

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAKURU**

**ELRC APPEAL NO. E044 OF 2024**  
***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**SAMMY WACHIRA MUNGA.....**  
**.....APPELLANT**

**VERSUS**

**RUBY HARDWARE LTD.....**  
**.....RESPONDENT**

***(Being an Appeal from the Judgment and Decree  
of the Honourable Bildad Ochieng, Chief  
Magistrate, delivered on 22<sup>nd</sup> May 2024 in  
Nakuru CM ELRC No. 71 of 2020)***

**JUDGMENT**

1. The Appellant, being dissatisfied with the judgment and decree of the Honourable Bildad Ochieng, Chief Magistrate, filed this appeal vide a Memorandum of Appeal dated 30<sup>th</sup> May 2024 on the following grounds that:

*1. The learned trial magistrate erred in law and fact in finding that the Appellant had not proved on a balance of probabilities his entitlement for the award of notice pay, compensation for unlawful*

*termination of his employment, normal overtime dues, off duties, underpayment, public holidays, and salary for 9 days for the month of March 2020.*

- 2. The learned trial magistrate erred in law and fact in declining to award the Appellant costs of the suit, yet costs do follow the event.*
- 3. The learned trial magistrate's judgment was unreasonable and untenable.*
- 4. The learned trial magistrate's judgment was against the weight of evidence and not in accordance with the legal principles.*

2. The Appellant prays that:

- 1. The proceedings and judgment together with the resultant decree of the trial magistrate be set aside, reviewed and or revised and substituted with the judgment.*
- 2. This Honourable court do make such further orders as it deems fit.*
- 3. This appeal be allowed with costs to the Appellant*

3. The appeal was disposed of by way of written submissions.

### **Appellant's submissions**

4. The Appellant submitted that he was employed as a driver since May 2014, and he was dismissed in May 2020 without a disciplinary hearing, a show cause letter, or any formal charges, despite being accused of theft, which was never substantiated. The Appellant relied on **sections 41 and 45 of the Employment Act**, which state that before terminating an employee for misconduct, poor performance, or physical incapacity, an employer must explain the reason in a language the employee understands and allow the presence of a chosen colleague or union representative. The employer must also consider any representations made by the employee or their representative. Termination is deemed unfair if the employer cannot prove the validity and fairness of the reason, whether related to conduct, capacity, compatibility, or operational needs, and if proper procedure was not followed. Employees with at least thirteen months of continuous service have the right to challenge unfair termination. A termination is also unfair if it violates section 46 or lacks justice and

equity. In assessing fairness, labour officers or courts consider the employer's procedure, communication, appeal handling, the employee's conduct and capability, compliance with statutory requirements, past practices, and any prior warnings.

5. The Appellant submitted that he was terminated both substantively and procedurally, and seeks 12 months' compensation, Kshs.299,388/= and relied on ***Florence Wambui Gitau V Eclipse International [2019] KEELRC 1765 (KLR)*** and ***National Bank of Kenya V Samuel Nguru Mutonya [2019] KECA 404 (KLR)***. Also, in ***Kenya Union of Commercial Food and Allied Workers V Meru North Farmers Sacco Limited [2014] KEELRC 813 (KLR)***, where Mbaru J held that ***section 41 of the Employment Act*** imposes mandatory procedural requirements on employers during termination. If an employer fails to follow these provisions, such as issuing a show cause letter, conducting a disciplinary hearing, or allowing the employee to respond, the resulting termination is deemed unfair.

6. The Appellant submitted that he is entitled to notice pay to Kshs.24,949/= under **sections 35(1) and section 36 of the Employment Act**, and substantial claims for overtime Kshs 257,725.20/= and off-duty dues Kshs.386,587.80/=, supported by unchallenged evidence and corroborated testimony. The Appellant relied on the case of **Kathra Hussein Noor & Another v Kaderdina Hajee Essak Limited [2016] KEELRC 509 (KLR)** quoted the case of **David Wanjau Muhoro V Ol Pejeta Ranching Limited [2014] KEELRC 296 (KLR)**, the court observed as follows:

***“where the salary of an employee remains in arrears, or remain underpaid, recovery of the arrears or the underpayments, is not to be defeated by limitation under section 90 of the Employment Act; all accrued benefits must be paid to the employee on termination; arrears of salary and underpayments of salary involve a default of a continuing nature by the employer, and the time would only start running from the date of cessation of the continuous default; every month there is a default by***

***the employer, the time for accrual of the cause of action rests with regard to the cumulative obligations; and so long as the whole claim is not time-barred, there is no reason to bar claims for arrears of salary, salary discrimination and underpayments accruing during the period in employment.”***

7. The Appellant urges this Honourable court to uphold the appeal and overturn the lower court’s judgment, thus granting him full relief with costs.

