were suspended on the same date, but Ndichu was returned to work, hence the finding of the committee.
53. Conversely, the respondent's RW1 on cross-examination confirmed the documents indicating 6635 stamps as not activated was dated 3rd December 2020. The witness on the screen shot of EGM report had no report of 4th December 2020 (annexure 4). RW1 stated it was a screenshot on 6th December 2020, and the court confirmed there was a date at the bottom to that effect. The court wondered why the respondent did not screen shot the material dates of 4 and 5th which concerns the instant grievant. RW1 confirmed that in his exhibit 4 (supplementary) on 4th December 00.52hrs Stephen Njagi accessed the systems and at 05.46am. This was the same report relied on to prove access three times by the grievant. He confirmed on 4th December 2020 at 19.53 hrs one Titus also visited the saferoom and David Ndichu 3 times on 4th December 2020. The grievant visited 3 times. RW1 confirmed more than 2 people visited the saferoom on the 3rd December 2020. He confirmed that the grievant last visit was at 04.58 hrs. That Ndichu visited next at 8.52 am. RW1 confirmed that said Ndichu in his statement spoke of visits at 9 a.m. and not 8.52 am. On being asked why Titus Njuguna visited the saferoom at 1952.hrs during the shift of the grievant RW1 responded that he was a manager and his responsibility cut across all shifts. RW1 could not explain why Titus was in the saferoom and they did not have his statement. RW1 confirmed the issue of missing stamps was discovered after the grievant had clocked out his shift at 7.00am. The witness relied on the screen shot on being asked when about the exact time of discovery of missing stamps and this was by the clerks for EGMS when Ndichu asked for a new rim. The claimant was called by Ndichu after 11am.



54. On being asked where it was required for the claimant to record balances at the safe room, the claimant relied on instructions procedure at clause 5.3 (annex 5 by claimant) dated 18th December 2020. RW1 confirmed these procedures were put in place after the event. The court finds that there was no such requirement as at 4th December 2020. RW1 had no issue with the data entered by the grievant in the handover forms produced at pages 64 and 65 of the claimant's bundle.
55. In re-examination RW1 told the court that the grievant was on 3 days' shifts but he was not sure of dates. The night shift started from 7 pm to 7am the next day. That the grievant never raised issue that there were no stamps at end of shift. That access to the biometric report is access to the saferoom where the safe is and the access to the safe was by key and password by team leaders.
56. RW2 was the investigator and he adopted his witness statement. During cross-examination RW2 admitted there was no proof of other team leaders having handed over stamps at the safe. He told the court they use scanners to check entry to the saferooms. That there were CCTV cameras at the exit of the saferoom. He had not found the grievant with the stamps. That the CCTV and scanners were limited technology. RW2 confirmed that the discovery was at 11.00am and before then Ndichu had visited the safe and had not reported missing stamps. He confirmed that between 0458 and 0852 am, only the grievant and Ndichu had visited the safe. He said this was the material time. He confirmed about 11 people had access to the saferoom. He told the court the EGM is fed by the clerks who feed the last and first serial numbers of the rim. He had no evidence the system had been audited frequently and added the grievant did not raise and issue with the system. On re-examination RW1 told the court that the safe is accessible by key which the grievant handed over to Ndichu and both were charged.
57. The court, on an in-depth evaluation of the evidence, establishes that 11 people accessed the saferoom at the material time. All team leaders had the key to access the safe, not just the grievant. Indeed, one Titus was a team leader and assessed on the night shift of the Grievant. The respondent did not account to the court on what all these other people were accessing the saferoom for, if not to access the safe. As of 4th and 5th December, the procedure for handover at safe which was effective 18th December 2020 and relied on by the respondent were not in place. The grievant handed over vide forms (pages 64 and 65 of the claim) and RW1 confirmed to court they had no issue of handover. The grievant handed over the remaining stamps, 850 in total, at the shop floor and this was not disputed. At the time of discovery of the missing stamps, the claimant had long handed over, and the next person, Ndichu, has accessed the safe twice . On the first access, if the stamps were missing, Ndichu could have alerted the clerk to request a new rim, but he only requested for a new rim on the second access, several hours later. The Police Investigator found Ndichu liable for stealing the 6635 stamps as they were reporting missing at his shift(page 124 of the claimant's bundle). He later implicated the grievant in a supplementary statement. The court found that the first police investigator's finding is consistent with the finding of the court that only Ndichu was responsible for the loss. The screen shot report was only up to 3rd December, yet the dates in question were 4 and 5th December. Why did the respondent omit these material dates unless they were hiding something? All the foregoing gaps creates doubts in the mind of the court that the grievant was responsible for the alleged loss. The respondent failed to put in mechanisms to secure its property. The lack of trail integrity in the respondent's procedures in handling the stamps and the unaccounted activities by 9 others persons besides Ndichu and the grievant and the lack of handover procedures at the safe makes the court to conclude there was no valid reason which existed for the employer to believe the grievant stole the stamps. The court noted the investigator first only recommended for Ndichu to be charged with the stealing(page 124 of the claimant's bundle). The court noted that the said police investigator wrote a further statement , way after the termination of employment of the grievant and stated that the grievant conspired with Ndichu and they should be charged together and they were charged(pages 46 and 47 of the respondent's bundle). The criminal



