

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 1742 OF 2015

BERNARD WANYOIKE NJUGUNA..... CLAIMANT

-VERSUS

KIU CONSTRUCTION COMPANY LIMITED.....RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. Vide a statement of claim dated the 17th of September 2015, the claimant sued the respondent and sought the following Orders:-
 - a) **Kshs. 2,116,456.40**
 - b) **Interest on (a) above at court rates from 6th July 2015 until payment in full.**
 - c) **Costs of the claim.**
 - d) **The actions of the Respondent were unlawful and untenable.**
 - e) **Any other relief this court may deem fit to grant.**

2. The claimant in support of the claim filed his witness statement dated 20th November 2015; undated list of witnesses; and undated list of documents filed on 15th December 2015 with the bundle of documents attached.
3. The Respondent entered appearance through the law firm of Julia Kariuki & Company Advocates and filed a response to claim dated 29th October 2015. In support of the said response, the respondent filed a list of witnesses dated 30th November 2015; list of documents dated 11th November 2016 containing the witness statements of Geoffrey Kimaiyo, Eng. Koskei, Beth Mutea, and Elizabeth Wangui Munyua; and a further list of documents dated 6th December 2019.
4. To counter the respondent's response, the claimant filed a reply dated 8th November 2015.

Hearing and evidence

5. The claimant's case was heard before Justice Ocharo on April 16, 2024, when she testified on oath as CW1, adopted his witness statement dated October 5, 2022, as his evidence in chief, produced his documents under a list of even date as C-exhibits 1-7, and was cross-examined by counsel for the respondent, Ms. Kimeto. The respondent's case was partially heard before Justice Ocharo on June 20, 2024, when Francis Gateri Kinuthia testified on oath as RW1, adopted his witness statement dated November 10, 2022, as his evidence in chief, produced documents filed by the respondent under two lists dated September 16, 2021, and one on November 14, 2023, and was cross-examined by counsel for the claimant, Ms. Ndungu.

6. The Respondent's case was heard before me on the 17th July 2025 where Florence Mundia testified on oath as RW2 and was cross-examined by counsel for the respondent . Ms. Ndungu.

The Claimant's case in summary

7. The Claimant's case is that he was employed by the Respondent as a driver on July 5, 2010, with an agreed monthly salary of Kshs. 24,897.00, plus payment for any overtime and other allowances earned from time to time. It was also a term of the employment contract that the employment was terminable by either party giving one month's notice or by payment of one month's pay in lieu of notice. The Claimant's first task upon being employed was to ferry bitumen from Mlolongo to Mwingi, where the Respondent was engaged in road construction. To ensure timely delivery, the Claimant was required to report to the collection center at Mlolongo by 10 pm and line up until 2:30 am when the lorry was loaded. He then had to leave for Mwingi by 3 am to arrive by 8:30 am After delivery, the Claimant would start the journey back to Nairobi. Most days, he would arrive in Nairobi by 7 pm or later. Upon arrival, he would go home, take a shower, change clothes, eat, and then head back to Mlolongo to line up for reloading of the bitumen before starting the trip to Mwingi. The Claimant states that the project lasted about 21 months. Once the project was completed, he worked in various other locations including Iten, Bogani, Nairobi JKIA Airport, Kitui, and Machakos.

8. The claimant's problems began on 2nd July 2015 at around 11pm when the motor vehicle he was driving experienced two tyre bursts, and developed a brakes problem and a broken spring, as he was ferrying murrum from Lukenya to the respondent's site at the Jomo Kenyatta International airport (JKIA). The claimant informed his supervisor via telephone and was

instructed to park the vehicle within the site which he did and left. On the following day, 3rd July 2015, the claimant reported to work as usual and was instructed by the supervisor to go and collect a new spring from Chui auto spares as the mechanics worked on changing the burst tyres and repairing the faulty brakes. The claimant delivered the new spring and handed it over to the mechanics. Before the mechanics was through with the repair, the claimant indicates that he was instructed by his supervisor to attend to some other urgent matter at the company's site in Sagana. Since he completed his work after 5 pm, the claimant went home. On the following day, 4th July 2015, the claimant reported to work and continued to assist the mechanics with the repair of the motor vehicle. The works were not completed on the same day. On 5th July 2015, the next day, the mechanic found that a portion of the braking system had been destroyed and needed replacement. He informed the supervisor but the supervisor stated since it was on Sunday and all the spare part shop were closed, the claimant should try and drive the lorry as it was because the murrum were required urgently. The claimant declined because it was not only illegal but also risky to the claimant and other road users. The supervisor asked the claimant and mechanics to go home as it was already past 6 pm. At around 8pm the claimant was called by the supervisor and requested to report to the Respondent's office directly on the next day before going to the site.

9. When the claimant reported to the office on Monday, 6th July 2015, he was issued with a suspension letter dated 6th July 2015 sending him on suspension for an indefinite period of time, and which required him to show cause in writing why he should not be dismissed. The claimant responded on 7th July 2015 but has never received a response to date. On 6th August 2015 the claimant, through his advocate on record wrote to the respondent requesting to know the claimant's status. Again, no response has been received from the respondent to date. On

the 24th August 2015 the claimant's advocates on record again wrote to the respondent advising them that the suspension letter was being treated as dismissal letter, and demanding the payment of the terminal dues together with compensation for wrongful dismissal/termination. No response or payment has been received from the respondent to date.

