

REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
AT MOMBASA  
ELRC APPEAL NO. E077 OF 2024

MOMBASA CONTAINER TERMINAL LIMITED .....APPELLANT

VERSUS

GABRIEL NYANGE MWANDOE ..... RESPONDENT

*(Being an Appeal from the judgment of the Honourable R. N. Akee, delivered  
on 12th April 2024 in Mombasa CMELRC E001 of 2021)*

JUDGMENT

**Background**

1. By the Statement of Claim dated 6th January 2021, the Respondent sued the Appellant and sought the following reliefs against them:
  - a) A statement claiming that the summary dismissal or termination was unfair, unlawful, and illegal.
  - b) The Appellant to issue the Respondent with a Certificate of Service.
  - c) Compensation for the wrongful and unfair termination.

d) The Court awards as particularised under paragraph Fourteen (14) of the Statement of Claim.

e) General and punitive damages.

f) Costs of this suit and interests.

2. The particularised awards under paragraph 14 of the Statement of Claim were:

i) One month's salary in lieu of notice..... KShs.  
23,253.00

ii) Compensation for wrongful/unlawful termination  
(23,253.00 x 12 months) .....  
KShs. 279,036.00

iii) Unpaid Leave (21 days X 5 years) ..... KShs  
116,265.00

iv) Payment for off days, including weekends, for the entire  
period of service (5 X 23,253/30 by 82 months) .....  
KShs. 317,791.00

v) Severance pay (to be assessed)

Sub-total                    Kshs.736,345.00/=

3. The Appellant responded to the Respondent's claim by submitting a Response to the Memorandum of Claim and Counterclaim dated 9th March 2021. The Appellant

acknowledged employing the Respondent as a Splitting Clerk starting from January 1, 2015, but refuted the claim that his dismissal was unfair. It was contended that the dismissal was warranted, as the Respondent was culpable of gross misconduct. The counterclaim was predicated on the assertion that his conduct resulted in a financial loss of KShs. 3,396,374.37.

4. In its counter-claim, the Appellant reiterated the alleged misconduct by the Respondent and sought;
  - a) A declaration that the Respondent breached the employment contract dated 1st December 2014.
  - b) Damages for breach of contract of employment.
  - c) KShs. 3,396,374.37 plus interest at the Court's rate until payment in full.
  - d) Costs and interest of this suit
5. In her judgment, the learned trial Magistrate found in favour of the Respondent's case and granted some of the reliefs he sought. However, she did not address the Appellant's

counterclaim. Aggrieved by the Judgment, the Appellant filed the instant appeal.

6. When this appeal came up for directions, this Court directed that it be argued through written submissions. The parties complied with the directions. Their submissions are now on record.

### **The Respondent's case before the trial court**

7. It was the Respondent's case that he was employed by the Appellant as a Splitting Clerk in the Finance and Administration Department, effective 1st January 2015, on permanent and pensionable terms, earning a gross salary of KShs. 18,950, together with a house allowance of KShs. 8,500 and a transport allowance of KShs. 3,500.
8. He diligently served the Respondent for five years without any record of misconduct or dishonesty.
9. On 26th February 2020, the Respondent received a letter from the Appellant's Human Resources Manager informing him that his services were no longer required, thereby terminating his employment.

10. The Respondent argued that the termination was conducted without following due process, and that he was not given notice, a fair hearing, or any valid reasons for his dismissal.
11. He claimed that the termination was a summary dismissal that was arbitrary, unfair, and unlawful, breaching the Employment Act, 2007, the Constitution of Kenya, and principles of natural justice.
12. The Respondent further stated that they failed to compute and pay his terminal dues, including accrued leave and other benefits owed to him, and also failed to issue him with a certificate of service upon termination.
13. He stated that none of his actions while employed by the Appellant caused the loss claimed by the Appellant. He denied the Appellant's claim against him.

### **The Appellant's case before the trial court**

14. The Appellant presented one witness, Michael Kariuki, its Human Resources Officer, to testify on its behalf. The witness admitted that the Respondent was first employed as a Splitting Clerk from 1st January 2015. His employment contract was in writing.

