

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER E992 OF 2021

TRANSPORT WORKERS UNION (K)..... CLAIMANT

-VERSUS

ROY PARCEL SERVICES LIMITED.....RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. Vide an amended memorandum of claim dated the 14th of March 2022, the Claimant sued the Respondent and sought the following Orders:-

a. The Claimant submits that the five (5) Grievants were unfairly dismissed and victimized for joining the Claimant Union and as such their summary dismissal be set aside.

b. The Respondent be ordered to pay each individual Grievant his/her lawful terminal benefits as recommended by the Ministry of Labour and submitted hereinabove under items 14-18.5 which are:

i. Hagai Esiyai Inonda	-KSHS.1,085,150.65
ii. Juma Omar	-KSHS. 376,167.50
iii. Mwifadhi Hamisi	-KSHS. 514,580.25
iv. Renos Muteti	- KSHS. 425,305.85
v. John Khalwale	-Kshs. 266,348.50-
TOTAL	-Kshs.2,667,552.75

2. The Claimant, in support of the claim, filed their undated list of documents with the bundle of documents attached; witness statement of John Khalwale dated 24th October 2022; witness statement of Juma Omar dated 24th October 2022; witness statement of Renos Muteti Katiku dated 24th October 2022; and witness statement of Rachel Wangui Kameru dated 24th October 2022.
3. The Respondent entered an appearance and filed a defence to the amended memorandum of claim and counterclaim dated 8th June 2022. In their counter-claim, they sought the following orders:
 - a. **A judgement be made for Kenya Shillings Fifty Thousand (Kes.50,000) to be granted, that a proper account be furnished and the funds debited be reimbursed.**
 - b. **Dismissal of the suit by the Claimant with costs and that it be rewarded general damages for loss of business and interests, special damages, costs and interests thereon.**

4. In support of the said defence and counterclaim, the Respondent filed a list of documents dated 8th June 2022 with the bundle of documents attached; another list of documents dated 6th July 2022 with the bundle of documents attached; an additional list of documents dated 13th July 2022 with the bundle of documents attached; a further additional list of documents dated 28th September 2022 with the bundle of documents attached; a list of witnesses dated 6th July 2022; and an amended witness statement of TEHSEEN OMAR dated 14th July 2022.

Hearing and evidence

5. The claimant's case was heard on the 20th February 2025 and 26th June 2025, where 2 witnesses testified on oath and were cross-examined by counsel for the respondent, Okoth Obera. The respondent's case was heard on the 26th June 2025 when the respondent called as its witness of fact Tehseen Omar as RW1 who testified on oath. He adopted his witness statement dated 14th July 2022 and produced documents under lists dated 14th July 2022, 8th June 2022, 6th July 2022, 13th July 2022 and a further list dated 28th September 2022.

The Claimant's case in summary

6. The Claimant is a duly registered Union representing 5 Grievants in the present case who are its members, namely Hagai Esiyai Inonda, Mwifadhi Hamisi, John Khalwale, Juma Omar and Renos Muteti. The Claimant's case is that or around the month of September 2019, the Respondent Company became aware that its employees were joining the Claimant union and the management began threatening and intimidating the unionized employees. Subsequently, the five (5) grievant(s) were unfairly dismissed from

employment without following due process and were denied their terminal benefits, in violation of labour laws.

7. The Grievants reported their unfair dismissal to the Claimant Union, which made a demand to the Respondent to either reinstate the Grievants or pay their terminal benefits, to no avail. They then reported a labour dispute to the Ministry of Labour which appointed a Conciliator to hear the dispute between the parties. Conciliation meetings were arranged but the Respondent failed to attend the same despite being served with notification of the same. On 16th November 2020, the Ministry of Labour issued its findings and recommendations on each Grievant to be paid their terminal benefits. The Claimant accepted the Conciliator's findings but the Respondent declined the same, and has never complied, forcing the Claimant to approach the court for a remedy.

8. Each Grievant's case is as follows:-

i. **HAGAI ESIYAI INONDA.**

The 1st Grievant was employed by the Respondent in October 1995 as a Heavy Commercial Vehicle driver at a monthly salary of Kshs.25,000/-. His normal duties included driving a Vehicle Reg. No. KCK 221V. On 24th July 2019 the Grievant was allocated duties on another Vehicle Reg. No. KAV184Q. The grievant noticed that the vehicle had a broken wind screen and informed the Respondent supervisor to facilitate repair, but he was accused of refusing to carry out the duties assigned to him. The Grievant was suspended for two weeks from 26th July 2019 to 9th August 2019. Upon returning to work, the Grievant was not allocated his ordinary duties until 14th October

2019 when he was issued with a summary dismissal letter, which did not state the reason for the dismissal. The grievant worked for the Respondent for 24 years.

