



**Transglobal Cargo Center Ltd t/a Africa Flights Services v Njeru (Employment and Labour Relations Appeal E333 of 2024) [2025] KEELRC 3209 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3209 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E333 OF 2024**

**NJ ABUODHA, J  
NOVEMBER 13, 2025**

**BETWEEN**

**TRANSGLOBAL CARGO CENTER LTD T/A AFRICA FLIGHTS  
SERVICES ..... APPELLANT**

**AND**

**SARAH MWENDIA NJERU ..... RESPONDENT**

*(An appeal from the whole Judgment and Decree of the Chief Magistrate’s Court at Nairobi delivered by Hon. Christine A. Ogweno on 24th October 2024 in Cause No. E1713 of 2023)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 22<sup>nd</sup> November 2024, the Appellant appeals against the Judgment of Honourable Christine A.Ogweno delivered on 24th October 2024 in Cause No. E1713 of 2023
2. The Appeal was based on the grounds that:
  - i. The Learned Trial Magistrate fundamentally erred in law and in fact in holding that the Claimant is entitled to untaken leave pay of Kshs.18,172.61/- by failing to consider that the Claimant had voluntarily failed to utilise her leave days on the respective years-2021, 2022 and that she had instead accumulated them without the express consent of the Respondents Board pursuant to clause 18 of the Employment contract.
  - ii. The Learned Magistrate gravely erred in law and in fact by awarding the Claimant one-month salary in lieu of notice pursuant to clause 20 of the employment contract without considering that the Claimant was summarily dismissed as a result of serious misconduct particularly theft which reason was valid and therefore, she is not entitled to one month’s notice in lieu of salary.



- iii. The Learned Magistrate erred in law and in fact by not taking into consideration that the Respondent followed the proper procedure in dismissing the Claimant from employment.
- iv. The Learned Magistrate erred in making an award of two months' salary as compensation for unlawful dismissal.
3. The Appellant prayed that the Appeal be allowed, the Judgment and Decree issued on 24<sup>th</sup> October 2024 by Hon. Christine A. Ogwenyo be set aside in their entirety and for the costs of the Appeal and lower Court be awarded to the Appellant.
4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates Wandabwa Advocates filed written submissions dated 22<sup>nd</sup> April, 2025 and on the issue of whether the trial magistrate erred in holding that the Claimant was entitled to untaken leave pay of Kshs.18,172.61/-, counsel submitted that the Respondent had the opportunity during the two claimed years to take her leave but failed to do so and did not as per employment contract have consent to accumulate the same. Counsel relied on Section 28(4) of the *Employment Act* and the case of Charles Nyarigo Rianga v Hatari Security Guards Ltd [2019] KEELRC to submit that an employer may by agreement with the employee defer the employee's leave for a period not exceeding eighteen months after the end of the leave year.
6. Counsel submitted that not only did the Respondent fail to demonstrate and/or provide sufficient reason as to why she did not apply for leave during her employment period despite having the opportunity, she also failed to demonstrate and/or provide evidence before the trial court that in compliance to clause 18 of her employment contract she sought consent of the board to defer accumulated leave and was denied the same.
7. Counsel relied on section 107 of the *Evidence Act* and the case of Rogoli Ole Manadegi v General Cargo Services Ltd [2016] KEELRC among other cases, to submit that the burden of proof lay with the Respondent yet she failed to demonstrate that she sought or obtained deferment nor there was a mutual agreement to accumulate leave beyond the statutory limit.
8. On the issue of whether the Learned Magistrate erred in law and in fact by awarding the Claimant one-month salary in lieu of notice, counsel relied on section 44 (3) of the *Employment Act* to submit that an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
9. Counsel submitted that the court in its judgment agreed that the Appellant had valid, fair and justified reasons to terminate the Respondent and further that while clause 20 of the employment contract may provide for one month's salary in lieu of notice in cases of termination, the contract has a caveat on which certain instances may lead to termination without notice.
10. Counsel further submitted that the contractual terms must be read together with the law and cannot contradict statutory protections afforded to the employers under section 44.
11. Mr. Wandabwa further submitted that the trial magistrate failed to consider that the Claimant was summarily dismissed for serious misconduct, specifically theft, which is recognised under section 44(4) (g) of the *Employment Act* as a valid reason for summary dismissal without notice.
12. On the issue of whether the trial magistrate erred by not taking into consideration that the Respondent followed the proper procedure in dismissing the Claimant from employment, counsel relied on section



