

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

APPEAL NO. E028 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

MODERN **MAIL** **LIMITED**

.....**APPELLANT**

VERSUS

BRIAN **ONYANGO**

MASINDE.....**RESPONDENT**

JUDGMENT

This is an appeal from the Judgment of Hon. Maureen Nyigeki, PM dated 19th November, 2024 in Kisumu MCELRC No. E005/2022 **Brian Onyango Masinde V Modern Mail Ltd.**

The brief facts of the claimant's case were that he was employed by the respondent in November 2016 as a Loader and later a Booking Clerk at Kisumu at Kshs.21,064.00 per month and served diligently until August 2021 when the respondent terminated his contract of service wrongfully and unlawfully.

The claimant prayed for a declaration that termination of employment was unfair, Kshs.592,425.00 as salary

arrears (8 months), salary in *lieu* of notice, leave days, service pay, 12 months compensation, certificate of service, costs, interest and such further relief as the court deemed fit.

The respondent's case was that after reconciling its accounts and conducting further investigation, it discovered that the claimant and another person had taken monies belonging to the respondent and the amount attributable to the claimant was Kshs.21,000.00

The respondent averred that it issued a notice to show cause dated 23rd August, 2021, invited the claimant for a hearing on the same day and he was summarily dismissed on 24th August, 2024 as his response to the allegations was unsatisfactory. According to the respondent termination of the claimant's employment was lawful.

After careful consideration of the pleadings, evidence placed before the court and submissions, the learned trial magistrate found that termination of the claimant's employment was unfair because it was conducted hurriedly and he was not accorded the right to be heard.

The court awarded salary in *lieu* of notice, 12 months compensation, certificate of service, costs and interest.

This is the Judgment appealed against.

The trial court is faulted on sixteen (16) grounds for having erred in law and fact by; delivering a copy pasted Judgment in Kisumu ELRC No. E007/2022 **Jeremiah Ochieng Omolo V Modern Mail Ltd**, without appreciating the factual differences in the two cases causing great injustice to the appellant, holding that termination of employment was unfair, awarding salary in *lieu* of notice, grounding the Judgment on misconceived ground that procedure was hurried and only thing the claimant did not do was call a witness, awarding 12 months compensation, misdirecting itself on matters not before the court, awarding costs, the case was unproven and occasioned miscarriage of justice.

These grounds implicate the entire decision of the court in the manner in which the learned trial magistrate dealt with the evidence and applied the law.

Appellant's submissions

As to whether the trial court erred in finding that the respondent was unfairly terminated, reliance was placed on the provisions of Section 43 and 45(2) of the Employment Act as well as the decisions in **Joseph Mwaniki Nganga V United Millers Ltd** [2022] KEELRC 732 (KLR) which cited the sentiments of Lord Denning in **British Leyland UK Ltd V Swift** [1981] I.R.L.R 91, on the band of reasonable responses test and the Court of Appeal decision in **Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others** [2019] eKLR, to submit that the burden of proof was on a balance of probabilities and the respondent admitted that he took the money and was in charge of cash collection and had thus committed an offence punishable by law.

On procedural fairness, reliance was placed on the decision in **James Chutha Gatherer V Nation Media Group Ltd** [2013] eKLR, to urge that the appellant issued a notice to show cause to enable the respondent explain himself as was the decision in **Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd** [2013] eKLR, on the prerequisites of Section 41 of the Employment Act.

Sentiments of the Court in **Phoeby Aloo Inyanga V Stockwell One Homes Management Ltd & another**

[2022] eKLR and the Supreme Court decision in **Gichuru V Package Insurance Brokers Ltd** (KESC) 12 (KLR) were relied upon to buttress the submission that the appellant accorded the respondent procedural fairness.

Further, counsel cited the provisions of Section 44(4) of the Employment Act to submit that the respondent performed his work improperly and committed a criminal offence against the appellant.

Other decisions cited to buttress the submission that the appellant had a substantive justification to terminate the respondent's employment were **Mc Kinsley V BC** Tel [2001] 2 SCR 161 2001 SCC 38 Can LII, **Thomas Sila Nzivo V Bamburi Cement Ltd** [2014] eKLR, **Josephine M Ndungu & others V Plan International Inc** [2022] eKLR and **John Jaoko Othino v Intra Health International** [2022] eKLR.

Counsel submitted that termination of the respondent's employment was in accord with the provisions of the Employment Act.

Concerning the respondent's entitlement to the reliefs, counsel submitted that salary in *lieu* of notice was not

merited because the respondent was summarily dismissed.

Termination of employment was not unfair and no compensation was merited and costs ought to have been awarded to the appellant for being dragged to court by the respondent.