The 1st Grievant states that he was underpaid contrary to section 48 of the Labour Institutions Act, 2007 & Ministry of Labour Wages Order wef May 2018 which stipulated a monthly wage of Kshs. 30,627.45 plus a 15% House Allowance of 4,594.10 per month, totalling Kshs.35,221.55 per month), based on a daily wage-of Kshs.1,474.50. The Grievant accepts the Ministry of Labour recommendations which are worked out as follows (Based on Ministry of Labour wages order w.e.f. 1st May, 2021):

- a) One month's pay in lieu of notice Kshs.35,21.55
- b) Unpaid August & September, 2019 salary @ Kshs.35,221.55x2=Kshs.70,443.10
- c) 9 days wages for October, 2019 x Kshs. 1,474.50 per day=Kshs.13,270.50
- d) One(1) year pending annual leave days-Year 2019(21 days x Kshs.1,474.50 per day) Kshs.30,964.50
- e) Underpayment of statutory Minimum wages w.e.f. 1/5/2018-Sept,2019 (Monthly underpay- Kshs. 10,221.55 p.m.x 12 months=Kshs 122,658.60
- f) 24 years' service pay @ 15 days per year-360 days wage x Kshs. 1,474.50 per day=Kshs.530,820.00
- g) 8 months' salary compensation as awarded by the Ministry of Labour@Kshs.35,221.55 pm=Kshs.281,772.40
- h) Certificate of service.

TOTAL KSHS.1,085,150.65

ii. **JUMA OMAR**

The 2nd Grievant was employed as a loader in February 2011 and later promoted to general clerk in 2015 at a monthly salary of Kshs. 16,299.50. The 2nd grievant carried out his duties for over 9 years on satisfactory performance and without any warning. On 22nd July 2019 the Respondent's HR Manager accused the 2nd Grievant that on 29th January 2019 of receiving goods in the company offices without following the right procedure. This was after lapse of more than 7 months. The Respondent's allegations were unfounded as no specific receipts/documents were provided by the company to authenticate their claims. The 2nd Grievant disputed the allegations and requested the Company to provide details, but the Respondent HR Manager refused to accede to the request. The Grievant was taken to Industrial Area Police Station on 22nd July 2019 recorded a statement under OB: 47/22/7/2019. The Grievant was then summarily dismissed from employment on 7th October 2019 even before the conclusion of the Police investigation report and without following due process. The police investigation found that the 2nd grievant was not culpable hence he is entitled to payment of his full terminal dues.

The 2nd Grievant states that he was underpaid contrary to section 48 of the Labour Institutions Act, 2007 & Ministry of Labour Wages Order wef May 2018 which stipulated a monthly wage of Kshs. 20,904.90 plus a 15% House Allowance of 3,135.70 per month, totalling Kshs. 24,040.60 per month. The 2nd Grievant claims that

his unfair dismissal be set aside and he be paid his terminal benefits as follows (based on Ministry of Labour wages order):

- a) On month's pay in lieu of notice-Kshs.24,040.60
 - b) Withheld/Unpaid July,2019 salary balance-Kshs.5,107.00
 - c) Unpaid August& September,2019 salary(s)-Kshs. 48,081.20
 - d) 7 days wages for October 2019-Kshs.7,035.70
 - e) 3 years pending annual leave days-Year 2017-2019-@21 days per year-Kshs.63,321.30-
 - f) 9 years' service pay @15 days per year-Kshs.135,688.50
 - g) Underpayment of statutory Minimum wages w.e.f. 1/5/2018-Sept,2019.(Section 48 of the Labour Institution Act-2007 L.K.) (Monthly underpay -Kshs. 7,741.10 p.m.x 12 months=Kshs.92,893.20
 - g) Certificate of service.
- TOTAL-KSHS.376,167.50

iii. **MWIFADHI HAMISI**

The 3rd grievant was employed by the Respondent in February 2012 as a Heavy Commercial driver at a monthly salary of Kshs.24,000.00 and had worked for the Respondent Company for over 7 years before he was terminated from employment. The 3rd Grievant was involved in an accident and upon return to work, he was unfairly dismissed. The Ministry of Labour recommended that the Grievant's summary dismissal be reduced to normal termination in order to enable payment of terminal benefits.