- 41, and 42(1) of the [Employment Act](#) to submit on the key elements of fair procedure. Counsel relied on the case of Kenya Ports Authority v Fadhil Juma Kisuwa (Civil Appeal 76 of 2016) [2017] to submit that in the circumstances of this case, the Appellant afforded the Respondent an opportunity as contemplated in section 41 and that notices of intention to dismiss the Respondent and an invitation to a disciplinary hearing dated 11<sup>th</sup> July 2022 and a summary dismissal letter were shared with the Respondent via her registered postal address.
13. Counsel submitted that despite being notified and invited for the disciplinary hearing, the Respondent failed to avail herself for the disciplinary hearing which led to her dismissal which she was informed about via post clear evidence of adherence to the required procedure.
  14. Counsel further submitted that the Learned Magistrate failed to look at the current circumstantial evidence as presented and disregard of this evidence amounted to a misapprehension of the facts and the law warranting appellate intervention.
  15. On the issue of whether the Learned Magistrate erred in making an award of two months' salary as compensation for unlawful dismissal, counsel relied on section 49(1) (c) of the [Employment Act](#), to submit that compensation is discretionary not automatic and is only awardable where the court finds that termination was unfair. That the Claimant was summarily dismissed for gross misconduct specifically theft, which is a valid reason under section 44 of the [Employment Act](#).
  16. Counsel submitted that the Appellant followed due process under section 41 therefore, there was no unlawful dismissal and thus the basis for awarding compensation under section 49 (1) (c) did not arise. In this regard counsel relied on the case of Jonathan Ciano v Uchumi Supermarkets Limited [2022] KEELRC 379 (KLR) to submit that where there is no finding on unlawful termination, the claim for compensatory damages cannot be sustained. The Trial Magistrate failed to explain how the two-month's compensation figure was arrived at or how the criteria under section 49(4) were applied.
  17. Counsel further relied on the Supreme Court case of Kenya Ports Authority v Joseph Makau & 4 others to submit that section 49 (4) (k) requires the court to consider the employee's contribution to the circumstances leading to dismissal. If the Claimant's own conduct for instance theft or gross misconduct precipitated the dismissal, compensation should be reduced or denied entirely.
  18. Counsel submitted that the award of two months' salary as compensation was misconceived and legally unsustainable as the dismissal was both procedurally and substantively fair, the trial Magistrate failed to apply or reference the mandatory considerations under section 49(4) and the Claimant's own misconduct contributed to her dismissal.

### **Respondent's Submissions**

19. The Respondent's Advocates Omongo Gatune & Co. Advocates filed written submissions dated 30<sup>th</sup> April, 2025 and on the issue of whether the learned Magistrate erred in awarding the Respondent payment of untaken leave days, counsel relied on section 28 of the [Employment Act](#) to submit that annual leave is a statutory entitlement which cannot be waived, forfeited, or negated by contractual terms or employer-imposed policies.
20. Counsel further relied on among other cases, the case of Richard Abiero v Nyali Golf and Country Club Limited [2020] eKLR to submit that there was no room for forfeiture, any contractual clause that provides for forfeiture is against the spirit and letter of the law on annual leave. Counsel additionally cited the case of Fancy Jeruto & another v Hotel Cathay Limited [2018] eKLR to submit that the employer had the duty to ensure every employee has taken annual leave as and when due. The defence



that the Claimant failed to take annual leave and thus forfeited the same is not a position supported in law.