#### **Respondent’s submissions**

8. The Respondent relied on the case of ***Loise Nduta Itoita V Aziza Said Hamisi [2020] KECA 618 (KLR)***, the Court of Appeal cited the case of ***Kenya Port V Kuston (Kenya) Limited (2009) 2 EA 212***, which held as follows:

***“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and should make due***

**allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with the parties in the evidence.”**

9. The Respondent submitted that the Appellant began working as a casual labourer in May 2014 and was formally employed as a driver in July 2015 at the Respondent’s Nakuru stores. His employment was terminated on 1<sup>st</sup> May 2020, following allegations of theft involving missing steel bars. He was asked to explain the incident and responded with a letter that appeared to contain admissions. Unsatisfied, the Respondent suspended him and reported the matter to Kaptembwo Police Station on 9<sup>th</sup> April 2020 vide OB No. 25/9/4/2025, prompting a police investigation.
10. The Respondent relied on the Court of Appeal case of ***Mutwol V Moi University [2022] KECA 537 (KLR)***, citing the Canadian case of ***Cabiakman V Industrial Alliance Life Insurance Co. 2004 SCC 55, [2004] 3 S.C.R 195***, the Supreme Court upheld the employer’s decision to suspend an employee accused of conspiracy to extort money, finding it justified due

to the employer's legitimate concern for the company's image and reputation. In its judgment, the Court outlined that administrative suspension is a limited but inherent power within employment contracts, and must meet four key criteria: it must serve a good faith business interest, be imposed fairly, be of a short and defined duration, and generally be with pay unless exceptional circumstances apply.

11. The Respondent submitted that the employer followed due process by informing the Appellant of theft allegations, suspending him pending investigations, and scheduling a disciplinary hearing, which he failed to attend. The Respondent relied on the cases of ***Saundu Amolo V Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR***, ***Shadrack Muthiani Kin'goo V Apex Steel Limited [2018] KEELRC 1888 (KLR)***, and ***Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd [2013] KEELRC 920 (KLR)***, where the courts emphasized procedural fairness and the employee's duty to participate in disciplinary processes.

12. The Respondent relied on ***under section 44(4)(g) of the Employment Act***, which provides as follows:

***“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section constitute justifiable or lawful grounds***

***for the dismissal if: —***

***(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.”***

13. The Respondent submitted that the dismissal met the threshold as the above-mentioned section. In ***Peter K***

***Kabau v Riley Services Ltd [2022] eKLR***, the court stated as follows:

***“Section 44(4) provides for matters that may amount to gross misconduct to justify the summary dismissal of an employee for lawful cause. Section 44(4)(g) specifically provides that where “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”, the employer may rightfully and lawfully summarily dismiss such an employee for gross misconduct.***

And further that:

***“On a balance of probability, this court is of the opinion that the Respondent had reasonable and sufficient grounds of suspecting that the Claimant has committed a criminal offence to its substantial detriment..... This is the import, implication, and application of section 44(4)(g) of the Act.”***

14. The Respondent submitted that the Appellant is not entitled to the relief sought in the Memorandum of Appeal. The Respondent relied on the case of ***Kenfreight (EA) Limited V Nguti [2019] KESC 79 (KLR)***, where the court was of the following view:

***“41] Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee’s employment, the appropriate remedy is the one provided under section 49 of the Employment Act. We also need to clarify that a payment of an award in section 49(1)(a) is different from an award under section 49(1)(b) and (c), section 49 allows an award to include any or all of the listed remedies provided that a court is making the award, exercises its discretion judiciously and is guided by section 49(4) (m)***

***Section 49(4) provides that:***

***“A labour office shall, in deciding whether to recommend the remedies specified in***

**subsections (1) and (3), take into account any or all of the following-**

**(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**

**(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;**

**(k) any conduct of the employee which to any caused or contributed to the termination.”**

15. The Respondent also refuted claims for notice pay, compensation, underpayment, overtime, off-duty, holiday pay, and salary for 9 days, citing lack of evidence and relevant precedents, including ***Kalani V East African Growers Limited [2022] KEELRC 1663 (KLR)*** and ***Kanyangi V University of Nairobi Enterprises and Services Limited [2025] KEELRC 566 (KLR)*** in support of that proposition

16. The Respondent urged the court to uphold the judgment of the learned trial magistrate and dismiss the appeal with costs.

### **Analysis and determination**

17. Being the first appellate court, this court's duty is to re-evaluate, reassess and reanalyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court as set out in ***Selle Associates V Associated Motor Boat Company Ltd (supra)***.

18. In ***Peter M. Kariuki V Attorney General [2014] KECA 713 (KLR)***, the court held that:

***“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR***

***SHIANI, Civil Appeal No. 38 of 2002  
(unreported)."***

19. The court has considered the record of appeal, the memorandum of appeal, and the submission by both parties. The court is here to determine whether the appeal is merited.

