

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**ELRC APPEAL NO. E109 OF 2023**

*(Before D.K.N. Marete)*

**FRANCIS MUCHINA.....APPELLANT**

**VERSUS**

**H. YOUNG AND COMPANY (EAST AFRICA) LTD.....RESPONDENT**

**JUDGMENT**

This matter arose from an Appeal and a Cross-Appeal filed on 20th June and 23rd June 2023 respectively, challenging the judgment of the trial court delivered on 26th May 2023. The trial court had dismissed the Appellant’s claim which was initially filed by a Memorandum of Claim dated 13th August, 2018.

The Appellant’s case before the trial court was that he was employed by the Respondent as a Prime Mover Driver until his summary dismissal on 16th March 2018. He was accused of siphoning 17 litres of fuel from a company vehicle, an allegation he vehemently denied.

The Appellant’s case was that the Respondent failed to provide any proof of his misconduct. He argued that the fuel usage graph presented by the Respondent was never explained by a competent witness such as the Transport Manager who was absent from the disciplinary hearing and did not also testify in court. He further highlighted the bizarre circumstances of receiving two letters on the same date, 16th March, 2018 one commending him as an asset and the other summarily dismissing him.

The Appellant pointed out to fatal inconsistencies in the procedure belying his termination from employment. This is evident in the minutes of the disciplinary hearing, noting that they first stated his response was *noted* but later claimed he had *no explanation* and sought forgiveness. He also maintained that the issue of his alleged resignation prior to dismissal was never pleaded by the Respondent and was improperly raised for the first time in the written submissions in respect and support of the defence case.

The Appellant in the Memorandum of Appeal prays thus;

- (i) That the Appeal to be allowed.
- (ii) The judgment of 26th May 2023 to be set aside.
- (iii) His claim as prayed in the Statement of Claim dated 13th August 2018 to be allowed.
- (iv) Costs of the Appeal and the suit in the lower court.

The Respondent's case was that the Appellant's dismissal was both substantively and procedurally fair. They relied on a fuel monitoring graph (pages 42-43 of the Record) which showed sudden dips in fuel levels, indicating siphoning or gross negligence leading to excessive consumption. They argued that under Section 44(4)(g) of the Employment Act, 2007 dismissal on reasonable suspicion of a criminal offence against the employer's property was justified. On the procedure employed in the termination of employment of the Appellant, the Respondent asserted that it fully complied with Section 41 of the Employment Act, 2007 by issuing a show-cause letter and conducting a disciplinary hearing where the Appellant was permitted to be accompanied by a colleague.

Through its Cross-Appeal, the Respondent advanced a further argument that the Appellant had rendered his claim for compensation moot by tendering a resignation notice on or about 15th March 2018, a day before his dismissal on 16th March 2018. They referenced a demand letter from the

Appellant's advocates dated 25th April, 2018 which acknowledged this prior resignation. Consequently, they argued the Appellant's claim should have been limited to payment for the shortened notice period, not compensation for unfair dismissal.

The Respondent prayed in its Cross-Appeal for:

- (i) The Appeal to be dismissed.
- (ii) The Cross-Appeal to be allowed, sustaining the trial court's judgment on the additional ground that the prior resignation defeated the suit.
- (iii) Costs of the Appeal, Cross-Appeal, and the trial.

The pleadings, evidence, and submissions of the parties birth the following as issues for determination;

1. Whether the Respondent discharged its burden of proving the validity of the reason for the Appellant's termination (Substantive Fairness).
2. Whether the Respondent followed a fair procedure in terminating the Appellant's employment (Procedural Fairness).
3. Whether the Appellant had tendered a resignation prior to his dismissal and what the legal consequences of that are for his claim.

The 1st issue for determination is whether the Respondent has discharged its burden of proving the validity of the reason for the Appellant's termination. This is the issue of substantive fairness as provided for in Section 43(1) of the Employment Act, 2007, which provides that the burden of proving the reason for termination rests solely on the employer and failure to do so renders the termination unfair

The Respondent's entire case on the reason for dismissal hinged on a fuel usage graph. However, no expert witness with technical knowledge of this system, such as the Transport Manager, was called to interpret the graph, explain how it worked, or demonstrate how it specifically implicated the Appellant in siphoning as opposed to any other possible explanations. The Respondent's sole witness admitted she was not from the relevant department and could not recall the hearing details. This is illustrated at pages 89-90 of the record of appeal.