Respondent's case in brief

10. The Respondent's case is that the claimant was indeed its employee who was involved in a project where the respondent was contracted to build Murram shoulders between the intersection of Likoni Road, Mombasa Road and JKIA round-about by the Kenya National Highways Authority (KENHA) in the month of June 2015 to July 2015 in preparation for United States President Obama's visit to Kenya. The work was very involving since the Respondent was working on a strict timeline set by the Government. The Respondent's employees were informed that due to the workload they would be required to work overtime until they met each specific day's target.
11. The circumstances of this case were that on 3rd July 2015 the claimant, who was a truck driver, experienced two punctures at night after which he left the site without communicating with the Operations Manager and his supervisor, one Engineer Koskei. Following this incident, the claimant failed to report to work on 4th July 2015 and 5th July 2015. He switched off his phone until Sunday 5th July 2015. The Respondent's officers tried to call him severally to inquire on his whereabouts but he declined to pick up their calls, only for him to send a text message to his supervisor telling him to drive the vehicle himself. The Respondent states that prior to this absence, the Claimant had been advised on several occasions and warned verbally

that he needed to take his work seriously, to be proactive in his work and show commitment to his duties, since his performance was not satisfactory.

12. The Claimant was issued with a suspension letter and notice to show cause why disciplinary action should not be taken against him for the gross misconduct. He responded and acknowledged his behaviour and asked for forgiveness. It is the Respondent's case that the Claimant was not terminated from employment. Rather, he was suspended from employment, and his employee file was not closed.

DETERMINATION

13. The parties filed written submissions after the hearing.

Issues for determination

14. The claimant outlined the following issues for determination in the suit-

- A) Whether the Claimant services were terminated?
- B) Whether or not the termination of the claim services was unlawful, wrongful and unfair?
- C) Whether the Claimant is entitled to the sum claimed?

15. The respondent outlined the following issues for determination in the suit-

- a. Whether the termination of the Claimant's employment was procedurally and substantively fair.
- b. Whether the Claimant is entitled to the remedies sought.

c. Who should bear the costs of the suit.

16. The court, upon reviewing the statement of claim, found that it was the claimant's case that he was issued a suspension letter along with a show cause notice, to which he responded. The employer did not provide any feedback despite letters from his advocate, and he thereby treated the suspension as termination. Conversely, the respondent argued that it never terminated the claimant's services; instead, the claimant absconded duty, rendering the claim premature. The response was dated 29th October 2015. The respondent later filed an additional list of documents on 6th December 2019, including a termination letter dated 10th October 2015 for absconding duty. The court finds that, based on the pleadings by both parties, the issue of termination is in dispute. The court then outlines the issues for determination in the case as follows.

A) Whether the Claimant's services were terminated?

B) Whether or not the termination (It true) was fair

C) Whether the Claimant is entitled to relief sought

Whether the Claimant services were terminated?

The claimant's submissions

17. The Claimant in his Statement of Claim has averred that by a letter dated 6th July 2015, the respondent herein without any Justification or notice suspended the Claimant from the employment which suspension was immediate, indefinite, without pay and privileges. Also in the said letter, the Respondent requested the claimants to show cause within 3 days of the said

letter why his services should not be terminated. The claimant in compliance with the above letter, wrote to the respondent on 7th July 2015 where he explained his reason. The hearing of the case commenced on the 25th May 2022 when Claimant case was fully heard and closed. In his testimony in chief, the claimant Adopted his witness statement dated 20/11/2015 and filed in court on 15th December 2015. The said statement explained clearly the sequence of event leading to the unlawful termination of his services. The claimant further produced a bundle of documents which is contained in the list of documents filed on 15th December 2015. The said documents were Admitted without any objection from the Respondent. From the witness statement and bundle of documents produced, it is evidently clear that the Claimant's services were terminated by the Respondent when they sent him on indefinite leave without further communication.

18. The Claimant has further produced a letter dated 6th August 2015 written by his Advocate which enquired on the fate of his suspension. The said letter was not responded to by the Respondent, nor was it objected to in production at the trial. This was followed by another letter by his advocate dated 24th August 2015 in which the Claimant notified the Respondent that in view of her failure to respond, the suspension has been treated as a letter of termination and demanded payment of terminal dues which were tabulated in the said letter. Though the said letter was not responded to, it was acknowledged in the statement of response at paragraph 10 in which the Respondent alleged that it was wrong to treat the suspension as termination. At the hearing of the defence case on 11th June 2025, the Respondent called 1 witness, Elizabeth Wangui Munyua who testified on its behalf. The witness adopted the statement of Beth Mutea filed on 18th November 2016 as her evidence in chief. The said witness also produced a list of documents contained in the Respondent list of documents dated

6th December 2019. From the pleadings and evidence adduced in court, the Respondent has taken 2 conflicting position. In their statement of Response, which was the first pleadings to be delivered by the Respondent after filing the Memorandum of Appearance, the Respondent maintained that the claimant was not dismissed but suspended. This position was also maintained by "RW1" in her witness statement which was adopted as evidence in chief. However, and notwithstanding, the above, the Respondent produced a letter dated 10th October 2015, which purported to terminate the claimant from his employment with effect from 10th July 2015. The claimant has denied receiving such letter from the Respondent and has challenged the Respondent to prove when and how the alleged letter was delivered to him which they failed to do. The question which arose is that if indeed the applicant was terminated on 10th July 2015, why did the Respondent deny termination in his response to claim and witness statement which were filed long after the alleged termination date. The fact that the Respondent in it response has denied terminating the claimant, and the failure to include the alleged termination letter in the initial list of document, clearly demonstrate that the alleged termination letter of 10th July 2015 was non-existent at the time the response was filed and the has been introduced as an afterthought. In addition to the above, it is important to note that before the claim was in lodged, the claimant through his advocates issued (2) demand notices to the Respondent. The first demand is dated 6th August 2015 in which the claimant inquired about his indefinite suspension which he considered illegal and unconstitutional. The 2nd letter is dated 24th August 2015 which the claimant advocates informed the Respondent that the 6th July 2015 suspension letter was being treated as a letter of termination and demanded payment of the terminal dues at the time which was tabulated as KShs-2,171,234.00 None of the above letters was responded to by the Respondent herein nor was their production challenged in any way during the hearing.