15. He stated that, as a Splitting Clerk, one of the Appellant's duties was to generate invoices and include all amounts payable by the Appellant's clients, including but not limited to storage charges.
16. He asserted that sometime in October 2019, the Respondent was instructed to generate a pro-forma invoice for storage charges as well as the standard charges for settlement by the Appellant's Client in respect of a Mercedes-Benz truck.
17. On 31<sup>st</sup> October, 2020, as the Appellant's Assistant Manager, Documentation & Customer Service was going through the Client's file, Sher discovered that the Client's said Motor vehicle had been released from the Respondent's Container Freight Station without payment of storage charges, which had accumulated within a period of three months and totalled to KShs. 3,396,374.00.
18. He further stated that, after internal investigations, it was realised that the Respondent, as the issuer of the invoice, had unlawfully omitted the storage charges of KShs. 3,396,374.00 from the final invoice, deleted the pro-forma invoice from the system, and changed the client's billing tariff from cash customer to auction tariff without

authorisation. This manipulation made it impossible to trace the outstanding charges and enabled the release of the truck from the Container Freight Station without payment.

19. It was asserted that the acts were carried out utilizing the Respondent's personal system credentials. It was further claimed that these actions constituted negligence, breach of duty, and gross misconduct, leading to financial loss to the Appellant totalling KShs. 3,396,374.37.
20. Following the discovery of the alleged misconduct, the Appellant issued the Respondent with a show-cause letter dated 24th January 2020. In response, the Respondent denied the charges. He was subsequently invited to a disciplinary hearing held on 12th February 2020. The Appellant stated that the Respondent was given an opportunity to defend himself at the hearing but failed to provide a satisfactory explanation for not including the storage charges in the invoice.
21. The disciplinary panel found the Respondent culpable and in breach of his employment obligations, leading to his summary dismissal through a letter dated 25th February 2020. It was emphasised that the termination was both

procedurally and substantively fair, as per Section 44 of the Employment Act, and that the Respondent was duly informed of the reasons for termination.

22. Additionally, the Appellant stated that the Respondent's dues had been calculated but were awaiting release because he had not completed the clearance process. It denied owing him any leave pay or terminal dues beyond what was calculated and maintained that he was not entitled to severance pay, as this was not a redundancy case.

### **The Judgment by the Lower Court**

23. Upon review of the pleadings, evidence, and submissions, the trial court determined that the Respondent, who had been providing services to the Appellant since January 2015, was summarily dismissed on 26th February 2020 on the basis that his services were no longer needed. The court further concluded that the dismissal was procedurally unjust, as the Appellant failed to issue notice or adhere to the due process requirements stipulated under the Employment Act.

24. Consequently, the Court awarded the Respondent one month's salary in lieu of notice and twelve months' salary as compensation for unfair dismissal, amounting to KShs.

302,298. It rejected claims for leave, off days, and severance pay due to insufficient proof and the inapplicability of redundancy.

### **The Appeal**

25. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

1. THAT the Learned Trial Magistrate erred in law and fact in making a finding that the Appellant's reason for dismissing the Respondent was that his services were no longer required, whereas there was evidence proving that the Respondent's dismissal was on account of gross misconduct.
2. THAT the Learned Trial Magistrate erred in law and in fact in failing to find that the Appellant had justifiable reasons for summarily dismissing the Respondent.
3. THAT Learned Trial Magistrate erred in law and in fact in finding that the Respondent's dismissal was procedurally unfair.
4. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Appellant failed to discharge its burden of proving that the Respondent's dismissal was

procedurally fair, whereas there was sufficient evidence to show that the procedure as set out in the Employment Act was followed to the letter.

5. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Appellant failed to issue notice to the Respondent, whereas the Respondent was summarily dismissed from employment under section 44, hence not entitled to any notice.
6. THAT the Learned Trial Magistrate erred in law and in fact in awarding the Respondent one month's notice despite making a finding that the Respondent was summarily dismissed from employment.
7. THAT the learned trial Magistrate erred in fact and law by failing to take into account the principles set out under Sections 49 and 50 of the Employment Act in awarding compensation which was, in any event, excessive in the circumstances.
8. THAT the Learned Trial Magistrate erred in law and fact in arriving at a decision against the weight of the evidence on record.
9. THAT the Learned Magistrate erred in law and in fact by failing to make a finding on the Appellant's counter-claim.

