



**Mbwika v Tawazon Chemical Company EA Ltd (Cause E1157 of 2018)  
[2025] KEELRC 2864 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2864 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1157 OF 2018  
DKN MARETE, J  
OCTOBER 22, 2025**

**BETWEEN**

**NICODEMUS KILUNDA MBWIKA ..... CLAIMANT**

**AND**

**TAWAZON CHEMICAL COMPANY EA LTD ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Statement of Claim dated 3rd July, 2018. The issues in dispute are therein tabulated as:-
  1. Whether the Claimant's dismissal from employment was lawful and fair.
  2. Whether the Claimant is entitled to his terminal dues.
2. The Respondent in a Respondent's Reply to the Statement of Claim dated 13th August, 2018 denies the claim and prays that its be dismissed with costs.
3. The Claimant's case is that on or about 1st March, 2016 he was employed by the Respondent as a warehouse attendant. He was however not issued with contract of employment from the onset but was paid a salary of Kshs.10,468.00 exclusive of house allowance.
4. The Claimant's further case is that he worked from 730 to 1700 hours from Monday to Friday and half day on Saturdays. This was up to 1300 hours. Overall, the Claimant was faithful and diligent in his service to the Respondent.
5. The Claimant's other case is that on 8th March 2018, he went out to do his usual routine duty of deliveries. It was not his duty to know the amount of goods that were loaded on the truck and his duty was only to arrange this and deliver them as instructed. The issues of taking the goods from the store and confirmation of the goods as such was done by two other different persons and employees. He only transported and delivered the goods.



6. The Claimant avers that on or about 9th March 2018 he was summoned together with his driver by the Respondent's assistant sales manager who told to produce and extra bag of pigment green 2727(7) which they had allegedly carried on the previous day. This was to be done by 1100 hours of the same day. The Claimant informed the manager that he had not noticed an extra bag and that if he had he would have returned to the company. They were asked to return the following day but were not able to meet the manager as agreed.
7. On 13th March, 2018, the claimant returned to the workplace and was issued with a termination letter by Harpreet Rehsi. He declined to sign the termination letter but instead did an explanation letter to the accusations against him. The Respondent failed to respond to his letter but instead he insisted that the decision to terminate his employment was final. This in toto caused grievous suffering to his family as he was the sole breadwinner.
8. He claims terminal dues as follows;
  1. The sum of SHS.565,594.08 calculated as hereunder;
    - a. 1 month salary in lieu of notice  
Basic salary plus House allowance  
(Kshs.19,909.45 + 15% of 19,909.45)  
Ksh.19,909.45 + Kshs 2986.42 ..... Kshs 22.895.87
    - b. Underpayment  
Minimum wage-Basic Salary  
March 2016 to April 2017  
Ksh. 16,872.40 -Ksh. 10.648  
Ksh. 6224.4 X 14 months ..... Kshs.87,141.16  
May 2017 in February 2018  
Ksh. 19,909.45-Ksk. 10648  
Ksh.9261.45x10 months ..... Kshs.92,614.50
    - c. Unpaid salary  
March 2018 ..... Kshs.22,895.87
    - d. Home Alliance (March 2016-April 2017)  
15% of 16,872.40=Kshs, 2530.86  
Kshs. 2530.86 x 14 months ..... Kshs. 35,432.04  
House Allowance (May, 2017 - February, 2018)  
15% of 19909.45-Ksh. 2986.42  
Kshs. 2986.42 x 10months ..... Kshs 29,864.20
    - e) 12 Months Salary Compensation  
Basic salary plus House Allowance x 12months  
Ksh. 22,895.87 x 12 ..... Kshs.274,750.44



Total..... Ksh.565,594 08

He prays as follows;

- a. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.
  - b. The sum of KSH 565,594.08 particularized in paragraph 18 above.
  - c. Certificate of Service.
  - d. Costs of this suit.
  - e. Interest on the amount awarded at court rates.
9. The Respondent's case is a denial of the Claim. The only area of admission is the descriptive paragraphs of the claim and also the particulars of employment as narrated in the claim.
10. In further denial of the claim, the Respondent avers that the claimant did not carry out his duties faithfully and diligently as alleged but instead engaged in conduct that was detrimental to the interests of the Respondent. This was by theft of the Respondent's goods, particulars of which are set out hereunder; On 8th March, 2018 (the material day) the claimant was instructed to load fifteen (15) bags of Suda fast Green 2727 amongst other goods for delivery to a customer. The working of the Respondent is that the sales manager would issue and order for delivery of goods and his assistant would then prepare the invoices and delivery notes of the intended delivery. These are sent to the warehouse manager who then instructs the warehouse assistant (claimant) to retrieve the items and load them onto the truck. On the material day, the claimant with the intention of stealing from his employer informed the warehouse manager that he had loaded one bag less of the number of pigment green bags indicated in the invoice and delivery notes and was allowed to load the extra bag into the delivery truck.
11. The Respondent further asserts that it was the express duty of the claimant to know what goods and quantities were being loaded onto the trucks as he was the delivery officer and was tasked with ensuring that the goods ordered for matched those loaded at the warehouse. The allegation of ignorance as to number/quantity of goods that were transported by the claimant are false as he was at all times issued with the invoices and delivery notes and would retain these documents from the point of loading to actual delivery to the customers.
12. The Respondent's further case is that on 9th March, 2018 on reconciling the warehouse stock, the warehouse manager realized that one bag of pigment green was missing and reported this to his supervisor. A review of the CCTV footage in the premises for the previous day and night was conducted thereby revealing that the claimant had loaded an extra bag without lawful instructions and authority so to do. He was asked to explain the whereabouts of the lost/stolen bag of pigment green and also show cause as to why his services should not be terminated on the basis of theft by servant as evidenced in the CCTV footage. In the absence of a reasonable explanation or even production of the stolen bag of green pigment the Respondent proceeded to summarily dismiss the claimant by a letter dated 9th March, 2018. This theft was reported to the police at Industrial Area Police Station as OB58/12/3/2018 and is now a matter under criminal investigation with the claimant as the main suspect.
13. The Respondent's penultimate case is that the claimant conduct warranted summary dismissal and was within the Respondent right under the provisions of *Employment Act*, 2007.
14. The matter came to court variously until the 6th February, 2024 when the parties agreed on a determination by way of written submission.