19. It is trite now that the parties are strictly bound by their pleadings and cannot be allowed to adduce evidence which is inconsistent with their pleadings. In the case of BNM VS BNM (Milimani HCC E007 of 2025) the Hon. Judge (Hon. Lady P. Nyaundi) stated as follows: "The Principal that parties are bound by their pleadings is well settled, parties must plead their case before proceedings to prove it. In Daniel Otieno vs South-Nyanza Sugar Co. Ltd (2018eKLR), Hon Justice A.C Mrima stated. is now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with pleadings is for rejection". Also in NAIROBI ELRC NO. E573 /2022, Kenya Building, Construction, Timber and furniture industries, Employees union vs Slumberland Kenya Ltd, the Hon. Lady Justice L. Ndolo stated as follows: "it is general principal of the law that parties are bound by their pleadings, in its decision in Raila.A. Odinga -vs- Independent Electoral & Boundaries Commission & 2 others (2017)eKLR, the Supreme Court of Kenya held that " in absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to state all necessary and material facts in support of the case set up by them". In the case of Consolata Wawira vs Betty Kyalo (Milimani HCCA E707 of 2023) the Hon. Justice T.N Ouya stated: "it is now (settled) principal in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averment in the pleadings, or put in another way, which is at variance with the averment in the pleadings go to no issue and must be disregarded" In this matter, while the Respondent has in her Response to the statement of claim categorically denied dismissing the claimant, she stated during cross-examination that the claimant was, indeed, terminated through the letter dated 10th July 2015, which she also produced in evidence. It is apparent that the evidence

tendered by the respondent if inconsistent with the statement of response filed by the respondent. From the foregoing, and considering the totality of the evidence, it is evidently clear that the Claimant was constructively terminated when he was suspended indefinitely without pay and privileges. The allegations by the Respondent that the applicant was terminated after following the due process was not proved at all.

20. The respondent did not submit on this issue

Decision

21. It was apparent to the court that the letter of termination dated 10th October 2015 was in contradiction to the filed statement of response. During the hearing, RW1 Elizabeth Wangui Muniya told the court that she adopted as her evidence in chief the witness statement of her predecessor, Beth Mutea, dated 16th November 2016. RW1 had filed a witness statement which stated that she was the current Human Resources Manager of the respondent and that she was relying on records filed by her predecessor Beth Mutea. In the statement of Beth Mutea adopted as respondent's evidence in chief stated in **part-** *'On 6th July I received a report by Eng. Koskei and Geoffrey Kimaiyo that Bernard Wanyoike a truck driver had a two punctures on 3rd July 2015 at night after which he left the site without communicating with His supervisor. He never turned for work on 4th and 5th July 2015. He switched off his phone till on Sunday 5th July 2015. He was called by his supervisor several time but declined to pick the calls only for him to send a text to his supervisor telling him to drive the vehicle himself.*

I had advised Bernard on several occasions and warned him verbally to take his work seriously and show commitment to his duties. Since it was lacking and reflected to his performance.

I issued him with a suspension letter and to show cause why disciplinary action should not be taken against him for the gross misconduct. He responded and acknowledged his behavior and asked for forgiveness.

*Further to this I received a claim letter on 23rd September 2015 indicating he was terminated which is not the case since he was suspended and his file was not closed.” Strangely, the respondent in further list of documents dated 6th December 2019 produced a termination of service letter dated 10th October 2015. The letter was signed by Beth Mutea. The claimant denied having received the letter. The court finds that the said termination letter was in contrast to the pleadings by the respondent. The general principle is that the evidence presented must be relevant to the issues defined by the pleadings. The alleged termination letter introduced after filing of defence and the witness statement adopted as evidence in chief by RW1 to the contrary can only be treated as an afterthought and is inadmissible. The court upheld the decision of Supreme Court in Raila. A. Odinga -vs- Independent Electoral & Boundaries Commission & 2 others (2017) eKLR, upheld by Ndolo J in NAIROBI ELRC NO. E573 /2022, Kenya Building, Construction, Timber and furniture industries, Employees union vs Slumber land Kenya Ltd where it was held that " *in absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also settled legal preposition that no party should be permitted to travel beyond it pleadings and parties are bound to state all necessary and material facts in support of the case set up by them*" The court upheld the decision to apply in the instant case to find that the letter of 10th October 2015 was inadmissible. The court agreed with the claimant that the suspension letter of 6th July 2015, which was indefinite, amounted to summary dismissal.*

Whether the termination was fair

Claimant's submissions

22. The relevant provision of the law where there is a challenge to termination of employment are mainly Section 41, 42, 43, 44 and 45 of the employment Act. Section 41 of the Act make provision for statutory right to a hearing before the dismissal or what is called in legal parlance as procedural fairness. Section 43 &45 of the Act on the other hand deal with substance fairness in that an employer is under obligation to prove the reasons for dismissal and that the said reasons are valid and fair. Section 45(1) of the Employment Act, 2007 provided that: "No employer shall terminate the employment of an employee unfairly "section 45 (2) states that a termination of employment by an employer is unfair if the employer fails to prove: A) The reason for termination is valid B) The reason for termination is fair reason C) That the employment was terminated in accordance with a fair procedure. The Respondent having failed to justify, substantiate and prove their action, the dismissal of the Claimant contravened the provision of Section 45 of the employment act which rendered the dismissal unlawful and unfair.