The 3rd Grievant states that he was underpaid contrary to section 48 of the Labour Institutions Act, 2007 & Ministry of Labour Wages Order wef May 2018 which stipulated a monthly wage of Kshs. 30,627.45 plus 15% House Allowance of 4,594.10 pm totalling Kshs. 35,221.55. The Grievant accepts the conciliators recommendations as follows:

- a) One month's pay in lieu of notice Kshs.35,221.55
 - b) Unpaid August & September, 2019 salary(s)-Kshs.70,443.10
 - c) 18 days wages for October 2019-Kshs. 26,541.00
 - d) 3 years pending annual leave days-@21 days per year-Kshs.92,893.507
 - e) 7 years' service pay @ 15 days per year-Kshs.154,822.50
 - f) Underpayment of statutory Minimum wages w.e.f. 1/5/2018-Sept,2019-(Section 48 of the Labour Institution Act-2007 L.K.)(Monthly underpay -Kshs. 11,221.55 p.m.x 12 months)-Kshs.134,658.60
 - g) Certificate of service
- TOTAL KSHS.514,580.25

iv. RENOS MUTETI

The 4th grievant was employed as a Turn boy in February 1999 and later promoted to a Tyre Man, earning a monthly salary of Kshs.14,000.00. The grievant had worked for the Respondent for over 20 years with satisfactory performance before his termination. On 2nd October 2019, the Grievant given Kshs. 9,000.00 to purchase some spare parts.

Along the way to the shops, the grievant discovered that he had misplaced/lost the money and he reported the incident back to the Respondent Company. The Respondent then unfairly dismissed the Grievant's employment and declined to pay his terminal benefits to date. In normal circumstances the Respondent would have carried out an investigation on the incident and if he was found guilty, the amounts would be surcharged or recovered from his monthly salary in line with section 19(d) of the Employment Act-2007. He states that his dismissal was unfair and amounted to excessive punishment.

The 4th Grievant states that he was underpaid contrary to section 48 of the Labour Institutions Act, 2007 & Ministry of Labour Wages Order wef May 2018 which stipulated a monthly wage of Kshs. 17,561.00 plus 15% House Allowance of 2,634.15 pm totalling Kshs.20,195.15. The Grievant accepts the conciliators recommendations as follows:

- a) One month's pay in lieu of notice-Kshs.20,195.15
- b) September,2019-unpaid wages-Kshs.20,195.15
- c) 4 days wages for October, 2019 @ Kshs. 846.25 per day=Kshs.3,385.00
- d) 3 years pending annual leave days @ 21 days per year-Kshs.53,313.75
- e) Underpayment of statutory Minimum wages w.e.f. 1/5/2018-Sept,2019-(Monthly underpay -Kshs. 6,195.15 p.m. x 12 months)-Kshs.74,341.8020
- f) 20 years' service pay @ 15 days per year-Kshs.253,875.00
- g) g) Certificate of service.

TOTAL - KSHS.425,305.85

v. **JOHN KHALWALE.**

The 5th Grievant was employed as a General Clerk in August 2014 at a monthly salary of Kshs.20,000.00 and worked for the Respondent for over 5 years on satisfactory performance before his termination. The Respondent alleged that the grievant received goods on behalf of the Company which were later discovered to have been missing. The Respondent's allegations were unfounded as no specific receipts/documents were provided by the company to authenticate their claims. The Grievant was taken to Industrial Area Police Station on 22nd July 2019 and recorded a statement under OB:47/22/7/2019. The Respondent then summarily dismissed the grievant unfairly even before the conclusion of the Police investigation report; which report established that the grievant did not commit any offence. The grievant was found not to have committed the said offence and as such he is entitled to payment of his full employment benefits.

The 5th Grievant states that he was underpaid contrary to section 48 of the Labour Institutions Act, 2007 & Ministry of Labour Wages Order wef May 2018 which stipulated a monthly wage of Kshs. 20,904.90 plus 15% House Allowance of Kshs.3,135.70 pm, totalling Kshs.24,040.60. The Grievant accepts the conciliators recommendations as follows:

- a) One month's pay in lieu of notice- Kshs.24,040.60
 - b) Unpaid August & September,2019 net salary(s)-Kshs.48,081.20
 - c) 7 days wages for October, 2019@Kshs. 1,005.10 per day=Kshs. 7,035.70
 - d) 3 years pending annual leave days @21 days per year-Kshs.63,321.30
 - e) 5 years' service pay @ 15 days per year-Kshs.75,382.50
 - f) Underpayment of statutory Minimum wages w.e.f. 1/5/2018-Sept,2019-(Pursuant to section 48 of the Labour Institutions Act-2007-Ministry of Labour Wages Order-effective 1st May,2018) (Monthly underpay -Kshs. 4,040.60 p.m.x.12 months)-Kshs.48,487.20
 - g) Certificate of service.
- TOTAL Kshs.266,348.50