## **Appellant submissions**

26. The Appellant raises the following issues for determination in this appeal: whether the termination of the Respondent's employment was lawful and fair; whether the Respondent was entitled to the reliefs granted; whether the Appellant's counterclaim should have been allowed; and who should bear the costs of the suit.
27. The Appellant submits that Section 41 and Section 45 of the Employment Act require employers to establish a valid and fair reason for termination and to follow a fair procedure. The Appellant asserts that it met both requirements.
28. The Respondent was guilty of gross misconduct as defined by Section 44(4) of the Employment Act. Internal investigations confirmed that the Respondent deleted a storage invoice of KShs. 3,396,374.37 from the system, which led to the release of a client's motor vehicle without full payment and resulted in financial loss to the Appellant.
29. Furthermore, the Appellant presented evidence demonstrating that the Respondent's system profile was utilised to access and delete the invoice. The Respondent was unable to provide any plausible explanation concerning

the act. The Respondent's conduct constituted dishonesty and a breach of the duty of good faith and fidelity owed to the employer.

30. The Appellant emphasises that the test for a valid reason is whether the employer genuinely believed, on reasonable grounds, that misconduct occurred. This principle is affirmed in **Kenya Revenue Authority v Reuwel Waithaka Gitahi & Another [2019] eKLR**.

31. Further reliance has been placed on the case of **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR**, where the Court held that,

*“In terms of section 43 of the Employment Act, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis or a genuine belief that the ground exists, even if it later turns out that it, in fact, did not. In my view, what the law is concerned with here is whether the circumstances surrounding the*

*decision to terminate would justify a reasonable man on the street standing in the same position as the employer, to reach a similar decision as him/her regarding the termination."*

32. The Appellant further argues that the Respondent's conduct fundamentally breached trust and confidence, justifying summary dismissal. The trial court, therefore, erred in holding otherwise.
33. The Appellant further submits that it complied with the statutory procedural requirements under Section 41 of the Employment Act. The Respondent was issued a show cause letter, responded to it, and was invited to a disciplinary hearing held on 12 February 2020, where he was afforded an opportunity to defend himself.
34. Additionally, the Respondent was permitted to be accompanied by a representative, in line with the decision in **Daniel Ochiekui Achochi v Dynaplast Limited, ELRC No. 533 of 2016**. After considering the Respondent's explanations, the disciplinary committee resolved to dismiss him for gross misconduct summarily.
35. Therefore, the dismissal was both procedurally and substantively fair, and the trial court erred in substituting its

own view for that of the employer without a proper legal basis.

36. The Appellant argues that, having lawfully dismissed the Respondent summarily, he was not entitled to notice pay under Section 44 of the Employment Act, which explicitly excludes the right to notice in cases of gross misconduct, as held in **Peter Mbithi Mutua v Athi River Steel Plant Ltd (2014) eKLR**.
37. The awarding of 12 months' compensation under Section 49 of the Employment Act was equally incorrect. In **Alexander Mutinda Ngila v Paul Iluvya Mutunga [2022] eKLR**, the court held that compensation is only applicable where dismissal is unfair. Since the dismissal was lawful, compensation should not have been granted.
38. It is further submitted that the claims for unpaid leave days, off-days, and severance pay were unproven. The Respondent did not produce evidence in support of these claims. Additionally, severance pay relief is only grantable in cases of redundancy. The case before the trial Magistrate was not anchored on Section 40 of the Employment Act.

39. Regarding the counterclaim, the Appellant emphasises that the Respondent's actions directly resulted in a financial loss amounting to KShs. 3,396,374. The trial court erred in dismissing the counterclaim despite substantial evidence establishing the Respondent's involvement in the fraudulent conduct.
40. Although the Respondent alleged that the amount was recovered from third parties, he provided no evidence to substantiate this claim. The Appellant contends that it is entitled to reimbursement for the loss and respectfully requests that the counterclaim be upheld.

### **Respondent's submissions**

41. The Respondent's Counsel submits that the Respondent was summarily dismissed by the letter dated 25th February 2020 on allegations of gross misconduct involving the preparation of invoices that allegedly resulted in loss of storage charges amounting to KShs. 3,396,374.37.
42. In his role as a splitting clerk, he generated invoices under the instructions of his supervisor. It is discernible from the record that the authority to alter tariffs rested solely with a supervisory officer, Ahmed Mwalazinge, and not the Respondent. The Respondent was unjustly blamed for the tariff change, which triggered the reduction in the payable

storage fee, and yet he did not have the necessary system rights to effect the changes.

43. Furthermore, internal investigations disclosed that after fraudulently receiving KShs. 1,700,00, Isaac Kamau [ a member of staff] conspired with the client to diminish charges. This individual absconded from duty and was subsequently charged; however, the Respondent was not charged and was only subjected to internal accusations.