23. Further Claimant was dismissed without following the procedure under the provision of section 41 of the employment act, which provides that: "41(1) subject to section 42 (1) an employer shall before be terminating, the employment of an employee, on the ground of misconduct, poor performance or physical incapacity explain to the employee, in language the employee understands, the reason for which the employer. is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this part, an

employer shall, before terminating the employment of the employee or summarily dismissing an employee under Section 44(3) of (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any chosen by the employee within subsection (1) make. The Claimant told the court that he was suspended indefinitely and was never recalled and that was the end of the matter. It is therefore not in dispute that the above statutory procedural requirement by Section 41 of the Act were never followed. The Claimant was never given any opportunity to be heard before his services were terminated and the termination was therefore unfair. The Respondent did not produce any evidence on when, how and where the Disciplinary proceedings was conducted. In the case of CMC Aviation Ltd -vs- Mohammed Noor (2015) eKLR, the Court of Appeal held that: - In view of the foregoing, we find that the appellant's act of summarily dismissing the respondent from its employment without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the Employment Act. In Kenya Union Of Commercial Food And Allied Workers V Meru North Farmers Sacco Limited, [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case for termination as well as in a case that warrants summary dismissal. See also MARY CHEMWENO KIPTUI v KENYA PIPELINE COMPANY LIMITED [2014] eKLR.

24. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an

employee without notice or without the right amount of notice contrary to the employment contract. Section 49 of the Act sets out the remedies for both wrongful dismissal and unfair termination. From the above citations, it is clear that even where the employer may have a good reason to terminate the services of an employee (which were lacking in our case) if the procedure laid down in Section 41 of the Employment Act is not followed in termination, the same is unfair termination. The Respondent having failed to give the Claimant a chance to be heard as provided under Section 41 of the Act, the termination was unfair and unlawful.

Respondent's submissions

25. Section 47(5) of the Employment Act, 2007 establishes the framework for challenging termination. It places a dual burden on both parties: the employee must prove that an unfair termination occurred, and the employer must justify the fairness and legality of the termination. Section 45 of the Act further demands that any termination must satisfy both substantive and procedural fairness. Substantive fairness is achieved when there is a valid and fair reason for termination related to the employee's conduct, capacity, or the employer's operational needs, while procedural fairness requires the employer to follow due process, including notification, hearing, and opportunity for the employee to respond. In the present case, the Claimant alleges unfair termination, yet has failed to meet his burden under Section 47(5). His assertions that he was dismissed without valid reasons or a fair hearing are unsubstantiated. The Respondent, however, has provided evidence that the termination was based on persistent misconduct, including poor performance, absenteeism, and disregard of workplace rules, despite repeated verbal warnings by the HR and Administration Manager,

Ms. Beth Mutea. The misconduct, although not criminal, amounted to gross misconduct as

defined under Section 44(4)(c) and (e) of the Employment Act, justifying summary dismissal.

16. The Respondent initiated internal disciplinary procedures in good faith. A show cause letter dated 6th July 2015 was issued to the Claimant, setting out concerns about his conduct and requesting an explanation. Although the letter raised performance-related issues, the Claimant failed to offer any satisfactory justification or improvement despite earlier verbal warnings. He was thereafter suspended to facilitate internal investigations, and following further review of his overall conduct and attitude, the Respondent issued a termination letter dated 10th October 2015, which formally communicated the end of the employment relationship. 17. While the show cause letter may not have detailed a singular, justifiable ground at the time, the accumulated pattern of absenteeism, insubordination, and poor performance amounted to serious misconduct under Section 44 of the Employment Act, justifying termination. The sequence of events nonetheless demonstrates that the Respondent afforded the Claimant an opportunity to be heard and acted in accordance with procedural requirements under the law.

26. In *Masaba v Teachers Service Commission & another* [2024] KEELRC 2232 (KLR), the Court reaffirmed that an employer must not only act reasonably and justifiably but also in accordance with due process, particularly when terminating an employee for misconduct or poor performance. The Court emphasized that “an employee cannot simply allege procedural impropriety without disproving the employer's evidence of compliance with Section 41 of the Employment Act.” This principle applies squarely to the present case, where the Respondent has established a fair and structured disciplinary process, while the Claimant has produced no contrary evidence to rebut it. Moreover, the Respondent has discharged its burden under