Respondent's case in brief

9. The Respondent concedes that it engaged all the Grievants but frames its case as follows:

i. HAGAI ESIYAI

This Grievant was employed as a driver for a medium to light weight commercial vehicle. On Underpayment claims, the First Grievant claims that he should have been paid a salary for driving a large heavy commercial vehicle for driving motor vehicle reg no. KCK 221V. However, this is not true. He drove motor vehicle reg no. KCA 845V, a medium sized truck with a load capacity of 7900 and therefore, his salary was within the minimum wages of the country at the time he was employed. On the claims for Pay in lieu of notice ,the 1st Grievant was dismissed undersection 44(1) and 44(4) (c) as he failed to follow direct orders to drive a truck allocated to him by his

supervisor. The Union claims that this incident happened on the 24th of July 2019 and that the employee was suspended on 26/7/19 up to 9/8/19. However, again this is not true. The employee was present the entire month of July and paid accordingly subject to deductions. He was also marked present in the August master-roll from 1/8/19 to 9/8/19. The incident happened on 21/09/19 whereby he was usually allocated to drive truck registration number KCA 845V as aforesaid, but on that day its windscreen was broken. As it was a Saturday, the company had an urgent order to fulfil and thus he was allocated a different truck registration number KAV 184Q which he refused to drive claiming that he needs his truck's windscreen repaired and that he will only drive his truck. He then walked out resulting in the company missing out on the order, being a Saturday with only a few working hours to work with. On 23/9/19 he failed to report to work and was issued with a show cause notice when he reported back on 24/9/19. He refused to acknowledge the same, and was then issued with a notice to attend a disciplinary hearing on 26/9/19. He never attended the hearing and never returned to work. On the 9th October 2019, the management resolved to summarily dismiss the 1st Grievant and he was issued with a letter of termination on 14th of October 2019. Again he refused to acknowledge the same.

For the claimed August and September 2019 salaries, the Grievant was paid for both months through his bank account. He never reported to work from 26/9/19 to 13/10/2019 and only came for one day on 14th October 2019 to collect his letter of dismissal. On unpaid leave days, the Respondent states that the Grievant went on leave

for 17 days from 13/8/2019 to 31/8/2019 and was paid. The balance of leave days was 4 and he never earned them, the Grievant having left in October 2019.

The Respondent disputes the service pay claim as it contributed to NSSF on the Grievant's behalf. It cites Section 35 (5) of the Employment Act on service pay.

It also denies that the Grievant is entitled to compensation for unlawful and unfair termination, as the company followed due procedure. They concede to issuance of a Certificate of service upon completion of the clearance procedure by the Grievant.

ii. **JUMA OMAR**

The 2nd Grievant herein was employed as a Loader and assigned to assist on goods loaded from Mombasa road. On Underpayment, the claim on is based on an alleged promotion that was done in 2015. However, the Respondent denies having records of any promotion offered at that time. On the claim for pay in lieu of notice, they maintain that the employee was terminated under gross misconduct because of theft resulting in losses to the Company. A police investigation was carried out under OB/40/22/07/2019.

On Unpaid Salary, the Union claims he was not paid for July – October 2019. The Respondent states that the Grievant was fully paid in July, and took an advance of Kshs. 22,000/- in August which was reflected in his September payroll. His salary for

September was withheld pending the police investigations. On unpaid leave days, the Respondent avers that the Grievant went on leave on 5/9/15 to 9/9/15, 5/8/19 to 14/8/19 and 12/9/19 to 13/9/19. Leave was never been denied to him. His remaining leave to be paid is 6.5 days.

Service pay is disputed as for the reason that the Respondent contributed to NSSF on his behalf. The Respondent confirms that a Certificate of service shall be issued upon signed clearance.

iii. **MWIFADHI HAMISI,**

The Respondent's case is that the 3rd Grievant was hired as a light weight commercial vehicle driver. The Respondent herein tried severally to contact him but in vain. There are reports that he passed on. The person who showed up as the next of kin failed to provide evidence of marriage and neither does the Respondent company have records relating to his next of kin. They aver that the claim on behalf of the 3rd Grievant has abated.

iv. **RENOS MUTETI**

On the Fourth Grievant, the Respondent states that he was employed in the company as a turn man. On the claim for underpayment, where the union claims that the said employee should have been receiving a salary of Kshs.20,195, the Respondent has no records of ever promoting him to a tyreman. The Respondent denies the claim for

unpaid salary for September 2019 and states that the said employee was paid through his bank account.