case had not been determined. Criminal procedures are distinct and separate from internal process. The court taking into account the conduct of the police investigator and fact that the criminal case is yet to be determined finds the criminal case has little weight in supporting the reason for the termination as the grievant was charged on the 23rd June 2021 after the termination on the 22nd February 2021 . It was said the stamps were in a big rim and surely the same would have been captured in the CCTV and even by the scanners. The court finds the respondent was not a reasonable employer in concluding the grievant stole the stamps. The conciliation report confirmed the forgoing though the report was rejected by the respondent. In the upper court, the court held that the termination was wrongful.

Whether the termination complied with procedural fairness

58. The claimant submitted that the procedure was not in compliance with the grievance procedure. The respondent submitted that the disciplinary procedure was complied with. At the hearing, the grievant confirmed that he was issued with a show cause, he responded, was taken through a hearing, and allowed to appear with a representative and appealed unsuccessfully. The claimant raised an issue regarding the extension of the suspension, and the grievant admitted that the police were involved, hence the extension was justified. The claimant submitted that it came out clearly during a trial in this Court that Mr. David Ndichu (Chege), although issued with a suspension letter, was reinstated immediately and worked while attending a criminal Court trial in the Chief Magistrates Court at Makadara in Criminal Cause No. E1933 of 2021. Ndichu was only terminated upon filing this claim and upon serving the pleadings, where discrimination between the two technicians was pointed out by the Claimant. The grievant's services were terminated on 22nd February, 2020 and he went through criminal trial while out of employment. The court found the unjustified treatment was also raised by the conciliator (page 64 of the respondent's bundle). The court found that the Respondent complied substantially with procedural fairness according to section 41 of the *Employment Act*. However, by recalling Ndichu only from suspension and leaving out the grievant when they were accused of the same offense was an act of discrimination and tainted the process. To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission [2013] eKLR). In the upshot, the termination is held as unfair on account of discrimination.

Whether the relief sought was merited

59. The claimant sought a myriad of reliefs. It is over 3 years since his employment was terminated, hence the relief of reinstatement is not available pursuant to the provisions of section 12 of the *Employment and Labour Relations Court Act* to wit- 'any written law; 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;'
60. On the relief sought of payment of remainder of contract, the relief is not a remedy under section 49 of the *Employment Act*. Section 50 of the *Employment Act* obliges the court, on finding unfair termination, like in the instant case, to grant remedies under section 49 of the *Employment Act*. In Ken freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR the Supreme Court explained the applicability of the provisions of Section 49 as hereunder;

“.....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it



is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....”The exercise of the discretion of the court is not capricious or whimsical and the court should justify the award (*Olpejeta Ranching Limited v David Wanjau Muhoro* (2017)e KLR. The available remedies under section 49 of the *Employment Act* are stated as follows- ‘(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following — (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; (b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. (2) Any payments made by the employer under this section shall be subject to statutory deductions. (3) Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to— (a) reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.’(emphasis provided).