Section 43 by showing that the decision to terminate was based on a genuine and reasonable

belief, formed at the time, that the Claimant's actions and conduct had undermined the employment relationship. The internal records and witness statement by Ms. Mutea attest to this belief, making the termination both substantively and procedurally justified. Unlike the circumstances in Masaba, where the Court found that an employer's failure to follow the due process outlined in their own internal disciplinary framework constituted procedural unfairness, the Respondent in this case strictly adhered to the principles of natural justice and the procedural safeguards in the Employment Act. The Claimant was informed of the allegations, given adequate time to respond, and notified in writing of the outcome. There is no evidence that the hearing was rushed or predetermined. Additionally, the Claimant has not demonstrated any violation of Articles 41 or 47 of the Constitution of Kenya, 2010, which protect fair labour practices and administrative justice. On the contrary, the Respondent has shown that it complied with both constitutional and statutory obligations, treating the Claimant fairly and lawfully throughout the disciplinary process. In conclusion, the Respondent has established that the termination was grounded on valid reasons and was conducted in strict adherence to lawful procedure, as required by Sections 41, 43, 44, and 45 of the Employment Act. The Claimant has not demonstrated any procedural breach, contractual violation, or constitutional infringement. As held in Masaba, mere dissatisfaction with the outcome does not render a lawful termination unfair. The claim before this Honourable Court is, therefore, without merit and ought to be dismissed with costs to the Respondent.

Decision

27. 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).

28. The prove of employment claims is according to section 47 of the Employment Act to wit- ‘(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.’ It was demonstrated on a balance of probabilities that the claimant was asked to show cause and at same time suspended till further notice effective from 6th June 2015. The respondent denied that it had terminated him in its pleadings. The court already rejected to admit the letter of termination for being contradictory to the respondent’s statement of respondent and its witness statement. The court finds that the claimant discharged his burden of proof of the incident of wrongful dismissal. The burden then shifted to the respondent to justify the termination to be fair as

required under section 45 of the Employment Act (supra) being that; the reason for termination were related to related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure..

29. The prove of the reasons for the termination of employment is according to 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.*' The parties produced the suspension /show cause letter dated 6th July 2017 where the claimant was accused of absconding duty on 4th and 5th July 2015. The claimant stated in a witness statement that he responded on 7th July 2015, but the respondent did not produce the said letter before the court. The respondent did not complete the disciplinary process by calling the claimant for a hearing to explain the termination. The court, on perusal of the proceedings, found that there was no cross-examination of the claimant on the termination. RW1 was not sure whether the claimant was heard after his response to the show cause. The court, in the circumstances, finds that the accusation in the suspension /show cause letter was not proved on a balance of probabilities. The claimant did follow up letters dated 6th August 2015 and 24th August 2015 with the respondent through his advocate which did not elicit response from the respondent. The disciplinary process aborted leaving the claimant in limbo. Consequently, the court holds that the action by the respondent of indefinite suspension amounted to constructive dismissal.

30. The procedure of fair termination is according to section 41 of the Employment Act to wit-
'41. Notification and hearing before termination on grounds of misconduct (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.' There was no compliance. The suspension /show cause letter was a good start on the process, but the same aborted. The court holds that the termination was wrongful and procedurally unfair.

Whether the claimant was entitled to relief sought

Claimant's submissions

31. One-month salary payment in lieu of Notice. 35. The claimant claimed one- month salary in lieu of Notice. It is not in dispute that the Claimant was summarily dismissed without any notice. Having established that his summary dismissal and/or termination was unfair he was therefore entitled to be given one- month Notice or to be paid one-month salary in lieu of Notice as provided for in Section 36 of the Employment Act. The Respondent allegation that he claimant was paid one month salary upon termination has not been proved, no evidence of

payment has been produced in court, no receipt or payment voucher was produced to confirm payment. The Claimant is therefore entitled to be paid KShs 24,897.60 in lieu of the Notice which he was never given.

32. Payment in lieu of leave 5 years The claimant in his Memorandum of Claim pleaded that throughout the period of his employment by the Respondent he never went for his leave. In his witness statement he states that he was never given any leave and on cross-examination he told the court that he never had any leave. No evidence was tendered by the Respondent to prove any payment in lieu of leave. The Claimant evidence on the issue is uncontroverted. Respondent having failed to produce any documentary evidence for payment for leave, the Claim have been proved and therefore the Claimant is entitled for payment for leave for 5 years in the sum of KShs 87,141.60 calculated as follows. $24,897.60 \times 21/30 \times 5 = 87,141.60$.

33. Compensation for unlawful termination of employment 36. The claimant claimed compensation for unlawful termination. The Claimant have already proved above in these submissions that the termination of his services was unfair and unlawful. The Claimant had worked for 5 years for the Respondent without any blemish or warning having been issued to him. According to the evidence before the court the Claimant never contributed in any way to the circumstances leading to his termination. The termination was not based on any valid reason or reasons. He was not given any hearing before his services were terminated; The court should also consider the Respondent conduct of forcing the claimant to work without resting for 21 months which subject the claimant to mental torture and anguish. The should also take notice that the day the claimant is alleged to have absconded work was a Sunday

which was not a working day. This was a most unfair termination and it warrants the maximum compensation allowable in law for unfair termination and is equivalent to 12 months' salary under provisions of the Employment Act. I therefore urge this court to award 12 months salary as a compensation for wrongful dismissal. This add up to KShs 298,771 made as follows: $24,897.60 \times 12 = 298,771.20$.