Reliance was placed on **Rai & 3 others V Rai & 4 others [2014] KESC 31 KLR** and **Premchand Rachand Ltd & another V Quarry Services of East Africa Ltd & Others [1972] EA 162**, to urge that the appellant merited compensation to recoup the expenses incurred in defending the suit.

The respondent had not filed submissions by the time the court retired to prepare this judgment.

Findings and determination

This being a first appeal, the role of the court is as was enunciated in several decisions such as **Peters V Sunday Post [1958] EA 424**, **Selle & another V Associated Motor Boats Co. Ltd [1968] EA 123** and **William Diamonds Ltd V Brown [1970] EA 1**.

In **Gitobu Imanyara & 2 others V Attorney General [2016] KECA 557 (KLR)**, the Court of Appeal held:

“This being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial ... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

In the discharge of this duty, the court is required to determine whether the findings of the trial court can stand or not and provide reasons in either case.

Before delving into the issue of evidence and awards upon which this appeal turns, it is essential to dispose of the question whether the learned trial magistrate delivered a copy pasted Judgment in Kisumu MCELRC No. E007 of 2022 **Jeremiah Ochieng Omolo V Modern Mail Ltd.**

Regrettably, the court could not trace a copy of the Judgment alleged to have been copy pasted by the

learned trial magistrate for comparative purposes and counsel did not highlight the salient differences which led to the alleged miscarriage of justice.

Having heard and determined the appeal in Kisumu MCELRC No. E007 of 2022, the similarities between the two cases are remarkably noticeable. For instance, the amount allegedly lost by the appellants was the same. Invitation to attend a disciplinary hearing in Nairobi was in August 2021.

In the absence of a verifiable comparative exposition of the two cases showing that they were fundamentally different and the copy pasting of the judgment, if that was the case, occasioned demonstrable miscarriage of justice, the court is not persuaded that the learned trial magistrate erred in law and fact in this instance.

As to whether termination of the respondent's employment was unfair, the trial court is faulted for having found so on the ground that the process was conducted hurriedly. The appellant also contends that the respondent was accorded a notice to show cause, the respondent was guilty of taking Kshs.21,000.00 without

authority, contract of employment provided for summary dismissal and the procedure used was fair.

According to the appellant, the only complaint the respondent had was that he was unable to call Mr. Jeremiah Ocheing Omido as a witness.

It is trite law that for a termination of employment to pass muster it must be demonstrated that the employer had a valid and fair reason to terminate the employee's employment and did so in accordance with a fair procedure, consistent with the provisions of Section 41, 43, 44, 45 and 47(5) of the Employment Act.

Expressed in alternative terms, the employer must have had a substantive justification to terminate the employee's employment and must have conducted the process in consonance with a fair procedure, as exquisitely captured by the Court of Appeal in **Naima Khamis V Oxford University Press (EA) Ltd [2017] eKLR** and Ndolo J in **Walter Ogal Anuro V Teachers Service Commission [2013] eKLR**.

In the latter case, Linnet Ndolo J held:

“In light of the foregoing, I find that respondent had a genuine reason for terminating the claimant’s employment as required under Section 43 of the Employment Act. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. I will therefore proceed to examine the disciplinary procedure adopted by the respondent against the beams of Section 41 of the Employment Act which provides as follows...”

As regards the reason for termination of the respondent’s employment, the appellant contended that the respondent stole the sum of Kshs.21,000.00

The claimant admitted, on cross-examination that he was a Booking Clerk and had contact with cash and the system was both manual and digital as confirmed by RWI on cross-examination and both were recorded.

During the hearing, the respondent testified that he had not been shown any document to confirm that he had stolen any money as a Booking Clerk.

Intriguingly, when called upon to respond to the allegations in writing after the issue of the notice to show cause, the respondent did not respond, a fact RWI confirmed on cross-examination by Mr. Odhiambo.

Where money is received and receipts issued manually or electronically or both, as was the case here and the cash deposited in a bank account as the respondent used to do, receipts and deposits must tally and discrepancies are easily noticeable.

By the notice to show cause dated 23rd August, 2021, the respondent was accused of taking Kshs.21,000.00 without authorization. In other words for misappropriating the cash. A response was required within 48 hours.

The respondent received the letter on the same date and attended the hearing on the same date and termination of employment followed on 24th August, 2024.

The letter of summary dismissal cited the same reason for dismissal under Section 44(4)(c) and of the Employment Act.

Having failed to respond to the notice to show cause to explain himself, the respondent denied himself an opportunity to clearly state his case in writing and demand documentary evidence of the alleged misappropriation. He could also have sought more time to respond and prepare himself for the hearing.