61. The factors to be considered by the court in determination of the appropriate remedy are as stated in section 49(4) thus- ‘(a) the wishes of the employee (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and (c) the practicability of recommending reinstatement or re-engagement; (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; (e) the employee’s length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; (g) the opportunities available to the employee for securing comparable or suitable employment with another employer; (h) the value of any severance payable by law; (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee; (j) any expenses reasonable incurred by the employee as a consequence of the termination; (k) any conduct of the employee which to any extent caused or contributed to the termination; (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.’”
62. On the relief sought of Notice pay in liue- The same is due the having found unfair termination. The claimant is awarded Notice pay under section 36 of the *Employment Act* - Kshs. 132,527.08.
63. Compensation for unfair termination =The grievant was employed on 5th September 2005 as a technical operator and exited wrongfully on 22nd February 2021 (C-exhibit 18). This was approximately 15 years and 5 months of continuous service. There was no evidence of prior disciplinary record issues. The grievant complied with the existing procedures of 2018 and the respondent had no issue with the forms he filled at handover. The grievant was discriminated in the



process as against Ndichu who he handed over to and was also suspended was returned to work during the period of suspension leaving out the grievant . I believe this is a case that deserved maximum compensation in addition to compensation for the said different treatment which the court holds was discrimination as it was not justified. The two employees faced same accusation and hence it was discrimination to return one back to work after the suspension over the incident. It does not matter that Ndichu was effectually dismissed. The last salary paid to the grievant as pleaded was Kshs. 104,185.76 plus Kshs. 28385.32 as housing allowance. Thus total awards for 12 month Kshs. 132527.08x12 total Kshs. 1,590,852.96 awarded as compensation for unfair termination.

64. Compensation for discrimination. Section 5(1) (a) of the *Employment Act* provides as follows:-(1)it shall be the duty of the Minister, Labour Officers and the Industrial Court:-a.to promote equality of opportunity in employment in order to eliminate discrimination in employment...”Section 5(2) of the *Employment Act* provides:-“(2) an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. “Further, section 5(3) (b) of the *Employment Act* provides that an employer shall not discriminate against an employee or prospective employee in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. The Respondent by treating Ndichu more favorably by recalling him from suspension while the grievant remained outside, for the same offence, directly discriminated against the grievant. This was unfair. The claimant is awarded Kshs. 1,000,000 on account of discrimination which is a violations of section 5 of the *Employment Act* and article 27 of *the Constitution*.
65. On costs the claimant asked the court to compute as it does not fall under the Advocates Remuneration Order. While that is true the claimant is treated as a party representing itself. The court taxing master can assess the costs. The parties, being under a CBA, are encouraged to negotiate on costs on award by the court under the principle of costs follow the event.

CONCLUSION

66. In conclusion, the claim is held as merited on balance of probabilities. Judgment is entered for the claimant on behalf of the grievant against the respondent as follows-
- a. The termination is held as unfair.
 - b. Notice pay of 1 month salary Kshs. 104185.76.
 - c. Compensation for unfair termination equivalent of 12 months gross salary 1,590,852.96.
 - d. Damages for discrimination Kshs. 1,000,000.
 - e. Total sum of Kshs. 2,695,038.72 above plus costs of the suit awarded with interest from date of judgment .
67. Stay of 30 days granted.
68. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH OCTOBER 2025.

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:



Court Assistant: Otieno

Claimant: Muunda h/b for Nyumba

Respondent: K'Ogangah