34. Unpaid Overtime -The Claimant also claimed a sum of KShs 1,593, 600 being unpaid overtime accumulated throughout the period of employment. In his testimony as contained in his witness statements, the claimant testified that upon employment, he was tasked with ferrying bitumen from Mlolongo to Mwingi in Kitui County. To ensure that the bitumen was delivered on time, he had to be at the site in Mlolongo by 10pm, line up to 2:30 am when the lorry is finally loaded and leave for Mwingi by 3:00 am in order to arrive at Mwingi by 8:30 am in the morning. After delivery he would start his journey back to Mlolongo where he usually arrived by 7.00 pm. He would then rush home, take supper, have a bath change clothes and head back to Mlolongo to line up for bitumen. The circle continued un-interrupted for 21 months when the project was completed. 38. The above evidence was never controverted or challenged in cross examination no evidence was produced by the Respondent to controvert what the Claimant stated This means that the Claimant worked an average of 21hrs a day without rest. Taking into account the above means that the claimant worked overtime of 95 hrs. per week over and above the statutory maximum of 52 hours per week. For 21 months he worked overtime of 8550 hrs. calculated as follows; $30 \times 21 = 630 / 7 = 90 \times 95 = 8550$ hrs. The Respondent in her statement of response denied that the claimant earned any overtime during his time of employment. However, no evidence was tendered by the Respondent to contravene the claimant evidence contained in his witness statement. The claimant was not even cross examined on the issue during the hearing. The Respondent should therefore produce evidence

for payment of overtime to the claimant. The claimant monthly salary at the time of his dismissal was KShs 24,897.60 which translated to KShs 830 per day which is equivalent to KShs 103.75 per hr. therefore the claimant having worked overtime of 8550 hrs. at the rate of KShs 103.75 per hr. is entitled to KShs 886,980.56. we humbly pray that the sum of KShs 886,980.56 be granted under this lead.

Respondent's submissions

35. The Claimant seeks the following reliefs:- (i) one month's salary in lieu of notice in the sum of Kshs. 24,897.60; (ii) payment in lieu of leave amounting to Kshs. 87,141.00; (iii) overtime (unpaid) in the sum of Kshs. 886,980.56; and (iv) compensation for unlawful termination in the sum of Kshs. 298,771.20. 24. The remedies available for unfair termination or wrongful dismissal are set out under Section 49 of the Employment Act, 2007, which empowers the Court to grant any or all of the listed reliefs at its discretion, subject to judicial consideration of the specific facts of each case. In the landmark decision of Kenfreight (E.A.) Ltd v Benson Nguti [2019] eKLR, the Supreme Court affirmed that remedies under Section 49 are not automatic but depend on the Court's discretionary evaluation of fairness, reasonableness, and proportionality. The Court emphasized that: "...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... [and] an award must be guided by the specific criteria set out in Section 49(4)." Likewise, in Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR, the Court of Appeal reiterated that Section 49 remedies are compensatory-not punitive-and are based on the principle of restitutio in integrum, which means restoring the aggrieved party to the position they would have been in had the injury not occurred, but only if the termination is found to have been unlawful or unfair. In the present

case, none of the Claimant's prayers are sustainable in law or fact: (a) Payment of one month's pay in lieu of notice. The Claimant seeks payment of Kshs. 24,897.60 as one month's salary in lieu of notice. However, under Section 44(1) of the Employment Act, 2007, an employer is legally permitted to summarily dismiss an employee without notice where the dismissal is grounded on gross misconduct. The law is explicit that summary dismissal is an exception to the notice requirement, provided the reasons meet the threshold of Section 44(4). Further, Section 49(1)(a) only entitles an employee to pay in lieu of notice where the dismissal or termination is found to be unjustified. In the present case, the Claimant was terminated for serious misconduct after repeated warnings and failure to adhere to work standards, as confirmed by the testimony of Beth Mutea and the Respondent's disciplinary records. As established in *Wilberforce Kimungui v United Aryan (EPZ) Ltd* [2022] eKLR and reaffirmed in *KUDHEIHA v BOM Lirhanda Girls High School* [2023] KEELRC 2519 (KLR), an employee is not entitled to notice pay following a lawful summary dismissal, unless it is proven to have been a contractual term-something the Claimant has not demonstrated. The norm therefore applies. The Claimant's demand for one month's salary in lieu of notice is thus without legal foundation and should be declined.

36. Payment of in lieu of leave. The Claimant seeks Kshs. 87,141.00 as payment in lieu of accrued leave days allegedly not taken during the period of employment. While Section 28(1)(a) of the Employment Act, 2007 entitles an employee to not less than twenty-one working days of leave with full pay after every twelve consecutive months of service, it is incumbent upon the Claimant to prove that he qualified for leave but was denied the opportunity to take it. *Radar Limited v Ali & another* [2024] KEELRC 1421 (KLR) underscores the employee's burden to demonstrate that leave was requested and denied: "Without evidence of the employee applying

for leave, a claim for untaken leave should be dismissed." This was derived from the Court's observation that: is In *Togom y Radar Limited ELRCA No. E003 of 2023* ... the operative word consultation, and therefore, an employee must submit to the employer an application for leave or their intention to proceed on leave." The Claimant has not produced any documentary evidence such as leave application records, payroll data indicating leave balances, or a written denial of leave by the Respondent. Notably, Section 10(7) of the Employment Act places the burden of proving terms of employment on the employer only where the employee has shown that such a term existed and was breached. In this case, the Claimant has made a bare assertion without any supporting documentation. In the present case, the Respondent asserts that the Claimant was at liberty to take annual leave, and there is no record of a denied leave request or any application that was rejected. The Claimant has neither pleaded the specific number of days accrued nor proved that he was denied the opportunity to utilize them. Accordingly, the claim for Kshs. 87,141.00 in lieu of leave is unsubstantiated, speculative, and should be dismissed for want of proof.