In most instances, documents speak louder than oral statements which fly in the air and are susceptible to modification.

The appellant relied on the provisions of Section 44(4)(c) and (g) of the Employment Act which provides;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

As to whether the appellant had a substantive justification to terminate the respondent's employment, the court is guided by the provisions of the Employment Act and case law.

Section 43(2) of the Employment Act provides;

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.

In **Naima Khamis V Oxford University Press (EA) Ltd (Supra)**, the Court of Appeal held:

"It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of a contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to terms and conditions of work set out in a contract.

The provisions of Section 43(2) of the Employment Act have been construed to mean that the employer must have had reasonable grounds for genuinely believing that it had reasons to terminate the employee's employment.

See in this regard **Galgalo Jarso Jillo V Agricultural Finance Corporation [2021] eKLR.**

Similarly, in **Kenya Revenue Authority V Ruelwa Waithaka Gitahi & 2 others** (supra), the Court of Appeal held:

“...the standard of proof is on a balance of probabilities not beyond reasonable doubt and all an employer is required to prove are the reasons that it genuinely believed to exist, causing it to terminate the employee’s services. That is a partly subjective test”.

Also relevant in making the determination are the guidelines in Halsburys Laws of England 4th Edition, Vol. 16 (1B) Para 642 on the principle of band of reasonable responses test adopted in **British Leyland (UK) Ltd v Swift [1981] I.R.L.R. 91** where Denning MR stated:

“... The correct test is: was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness,

within which one employer might reasonably take one view: another quite reasonably take a different view”.

Guided by the foregoing authorities and based on the evidence on record, the court finds that the appellant had reasonable grounds for genuinely believing that the respondent had taken its money without authority as his work involved handling cash on behalf of the appellant, a fact the respondent admitted in court and refused to express his denial of having taken the cash in writing, which in the court’s view reinforced the appellant’s belief that it had a reasonable basis to terminate the respondent’s employment.

Concerning the procedure used in terminating the respondent’s employment, the appellant faults the learned trial magistrate for finding that the termination was fair.

According to the appellant, since the respondent was given a notice to show cause, had a warning in 2020, attended a hearing and was accorded an opportunity to be heard, termination of his employment was fair.

The issue for determination is whether the process adopted by the appellant in terminating the respondent's employment met the threshold of procedural fairness as by law required.

Section 45(2)(c) of the Employment Act makes it clear that the procedure adopted by the employer must be fair if the termination is to pass the fairness test.

Section 41 of the Employment Act, on the other hand prescribes the tenets of procedural fairness which are mandatory as held in **Pius Machafu Isindu V Lavington Security Guards Ltd [2017] KECA 225 (KLR)** where the Court of Appeal stated:

"... A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination..."

See also **Gichuru V Package Insurance Brokers Ltd [2021] KESC 12 (KLR)**.

In **Jane Samba Mukala V Ol Tukai Lodge Ltd [2013] KEELRC 794 (KLR)** Mbaru J. held:

"Where this procedure as set out under Section 41 of the Employment Act is not followed, then a termination that

arises from it will be procedurally flawed. It is procedurally irregular...”.

The elements of procedural fairness have been articulated in various decisions. In **Postal Corporation of Kenya V Andrew K. Tanui [2019] eKLR**, the Court of Appeal stated:

“Four elements must thus be discernible for the procedure to pass muster:-

- 1. an explanation of the grounds of termination in a language understood by the employee;*
- 2. the reasons for which the employer is considering termination;*
- 3. entitlement of an employee to another employee of his choice when the explanation of grounds of termination is made;*
- 4. hearing and considering any representations made by the employee and the person chosen by the employee”.*

Juxtaposing the procedural process in the instant case against the foregoing principles demonstrates beyond peradventure that the appellant’s conduct did not meet the threshold prescribed by the Employment Act and this is why.

First, the respondent was summoned to Nairobi for disciplinary meeting slated for 23rd August 2021 and upon arrival, he was issued with a notice to show cause dated 23rd August 2021 and acknowledged receipt. A response was required within 48 hours.

Considering the nature of the charge, the 48 hour period given by the appellant was in the court's view sufficient.

The appellant availed no evidence to show that the respondent was aware of the charge(s) he had to confront at the meeting and thus violated a cardinal tenet of the right to fair hearing.

Second, the appellant did not accord the respondent a notice of the disciplinary hearing to enable him prepare for the hearing.

An invitation to a disciplinary hearing is mandatory and ought to notify the employee, the charge(s) he/she has to confront, the date, time and venue of the hearing.

Equally, the notice must accord the employee sufficient time to prepare for the hearing.