21. Counsel submitted that the Appellant's reliance on clause 18 of the employment contract which allegedly conditions leave accumulation on Board consent is misplaced. The clause was never pleaded, invoked, or enforced during the employment period or litigation and cannot now be used to defeat a statutory right on appeal.
22. Counsel submitted that the Appellant never relied on the clause in its pleadings, witness testimony, or submissions at the trial and that the clause provided that upon termination the employee shall be entitled to pending leave or payment in lieu as the Board may decide. There is no evidence that the Board ever made a decision to deny such payment.
23. Counsel submitted that the Appellant's argument that the Respondent's leave lapsed for lack of formal deferment was unfounded. By failing to manage the leave schedule or communicate any limitation, deadline, or risk of forfeiture, the Appellant effectively permitted accumulation through inaction or implied consent.
24. Counsel submitted that the Appellant's reliance on section 107 of the *Evidence Act*, arguing that the burden of proof lay with the Respondent was fundamentally misplaced and that the trial court did not base its finding on the Respondent's assertions or documents but rather, it relied entirely on the leave forms produced by the Appellant itself. Upon analysing the said forms, the court determined that only 9 leave days had been taken. The award was therefore not based on any failure by the Respondent to prove her case but on the Appellant's own records, which failed to account for the remaining leave days.
25. Counsel submitted that the trial court was correct in awarding compensation for untaken leave, its decision was based on credible documentation, statutory rights and the Appellant's own failure to manage or rebut the record.
26. On the issue of whether the trial Magistrate erred in awarding the Respondent one month's salary in lieu of notice, counsel relied on section 35(1)(c) of the *Employment Act* to submit that where an employee has been in continuous employment for more than one month, the employer is required to give at least 28 days' notice or pay one month's salary in lieu of such notice.
27. Counsel submitted that while section 44 provides for grounds upon which an employer may summarily dismiss an employee including for gross misconduct such as theft, the law does not give employers carte blanche to dismiss employees without due process.
28. Counsel relied on Section 41 of the *Employment Act* to submit that even where misconduct is alleged, the employer is obligated to inform the employee in writing of the allegations, allow the employee a chance to respond in the presence of a fellow employee or shop floor representative, and conduct a fair hearing.
29. Counsel submitted that the Respondent was served with a notice to show cause of which she responded to. Shortly after, she was sent on compulsory leave. There was no evidence that the notice of intended dismissal was issued and received by the Respondent and no evidence of any disciplinary hearing was held.
30. Counsel submitted that the court therefore, correctly found that the summary dismissal could not stand and reverted the termination to an ordinary one which under the law entitles the employee to notice or payment in lieu of notice.
31. On the issue of whether the trial Magistrate erred in finding that the Appellant failed to follow proper procedure in dismissing the Respondent, counsel relied on Section 41 of the *Employment Act* which



forms the backbone of fair termination procedures in Kenya. In this regard, counsel relied on the case of *Loice Otieno v Kenya Commercial Bank Ltd* [2013] eKLR to submit that an employer who resorts to summary dismissal must demonstrate that the summary dismissal meets the requirements of sections 43 and 45, even where gross misconduct is alleged, procedural fairness must be observed.

32. Counsel submitted that the Appellant failed to demonstrate compliance with Section 41 of the *Employment Act*. There was no notice of intended dismissal, no invitation to a disciplinary hearing, and no evidence of any hearing ever being conducted.
33. Counsel submitted that the Appellant alleged that correspondence was sent to the Respondent via post, but they took no meaningful steps to ensure the Respondent was properly notified, despite having her phone number and the opportunity to communicate in person and that the Appellant fell short of establishing that there was any actual exchange of letters or effective communication with the Respondent which underscored the Appellant's failure to observe procedural fairness.
34. On the issue of whether the Learned Trial Magistrate erred in awarding 2 months compensation for unfair dismissal, counsel relied on Section 49(1) (c) of the *Employment Act* to submit that the courts may award compensation of up to twelve (12) month's gross salary where it finds that an employee has been unfairly dismissed.
35. Counsel submitted that in determining the quantum of compensation under section 49(4) of the Act, the court was required to take into account various factors such as circumstances leading to the termination, employees conduct and employee's length of service among others.
36. Counsel relied on among other cases, the case of *Muchiri v Security Guards Services Limited* (Employment and Labour Relations Appeal E108 of 2021) [2024] KEELRC to submit that appellate court's intervention in an award for compensation is only merited where it is shown that the trial court misdirected itself in law, misapprehended the facts, or rendered a decision that is plainly wrong.
37. Counsel submitted that the trial court exercised discretion within the framework of section 49 of the *Employment Act* and awarded a modest two-month compensation far below the statutory cap of twelve months. The award was therefore proportionate, lawful and should not be disturbed on appeal.
38. Counsel submitted that the Respondent cannot rely on unproven allegations of gross misconduct to defeat the Claimant's entitlement to compensation. As the trial court rightly found, the dismissal was procedurally unfair due to non-compliance with sections 41 and 45 of the *Employment Act*.