44. The Appellant nonetheless proceeded to dismiss him, despite knowing who carried out the fraudulent scheme. The disciplinary hearing acknowledged a system lapse regarding invoice deletion, thereby confirming that he merely generated invoices as instructed. The finding of the trial court that the dismissal was malicious, unsupported by evidence of culpability, and procedurally flawed is therefore justified.

45. The trial court correctly applied the principles of procedural fairness and summary dismissal, including the guidance that even in cases alleging gross misconduct, an employer must meet the requirements of fairness. The record shows the disciplinary hearing was merely a formality, intended to

validate a predetermined decision. The trial court correctly held that the Appellant failed to prove misconduct and did not afford fair procedure; hence, the termination was unlawful and unfair. To support this point, reliance has been placed on the case of **Antony Mkala Chitavi Vs Malindi Water & Sewerage Company Limited, Cause No. 64 of 2012.**

46. Regarding the reliefs granted, Counsel submits that once a court finds that a dismissal is unlawful or unfair, it is required to determine the appropriate remedy within the parameters of Section 49 of the Employment Act. In exercising its discretion, the trial court considered the statutory factors and awarded compensation equivalent to twelve months' salary, which was within the permissible limit. Judicial discretion demands fairness, reasonableness, and compliance with statutory considerations, and the trial magistrate properly exercised such discretion in awarding the reliefs she did.

47. To buttress the foregoing submissions, Counsel cites the case of **Ken Freight (E.A) Limited v Benson K. Nguti [2019] eKLR**, where the Supreme Court held;

*“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 is 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.”*

48. On the counterclaim, it has been submitted that he acted under instructions to generate the invoices. He neither possessed the authority nor the system access to alter tariffs or delete invoices. The loss occurred after the tariff was changed by a superior and facilitated by another staff member, who later admitted involvement and faced criminal proceedings. The Appellant subsequently recovered the loss through the criminal process. The counterclaim, therefore, lacked merit as the Respondent bore no responsibility for the fraudulent actions.

### **Analysis and determination**

49. In the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123**, the court therein rendered itself as follows: -

*“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of 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...”*

50. I have thoroughly examined the grounds of appeal, along with the parties' pleadings, the oral and documentary evidence presented before the trial court, and the written submissions by Counsel. In my view, this appeal hinges on three main issues: (a) whether the Respondent was unfairly dismissed, (b) whether the counterclaim should be upheld, and (c) whether the Respondent was entitled to the reliefs sought.

### **Whether the Respondent was wrongfully dismissed**

51. Undeniably, for a termination of an employee's employment or summary dismissal of an employee to be considered fair, it must be both substantially and procedurally fair, as

dictated by 45 of the Employment Act. Procedural fairness pertains to the process leading up to the employer's decision to terminate/dismiss. In contrast, substantive fairness concerns the legitimacy of the decision, considering the validity and fairness of the process.

52. In assessing the fairness of an employee's termination, it is essential that the Court, when confronted with the task, accurately and clearly determines, based on the material before it, the manner in which the termination occurred. This is crucial because the statutory requirements for procedural and substantive fairness may vary depending on the specific circumstances of each case. For example, the statutory criteria for a fair redundancy termination differ from those applicable to a termination due to desertion or a summary dismissal based on gross misconduct.

53. With great respect to the learned trial Magistrate, her judgment does not demonstrate an understanding of the above. This Court observes that, by relying on the ruling in the case of **Kenya Airways Limited vs Aviation and Allied Workers Union of Kenya and 3 others [2014] eKLR**, the trial court failed to clearly distinguish between summary dismissal and termination of an employee's employment due to the employer's operational needs. The trial court needs to familiarise itself with the various ways an

employee's employment can come to an end, and the statutory fairness requirements, whenever there is a dispute over any of these.

54. Notwithstanding the aforementioned confusion, the trial Magistrate, at a certain juncture in her judgment, held that the Respondent was summarily dismissed. In evaluating the procedural fairness of this dismissal, she concluded that it was not fair, as the Appellant had not issued any notice prior to the summary dismissal. This conclusion was made in ignorance of the explicit provisions stipulated in section 44[1] of the Employment Act. A summary dismissal is characterised by the absence of notice or the provision of a notice that is less than what is prescribed by law or the employment contract. As such, the learned trial Magistrate erred in anchoring her finding on the wrong point of law.