20. In ***Kenfreight (E.A) Limited v Benson K. Nguti [2016] KECA 409 (KLR)*** the Court of Appeal stated as follows:

***".....The respondent was serving a two-year contract of employment, which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure, the dismissal was found to be unfair, which we agree."***

21. In ***Echwa v Kenya Airports Authority***

**[2024] KECA 828 (KLR)**, the Court of Appeal stated as follows:

***“In the same vein, this Court in Ndugu Transport Company Limited vs. Sewe [2024] KECA 127 (KLR) held that the question of whether or not a termination is unfair is dependent on whether or not an employer has adhered to the twin requirements of due procedure and substantive justification. As the Court observed, adhering to one and contravening the other renders the dismissal wrongful.***

***To our mind, the twin requirement aforementioned was satisfied. The respondent did not only establish gross misconduct on the part of the appellant, but also gave him the opportunity to give a defence. In Cooperative Bank of Kenya Limited vs. Yator [2021] KECA 95 (KLR), this Court had this to say on the issue of procedural fairness:***

***“... even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such a sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence.”***

22. In this instant case, it was undisputed that the Appellant worked as a driver for the Respondent, earning Kshs. 24,949/=, and was summarily dismissed due to theft allegations. The learned magistrate found that the Respondent had valid grounds for termination and had followed due process, citing the issuance of two cause letters, the Appellant’s written response, and minutes from disciplinary hearings held on 7<sup>th</sup> and 11<sup>th</sup> November 2019. The learned magistrate concluded that the dismissal was fair and based on credible evidence of criminal misconduct.
23. The above documents being notice to show cause and disciplinary hearing proceedings were not annexed to

the pleadings. This court is not clear where the trial court cited those documents.

It is trite law that he who pleads as in Sections 107, 108 and 109 of the Evidence Act must prove.

The Respondent should have availed all the support documents to convince the court that the Appellant was well aware of the charges against him.

This court finds the Respondent rather made general allegations but failed to produce evidence to support the same.

24. The case was reported to the police and the investigating officer wrote his statement pertaining to his investigation. That however was not sufficient evidence to prove valid reasons were established to prove the Appellant was involved in theft. The Respondent even alleged that the Appellant was involved in a criminal case and was away from work for over one year.

25. The court has considered the case of **LAWRENCE ONYANGO ODUORI -VS- KENYA COMMERCIAL**

**BANK LIMITED CASE** 1592 OF 2010 where court held: -

***“The fact that an employee was absent from work on police arrest or detention for up to 14 days did not give the employer the right to dismiss the employee without observing the procedural guarantees given under Section 41 and 45 of the Employment Act 2007. The court stated all that Section 44 of the Employment Act provided was that specified acts amounted to gross misconduct of which summary dismissal could be justified. In addition, the court found summary dismissal was not dismissal on the spot without a hearing and that the right to be heard could never be discarded.”***

26. The Respondent says in his response that he suspended the Appellant verbally and asked him to report back to work for disciplinary hearing on 14<sup>th</sup> April 2020. He says the Appellant did not report back to work but showed up later demanding his dues.

27. It is curious why the Respondent would not invite the Appellant for a disciplinary hearing formally but claims he invited him orally. Section 41 of the Employment Act is mandatory and it provides as hereunder: -

***“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.”***

This must be formal notification and not a casual oral communication.

28. The court is persuaded by a number of authorities that have established that fair and lawful termination of employment must meet the criteria of substantive justification and procedural fairness. The case of

**WALTER OGAL ONURO -VS- TEACHERS SERVICE  
COMMISSION CAUSE 955 OF 2011** it was held: -

***“For termination to pass the fairness test it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.”***

29. The court is persuaded the learned trial Magistrate erred in law and fact in finding the Appellant had not proved his case on a balance of probability. In other words, the respondents terminated the Appellant unfairly and unprocedurally. The Judgment by Hon. Bildad Ochieng is set aside and instead judgment is entered in favour of the Appellant.

30. Further to the reliefs granted by the trial court as follows: -

**a. Underpayment - Kshs.50,030/=**

**b. Public holidays -**

**Kshs.78,453/=**

**c. Salary for 9 days -**

**Kshs.9,178/=**

***The Appellant is also awarded the following other reliefs: -***

***d. Compensation for unlawful termination***

**6 months at Kshs.24,949/= -  
Kshs.149,694/=**

*This has taken into consideration the period the Claimant worked for the Respondent*

**e. Notice pay - Kshs.24,949/=**

**f. The court finds no proof of overtime and off duties and so the same are not awarded.**

**g. Costs of the trial court and of this appeal are awarded to the Appellant.**

**h. Interest will accrue at 14% per annum from date of this judgment till full payment.**

Orders accordingly.

**Dated, Signed and Delivered virtually at Nakuru  
this 21<sup>st</sup> Day of November, 2025.**

**ANNA NGIBUINI MWAURE  
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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**  
**JUDGE**