Finally and importantly, the notice must notify the employee of his or her right to be accompanied by a fellow employee of their choice or shop floor representative, as well as their right to call witnesses and adduce evidence.

The appellant did not avail copy of the invitation letter for perusal by the court.

These are basic tenets of the right to fair hearing, which is a constitutional imperative.

The respondent was not informed of his rights and was not accorded time to search for a colleague to accompany him to the hearing or prepare for the hearing.

The fact that the respondent was heard *per se* did not render the process procedurally fair.

Third, the appellant did not produce a copy of the minutes of the disciplinary hearing as evidence of the proceedings.

RWI confirmed on cross-examination that she did not produce minutes of the disciplinary hearing and was not present at the hearing.

Without a copy of the minutes, it is difficult to determine whether the law was complied with. For instance, was the charge read out to the respondent and in what language? Did the respondent consent to proceed with the hearing without a fellow employee of his choice? Were the respondent's representation heard and considered in the final determination?

These are pertinent questions which the minutes of the disciplinary hearing could have effortlessly demonstrated.

The appellant's contention that the respondent was accorded an opportunity to be heard and the resultant summary dismissal was fair overstretches imagination bearing in mind that the respondent was issued with a notice to show cause dated 23rd August 2021, the date of the hearing among other shortcomings of the process.

In **Gichuru V Package Insurance Co. Brokers Ltd (supra)** the court held:

“... No hearing was demonstrated to have been conducted. The dismissal was unfair and unlawful for failing to accord the appellant a fair hearing. The respondent was required to facilitate the termination in accordance with Section 41(1) of the Employment Act in order to come within the ambit of fairness... however grave the circumstances of the employee’s conduct, the employee was entitled to be heard before he was dismissed”.

These comments apply with equal force to the circumstances of the instant case.

Puzzlingly, the trial court was faulted for having found that the process was conducted hurriedly which was an indisputable fact as the entire process was completed in less than 4 days.

It is trite law that termination of employment must be procedurally fair, if it is to pass muster and the requisite procedural precepts are prescriptions of law and not a mechanical process. These processes are intended to ensure a fair hearing as ordained by the Constitution of Kenya.

Finally, the trial court is faulted for having granted the reliefs as it did and in particular salary in *lieu* of notice and the 12 months compensation for the unfair termination of the respondent's employment.

As regards the declaration sought, having found that termination of the respondent's employment by the appellant was procedurally unfair, the declaration was merited.

Concerning salary in *lieu* of notice, since the respondent was summarily dismissed and based on the finding elsewhere in this judgment, the court is satisfied that the same was not merited by dint of the provisions of section 44(1) of the Employment Act which permit an employer to summarily dismiss an employee without notice or with less notice than the employee is entitled to.

On the maximum compensation for unfair termination, under the provisions of Section 49(1)(c) of the Employment Act, it is discernible that the learned trial magistrate did not take into consideration any of the parameters under Section 49(4) of the Employment Act.

The court did not consider the fact that:

- (i) *The respondent had served the appellant for about 4 years and 8 months which was a fairly short time.*
- (ii) *The respondent substantially contributed to the termination of employment.*
- (iii) *The respondent neither expressed his wish to remain in the appellant's employment nor appeal the summary dismissal.*

It is trite that the foregoing reliefs are discretionary and involve the exercise of discretion by the trial court.

The principles that govern the circumstance in which an appellate court may interfere with the exercise of discretion by a trial court are well settled.

The decisions in **Price and another V Hilder [1996] KLR 95** and **United India Insurance Co. Ltd & 2 others V East African Underwriters (Kenya) Ltd [1985] EA 898** set out the five (5) instances in which an appellate court may interfere with a discretionary decision of the trial court.

These grounds include, where the trial court fails to take account of considerations of which it should have taken

account, and as adverted to elsewhere in this judgment, the learned trial magistrate did not take into consideration the relevant provisions of Section 49(4) of the Employment Act and the fact that the respondent was summarily dismissed, which, in the court's view were relevant.

In the circumstances, the court has reason to interfere with the discretionary decision of the learned trial magistrate as regards the award of salary in *lieu* of notice and 12 months compensation.

Consequently, the award of salary in *lieu* of notice is set aside.

The 12 months salary compensation is also set aside and in its place, the equivalent of three (3) months gross salary.

In the upshot, the appeal is partially successful to the extent that:

- (a) *The award of salary in lieu of notice is set aside.*
- (b) *The award of 12 months compensation is set aside and substituted with an award of three (3) month's gross salary, Kshs.63,192.00.*

- (c) *In light of the partial success of the appeal, parties shall bear their own costs.*
- (d) *Other findings and awards by the trial court are affirmed.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 13TH DAY OF NOVEMBER 2025.**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under

Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

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