55. Section 41 of the Employment Act provides for a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing them must follow. The procedure entails three vital components. First, the notification component requires the employer to notify the employee of the grounds for the intended action. Second, the employer shall accord the employee an adequate opportunity to make a representation on the grounds, in other words, to defend themselves against the accusations. Concomitant with this right to a hearing is the

right to accompaniment-the employee should be allowed to be accompanied during the hearing by a colleague of his choice or a trade union representative, where the employee is a member of a trade union. Lastly, the employer must consider the representation made by the employee and/or the person accompanying them before taking a final decision on the matter.

56. The Court in **Cooperative Bank of Kenya Ltd versus Yator (Civil Appeal 87 of 2018) (2021) KECA 95 (KLR)** aptly elaborated on the procedural fairness requirement, thus;

*“That notwithstanding, even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate. We have laboured through the Appellant’s disciplinary policy and procedure manual to find out the disciplinary procedure adopted in the case of the Respondent, and have not been able to find any, considering that the earlier complaint had been dealt with exhaustively. If another complaint arose after the earlier one, then the*

*Appellant was obligated to commence the termination procedure in accordance with its manual. That this did not happen and the summary dismissal of the Respondent was unfair, unprocedural and illegal. We therefore find no basis for interfering with the Judge's finding to that effect. It follows that the act of summarily dismissing the Respondent without giving him an opportunity to be heard and was the cause with the first complaint amounted to unfair termination. The burden was on the Appellant to prove that the employment was terminated in accordance with fair procedure. The Appellant did not discharge this burden at all."*

57. From the record, it is clear to this Court that the Respondent was issued with a show cause letter dated 24th January 2020, and he responded to the same. He was subsequently invited to a disciplinary hearing held on 12th February 2020. The Respondent participated in the hearing. All this the Respondent admitted in his evidence under cross-examination. In my view, there was sufficient evidence before the trial Court that demonstrated that the Appellant followed the process contemplated under the Employment Act in deciding to dismiss the Respondent summarily. The learned Magistrate had no reason to hold otherwise.

58. The Appellant maintained that internal investigations linked the Respondent to the manipulation of the billing system and deletion of a pro-forma invoice, thereby enabling the release of a motor vehicle without payment of storage charges. During cross-examination, the Respondent admitted that he generated the invoice. He asserted that the pro forma invoice included storage charges. He further admitted that the pro-forma invoice was deleted from the system.

59. I have carefully gone through the documents that were presented before the trial Court, particularly the Preliminary Investigation Report, and note that it revealed that the Respondent's credentials were used in the process of deleting the pro-forma invoice from the system. The Respondent's evidence, in my view, did not offer any plausible explanation for how this was possible without his involvement. In the circumstances, any reasonable employer would suspect the Respondent of having committed gross misconduct. As a result, I hold that the Appellant had a reason for the Summary dismissal and that the same was valid.

60. By reason of the foregoing, this Court finds that the trial Court erred in holding that summary dismissal was unfair. To

the contrary, it is this Court's view that it was both procedurally and substantively fair.

61. The Appellant counter-claimed for KShs. 3,396,374 on the basis that the Respondent's conduct occasioned financial loss. The Respondent contended that the loss resulted from fraudulent conduct by another employee, who had already reimbursed the sum through criminal proceedings.
62. The Appellant's claim for the stated amount was, in my view, in character a special damage claim. The requirement is that such a claim be specifically proved. Other than consistently asserting that this amount was lost, the Appellant did not bother to place evidence before the trial court that would specifically prove the loss. Nothing was put forth to demonstrate that the amounts were pursued against the Client, but recovery of the same became impossible.
63. Arising from the same one, it would be safe to argue that the Appellant did not demonstrate that they mitigated the damage at all.
64. By reason of the foregoing, it isn't difficult to conclude that the Counterclaim before the trial Court was not proven. An order of dismissal of the same was merited.

65. In the upshot, the Appeal herein succeeds partially. The learned trial Magistrate's judgment in favour of the Respondent is hereby set aside. In place thereof, this Court's decision is handed down, dismissing the Respondent's claim.

66. The Appellant urged this Court to rule in favour of their counterclaim in the lower court. As it was not proven, it is hereby dismissed.

67. Each party shall bear its own costs, both in the lower court proceedings and this appeal.

**Read, Signed and Delivered this 13<sup>th</sup> Day of November 2025.**

**OCHARO KEBIRA**

**JUDGE**