37. Overtime (unpaid)- The Claimant alleges unpaid overtime totaling Kshs. 886,980.56, but has failed to present any credible evidence to support this claim. Under Section 10(7) of the Employment Act, 2007, while the burden of proving contractual terms rests with the employer when the employee establishes their existence, this only applies once the Claimant has laid a proper factual foundation-specifically demonstrating that overtime was worked, authorized, and unpaid. 36. In *H. Young & Company (E.A) Ltd v Okoth & another [2025] KECA 466 (KLR)*, the Court of Appeal clarified the requisite standards for proving an overtime claim: "The respondents produced staff movement summary and clock-in/clock-out reports, which sufficed to establish overtime. The obligation then shifted to the employer to rebut these

records, which it failed to do." This decision holds that once employees present reliable time-keeping evidence indicating overtime, the onus shifts to the employer to disprove it. Crucially, the CBA's terms on overtime and approved rates are equally critical in calculating the claim. In the present case, the Claimant has not supplied any timesheets, clock-in/out reports, or biometric data showing that he actually worked overtime. Additionally, there is no documentary proof that any overtime was authorized by his supervisors, nor has he produced any contractual provision stipulating the applicable overtime rate. In the absence of such foundational evidence, the claim for overtime remains speculative and unproven. Absent foundational evidence, the Claimant's demand remains speculative and unsubstantiated. The H. Young decision makes clear that without proof, there is no evidentiary burden on the employer to refute. In conclusion, as per established jurisprudence, including H. Young, the Claimant has not discharged his burden of showing that overtime was worked or that it was unpaid. Consequently, this head of claim must be dismissed.

38. Compensation for unlawful termination. The Claimant seeks compensation for unlawful termination in the sum of Kshs. 298,771.20. However, for such an award to issue under Section 49(1)(c) of the Employment Act, 2007, the Court must first be satisfied that the termination was indeed unfair or unlawful. Compensation under this provision is not automatic but discretionary and guided by several factors enumerated under Section 49(4) of the Act. In *G4S Kenya Limited v Khawanga* (Employment and Labour Relations Appeal E046 of 2022) [2024] KEELRC 13202 (KLR), the Court emphasized that compensation under Section 49(1)(c) of the Employment Act, 2007 is not an automatic entitlement but is subject to the court's discretion. The Court further held that even where a claim for unfair termination is made, an employee must prove that the dismissal was without valid reason and conducted in breach of

fair procedure to warrant an award of compensation. Crucially, the Court stated: "Where the employer demonstrates that there was a valid reason for termination and that due process was followed, then compensation under Section 49(1)(c) is not warranted, even if the employee alleges unfairness. The onus is on the employee to substantiate the claim, and mere allegations unsupported by evidence do not suffice." Applying this reasoning to the present case, the Respondent has demonstrated that there was a valid and fair reason for the Claimant's termination, grounded in persistent misconduct and poor performance. The process followed was procedurally compliant with Section 41 of the Employment Act—beginning with a show cause letter dated 6th July 2015 and culminating in a termination letter dated 10th October 2015. The Claimant was given an opportunity to respond but failed to justify his conduct or offer mitigating circumstances. As in the G4S Kenya case, the Claimant herein has not discharged his evidentiary burden to prove that the termination was unlawful or procedurally flawed. Accordingly, and in line with the Court's guidance in that decision, no compensation is payable under Section 49(1)(c). The Respondent therefore respectfully prays that the claim for compensation be dismissed. iii. Who should bear the costs of the suit. In *DGM v EWG* [2021] eKLR, the High Court reiterated the general principle that costs follow the event, unless there are special reasons to depart from that rule. The Court cited Rule 3 of the Civil Procedure Rules and Section 27 of the Civil Procedure Act, affirming that the successful party in litigation is ordinarily entitled to costs as a form of recompense for expenses incurred during the proceedings. The Court stated: "The award of costs is a matter within the discretion of the Court but that discretion must be exercised judiciously and not capriciously or whimsically. The general rule is that costs follow the event." In the present matter, the Claimant instituted proceedings alleging unfair termination and sought several remedies including notice pay, unpaid salary, overtime, and damages for unlawful termination. However, as demonstrated in

the Respondent's evidence and submissions, the Claimant has failed to discharge the evidentiary burden required under Section 47(5) of the Employment Act, 2007. The Respondent, on the other hand, has shown compliance with both substantive and procedural legal requirements under Sections 41, 43, and 45 of the Act, and has offered credible documentary and testimonial evidence through its witness, Ms. Beth Mutea. Moreover, the Claimant has failed to substantiate claims such as unpaid overtime, leave pay, and compensation for unfair termination-rendering the claims speculative and unsupported by proof. This mirrors the findings in *G4S Kenya Limited v Khawanga* [2024] KEELRC 13202 (KLR), where the Court declined to award reliefs where the claimant had failed to prove wrongful termination. In light of the foregoing and consistent with the holding in *DGM v EWG* [2021] eKLR, the Respondent submits that the Claimant's suit lacks merit and should be dismissed. As the unsuccessful party, the Claimant should bear the costs of the suit. The Respondent has been compelled to defend itself against unsubstantiated claims, and it would be inequitable for it to shoulder the costs of litigation triggered by the Claimant's unmeritorious pursuit.

Decision on relief sought

39. The claimant sought for the following relief in the suit-

- a) Kshs. 2,116,456.40
- b) Interest on (a) above at court rates from 6th July 2015 until payment in full.
- c) Costs of the claim.
- d) The actions of the Respondent were unlawful and untenable.
- e) Any other relief this court may deem fit to grant.