## **Determination**

39. The court has considered this Appeal, the record of appeal and submissions filed by the both parties herein and observes that the principles which guide this court on an appeal from a trial court are now well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that: \_

“[A]n appeal to this Court from a trial by the High 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 allowances in this respect”

40. In this case, the judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent when that Court found that the termination was unprocedural and therefore unlawful. The trial court awarded the claimant a total of Kshs 72,172.61/= with costs of the suit



and interest from the date of filing suit. The trial court allowed some of the prayers as sought by the Claimant in his claim specifically; notice pay Kshs 18,000/=, leave pay Kshs 18,172.61/=, and 2 months' compensation for unfair dismissal Kshs 36,000/=.

41. The issues identified by the Court in order to conclusively determine the appeal are as follows:
  - a. Whether the trial court erred by finding that Respondent's termination of employment was procedurally unfair hence unlawful
  - b. Whether the trial court erred in awarding the Respondent notice pay, unpaid leave and 2 months compensation for unlawful termination.

**Whether the trial court erred by finding that Respondent's termination of employment was procedurally unfair hence unlawful**

42. The Appellant challenges the trial court decision that the termination fell short of procedural fairness. The Appellant relies on section 44(3) and (4) of the *Employment Act* to justify its summary dismissal.
43. This court however does not agree with the Appellant on this assertion because even on cases of summary dismissal, section 41 of the *Employment Act* on procedural fairness requires that an employer must take the employee through a hearing as prescribed under this section. This was the holding in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, where the Court of Appeal stated:

“ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of Summary Dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

44. This court agrees with the trial court that the Appellant did not adhere to the clear provisions of section 41 of the Act since after issuing the Respondent with the show cause letter on the theft issues it proceeded to send her on compulsory unpaid leave pending investigations. The allegations of sending the Respondent the letter of invitation to disciplinary hearing on 10<sup>th</sup> July, 2022 to take place on 15<sup>th</sup> July, 2022 was not sufficiently proved by the appellant. The Appellant did not illustrate why they did not use her mobile phone to reach the Respondent or her next of kin. There was no proof of service hence the trial court was justified in finding that there was no procedural fairness in the process of terminating the respondent's service.
45. In the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR it was held that: -

Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

**Whether the trial court erred in awarding the Respondent notice pay, unpaid leave and 2 months compensation for unlawful termination.**

46. On the above issue, the trial court awarded the respondent two months' salary as compensation for wrongful dismissal, the Appellant faulted this as excessive because the trial court did not justify



the reasons for the award despite finding that the Appellant had valid reason for the Respondent's dismissal. This court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

47. This court will therefore only disturb an award by the trial court if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court notes that the award of compensation is discretionary however the court should be guided by considerations set out under Section 49(4) of the *Employment Act*.
48. While taking note of the duration the Respondent worked for the Appellant which was almost three years and the conduct of the Respondent which contributed to the dismissal, this court finds that the two months salary awarded by the trial court was reasonable.
49. The award of one-month salary in lieu of notice was also justified after finding the Respondent was unfairly terminated without notice as provided for under section 35 of the *Employment Act*.
50. On the claim for leave, the Court agrees with counsel for the respondent that the same is statutorily provided for and cannot be waived or forfeited. Section 26 of the *Employment Act* provides that the provisions in Part V of the Act constitute basic minimum terms hence any provision in a contract of employment which provides for terms inferior to the provisions of that part shall be null and void. The assertion by counsel for the appellant that the respondent forfeited her leave by not taking the same or seeking approval of the Board of Directors for deferment is therefore not correct in law. The trial court was therefore justified in awarding the respondent for leave earned but not taken.
51. In the upshot the Appeal is found unmerited and is hereby dismissed with costs.
52. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2025**

**DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF NOVEMBER 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