The Respondent is correct that the standard of proof is on a balance of probabilities and not beyond reasonable doubt, as held in **Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR**. However, this principle does not excuse an employer from adducing any credible evidence to link the employee to the alleged misconduct. Presenting an unexplained graph and leaving the court to draw inferences falls short of this statutory obligation. It is a derogation of section 107 of the Evidence Act, Chapter 80, Laws of Kenya that calls upon a party seeking to rely on a particular fact to adequately prove the same by way of evidence. I therefore find that the Respondent failed to prove, on a balance of probabilities, that the Appellant siphoned or was negligently responsible for the loss of fuel. The termination was therefore substantively unfair for failure to prove and justify the reason(s) for termination of employment.

The 2nd issue for determination touches on the procedural fairness of the termination of employment.

Section 41 of the Employment Act mandates a fair hearing before termination of employment on grounds of misconduct. The Appellant has raised legitimate concerns regarding the minutes of disciplinary hearing. The inconsistency between the minutes stating his response was noted and the subsequent entry that he had no explanation creates doubt about the accuracy and fairness of the process. A fair hearing requires a genuine consideration of an employee's defence and inconsistent

records undermine this principle as echoed in the authority of **Kiliu v Isinya Resorts Limited [2022] KEELRC 13240 (KLR.)** This inconsistency of the record renders the whole record unreliable and therefore invalid. It is not material for a determination of a case for termination of employment like we now have.

Again, the failure to have a person who could authoritatively explain the primary evidence the fuel consumption or utilization graph present at the hearing further vitiates the procedural integrity of the process. I therefore find that the termination was also procedurally unfair.

The last issue of the effect of the alleged prior resignation, the Respondent's case on this point is that the Appellant resigned on 15th March 2018 and was dismissed on 16th March 2018. They rely on authorities like **William Ochieng Orondo Vs Aturukan Hotel Limited (2016) eKLR** and **Savachi M. Amos Vs Sei Fee Bakeries 1968 Limited (2016) eKLR** to argue that a prior resignation defeats a claim for compensation for unfair dismissal. However, a fundamental principle of litigation is that parties are bound by their pleadings. The record is clear that the Respondent's Memorandum of Response filed in the trial court (Pages 25-26, Record) contains no averment whatsoever regarding the Appellant's resignation. This issue was sprung upon the Appellant at the submission stage of the trial in the lower court. The Court of Appeal in the authority of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** reaffirmed the law that a party cannot be allowed to succeed on a case not pleaded. The alleged resignation letter was never pleaded or produced as an exhibit. To allow the Respondent to rely on this unpleaded and unproven fact would be a grave procedural miscarriage of justice. This issue is therefore not properly before this court. The Cross-Appeal on this ground therefore fails from their onset.

This court finds this appeal merited. The Respondent failed to establish both substantive and procedural fairness of the termination the Respondent. The Respondent's Cross-Appeal is without foundation and is dismissed.

I am therefore inclined to allow the appeal, set aside the judgement and orders of the lower court and award relief as follows;

- (i) The Respondent's Cross Appeal filed on 23rd June, 2023 be and is hereby dismissed.
- (ii) One (1) months salary as compensation in lieu of notice.....Kshs.53,456.00
- (iii) Ten (10) months salary ..Kshs.53,456.00 x 10 .....Kshs.530,456.00
- Total of claim .....Kshs.588,016.00**
- (iv) The costs of this appeal and claim at the trial court shall be borne by the Respondent.
- (v) Interest at court rates from the date of this judgment of court till payment in full.

Delivered, dated and signed this 22<sup>nd</sup> day of October 2025.

**D. K. Njagi Marete**  
**JUDGE**

Appearances:

1. Stanley Kinyanjui instructed by Mbuthia Kinyanjui & Company Advocates for the Respondent
2. Mr Burugu instructed by Macharia Burugu & Company Advocates for Appellant.