40. The sum of Kshs. 2,116,456.40 is itemised under paragraph 12 of the statement of claim as follows-

- a) One-month salary in lieu of Notice. .KShs 24,897.60
- b) Payment in lieu of leave for 5 years .KShs 87,141.00
- c) Overtime (unpaid) KShs 886,980.56
- d) Compensation for unlawful/unlawful termination. KShs298,771.
- E) Service/gratuity or every complete 5 years. – Kshs. 74,692.80

41. **On Notice pay-** The court held there was no procedural fairness. Notice pay is due under sections 35 and 36 of the Employment Act equivalent of 1 month's salary and is awarded for **Kshs. 24,897.60** (C-exhibit 1 - Payslip of November 2014)

42. **Payment in lieu of leave for 5 years** .KShs 87,141.00 – The Respondent's position on leave was mere denial. The court agreed with the authority cited by the respondent in Radar Limited v Ali & another [2024] KEELRC 1421 (KLR) underscores the employee's burden to demonstrate that leave was requested for and denied: "*Without evidence of the employee applying for leave, a claim for untaken leave should be dismissed.*" The court stated that this was derived from the Court's observation that: is In Togomy Radar Limited ELRCA No. E003 of 2023 ... the operative word consultation, and therefore, an employee must submit to the employer an application for leave or their intention to proceed on leave." The claimant did not plead that he asked to proceed on leave and the same was denied. The claimant was in employment for approximately 5 years. By failing to apply for leave the claimant forfeited his

leave save for the maximum 18 months carried forward according to section 28(4) of the Employment Act to wit- '(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.' The court awards the claimant untaken leave of 18 months thus **Kshs. 37,346.40/=**.

43. **Prayer for Overtime (unpaid). KShs 1,593,600** - The burden to prove extra hours worked beyond the official work hours lies with the employee. The court, on perusal of the statement of claim, did not find any pleadings outside the prayer on overtime. In the witness statement the court was not convinced that the claimant was justifying his overtime claim. He gave scenario of a specific project which took 21 days. The claimant contended that he was entitled to overtime in addition to his salary. The court finds that the claim for overtime failed for lack of specificity as to the exact days the claimant worked overtime. Indeed in the statement he stated that on 3rd July 2015 on being asked to attend to other issues at Sagana, the request being after 5 pm he went home. In the case of Rogoli Ole Manadiegi -vs- General Cargo Services Ltd (2016) eKLR Justice Rika stated in paragraph 7- '*The employee in claiming overtime pay however is not deemed to establish the claim for overtime pay by default of the employer bringing to the Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee.*' I uphold the foregoing decision and hold the claim for overtime was not proved on a balance of probabilities.

44. **Prayer for Service/gratuity completed 5 years. – Kshs. 74,692.80** -Neither party submitted on the item. The court on examination of payslip produced by the claimant found he was under NSSF. The employer was thus not under obligation to pay service pay according to the provisions of section 35 and 36 of the Employment Act to wit- *‘(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. (6) This section shall not apply where an employee is a member of— (a) a registered pension or provident fund scheme under the Retirement Benefits Act;(b) a gratuity or service pay scheme established under a collective agreement; (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and (d) the National Social Security Fund.’* The prayer is disallowed.

45. **Prayer for Damages for unlawful termination. KShs298,771**-On finding a case of unfair termination the court is obliged under section 50 of the Employment Act to consider and apply remedies under section 49 of the Act. The Supreme Court in **Ken freight (E.A) Limited v Benson K. Nguti** SC Pet. No. 37 of 2018 [2019] eKLR 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 remedies include compensation and reinstatement. The wish of the employee in this case is to be compensated.

46. The claimant submitted that he had worked for 5 years for the Respondent without any blemish or warning. That according to the evidence before the court the Claimant never contributed in any way to the circumstances leading to his termination. The termination was not based on any valid reason or reasons. He was not given any hearing before his services were terminated; The court should also consider the Respondent conduct of forcing the claimant to work without resting for 21 months which subject the claimant to mental torture and anguish. The Court should also take notice that the day the claimant is alleged to have absconded work was a Sunday which was not a working day. This was a most unfair termination and it warrants the maximum compensation allowable in law for unfair termination and is equivalent to 12 months' salary under provisions of the Employment Act.

47. The court held the termination was wrongful and unfair. The court finds that the claimant, having been issued a suspension letter, he cannot say he had a clean record of employment. He had worked for 5 years. The issue of working overtime was not proved. He was a driver, and there was no reason for the court to find any difficulty with the claimant securing an equivalent job in the market. The court, taking the foregoing into account, finds compensation

equivalent of 6 months' salary is adequate compensation. Thus Kshs. 24897.60 x6 total sum awarded as compensation for unfair termination is **Kshs. 149,385.60**

Conclusion

48. The court allowed the claim on prove on a balance of probabilities. The Court enters judgment for the claimant against the respondent as follows-

- a. **Notice Pay in lieu - Kshs. 24897.60**
- b. **Leave pay in lieu equivalent of 18 months Kshs. 37,346.40/=.**
- c. **Compensation for unfair termination equivalent of 6 months' gross salary Kshs. 149,385.60**
- d. **Total sum awarded for Kshs. 211,629.60 plus costs of the suit is payable with interest at court rate from date of judgment.**

49. Stay of 30 days granted.

50. It is so Ordered.

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

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Absent

Respondent: Ms. Wangui h/b Mrs Kariuki

ORIGINAL