The issues for determination therefore are;

1. Whether the termination of employment of the claimant by the Respondent was wrongful, unfair and unlawful.
  2. Whether the claimant is entitled to the relief sought.
  3. Who bears the costs of this claim
15. The 1st issue for determination is whether the termination of employment of the claimant by the Respondent was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this. The claimant in his written submission dated 20th February, 2024 reiterates a case of unlawful termination of his employment by the Respondent.
16. The claimant submits that this court in determination of the issue of termination of his employment must consider whether this was substantively and procedurally fair. On this he seeks to rely on the authority of *David Gichana Omuya -vs- Mombasa Maize Millers Ltd (2014) eKLR*.
- Section 43 of the *Employment Act* has placed a statutory Obligation upon the employer to prove the reasons for terminating the services of an employee. Section 45 of the Act on the other hand requires the employer to prove that the reason(s) for terminating are valid and fair reasons.
17. The claimant's further submission is that in his pleading and testimony is that on 9th March, 2018 he and the driver were summoned and informed that they had carried an extra bag of pigment green 2717(7) as they undertook the deliveries the previous day and that this was missing. He denied knowledge of the extra bag and he was requested to go home only to return on 12th March, 2018 and be served with a letter of termination.
18. It is his case that the Respondent did not have valid reasons for dismissal for reasons that he was not charged in court of law. The CCTV footage produced by the Respondent does not conclusively prove that the claimant was indeed stealing from the Respondent but was instead performing his normal duties of arranging the luggage in preparation of making normal deliveries as was usual of his assignment. Secondly, the claimant did not have any history of indiscipline as an employee of the Respondent in his two years stint of service. He had always acted with due diligence and dispatch in conduct of his duties in the two years of the service to the Respondent. The Respondent therefore failed to meet the criterion set out in sections 43 and 45 of the *Employment Act*, 2007 as to the reason or reasons for termination of his employment.
19. The other faulty aspect of the dismissal of the claimant is one on procedural fairness. The claimant submits that the termination of employment did not comply with section 41 of the *Employment Act*, 2007 in that he was not notified of the reasons for termination before an employee of his choice or a shop floor union representative during the explanation/notification. Again, the claimant was not subjected to a disciplinary hearing where the employer would hear his representations before making the decision to terminate the employment. On this the claimant seeks to rely on the authority of *David Gichana Omuya (supra)*.
20. The Respondent on the other hand submits a compliance with the provisions of section 41 of the *Employment Act*, 2007. On this they seek to rely on the authority of *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR* where the Court of Appeal restated the ingredients of section 41 and the need to comply with it.



21. The Respondent further seek to rely on authority of section 44 of the *Employment Act*, 2007 which provides that summary dismissal would occur where and employer terminates the employment of an employee without notice or with lesser notice that to which an employee is entitled in law or contractual terms. Section 44(4) particularly provides for justifiable and lawful grounds of summary dismissal in situation where an employee commits or on reasonable or sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or the employer's property.
22. The Respondent in finality submits that its enquiry on the incident of theft of the extra bag which was not adequately answered by the claimant and the subsequent reference to the CCTV footage was clear demonstration of theft by servant for which the claimant was dismissed. The termination of employment of the claimant by the Respondent therefore met the test of reasonableness as was established in the authority of *British Leyland UK Limited vs. Swift* [1981] IRLR 91 at page 93.
23. Overall, the Respondent's case overwhelmed that of the Claimant both on a balance of probabilities and preponderance of evidence. The Respondent's case of summary dismissal is compelling and sober on the face of the evidence adduced by the parties. It is the more convincing of the two.
24. I am therefore inclined to dismiss the claim with orders that each party bears its costs of the same.

**DELIVERED, DATED AND SIGNED THIS 22<sup>ND</sup> DAY OF OCTOBER 2025.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

1. Miss Malombo instructed by Charles Gomba & Company Advocate for the Claimant.
2. Mrs Ligunya instructed by Ligunya Sande & Associates for the Respondent.