On unpaid days in October 2019, the said employee was deducted for the Kshs.9000 he had not returned to the company with this being considered an advance. On the claim for unpaid leave days, the Respondent states that its records show that the 4th Grievant had a balance of 18 leave days only. The claim for Service Pay for Twenty (20) years is disputed for the same reason as the other Grievants.

The Respondent challenges the 4th Grievant's membership to the Union.

On the circumstances of the 4th Grievant's dismissal, it is averred that on 2nd October 2019, the 4th Grievant was given some money amounting to Kshs. 9000/- to purchase spare parts for repair of a company vehicle. He was sent in the morning but failed to report to work prompting calls from the supervisor who had sent him. He refused to pick up the supervisor's phone calls. Late in the evening, he picked up his phone calls, but was not clear on whether he had completed the errand. The supervisor instructed him to report to office the following day but he failed to do so, culminating in the issuance of a show cause letter. He failed to acknowledge the same or respond thereto. He was then asked to hand over the company tools in his possession including the wheel spanner and jack which he had been allocated, but failed to comply. He was subsequently summarily dismissed from service for gross misconduct based on the offence of theft by servant.

v. JOHN KHALWALE

The Respondent admits employing the 5th Grievant as a junior clerk. They deny the claim for underpayment whereby the union claims underpayment that he was engaged as a general clerk, and state that as a junior clerk, his salary was paid accordingly. The Grievant was an outside collection clerk and his main duties were to deliver and collect parcels from the customers and drop them at the Respondent's Dunga Close warehouse for consolidation. He was allocated the Mombasa Road route and expected to visit all the customers along that route and collect parcels and consolidate the same and take them to the Respondent's said office for loading to different destinations. Buyline industries, one of the Respondent's regular customers who was based on the 5th Grievant's route, began complaining that their customers upcountry were not receiving their goods which they had dispatched through the Respondent. They provided reference numbers of the missing parcels for confirmation, and it was discovered that the 5th Grievant had indeed collected the goods from the customer and others, issued waybills to them, but failed to record in the Respondent's black books all the goods that he had collected, upon arriving at their offices, as part of the handover to the counter clerk. He failed to sign the handover to the counter clerk against the waybills. Due to the 5th Grievant's lapses, the counter clerk was unable to prove that he delivered the goods to the final recipients. The 5th Grievant was summoned to a meeting to respond to the allegations of the customer and to provide proof by showing the committee the signed waybill from the customers as proof that the goods were delivered and received by the upcountry clients. He confirmed that he collected goods from the customer and wrote the waybill in the black book but did not counter sign the black book as required when he handed them over to the counter

clerk. He also stated that he did not follow up for the signed green copies of the waybill after the goods were delivered. Further, he confirmed that he did not inform the accounts department when he failed to receive the green copies of the waybills for the affected clients from the branches so that he could be assisted to follow up. The matter was reported at industrial area police station for investigation and the 5th Grievant was summarily dismissed from service after internal investigations carried out by the disciplinary committee found him liable. The client charged the company for the lost goods and the 5th Grievant's lapses also damaged the Respondent's reputation among its clients. Therefore, the 5th Grievant's salary was withheld in order to recover losses. The Respondent is adamant that it did not receive any letters from the Claimant Union as alleged, except for the one dated 16/10/2020 which notified them of appointment of a conciliator. The Respondent's HR Manager admits that the Union sent him an email but he was outside the country hence had no access to his emails. Once arriving back, the conciliation meeting had already been held and so the Respondent was condemned unheard. They challenge the decision of the conciliator for being made in violation of their right to fair hearing.

DETERMINATION

Issues for determination

10. The claimant addressed the merit of claims in general and relied on the conciliation recommendations.

11. Conversely, the respondent outlined the following as the issues for determination in the suit-
- a) As a consequence of the non-attendance by Juma Omar & John Khalwale on the date of the hearing, 26th June, 2025, what fate should befall their claims?
 - b) How should Court treat Renos Muteti Katiku & Rachel Wangui Kameru's witness statements both dated 24th October, 2022 in light of the fact that the witnesses never adopted them?
 - c) Was Renos Muteti Katiku's dismissal justified in light of his own admission of diverting the employer's money meant for spare parts?
 - d) Whether Rachel Wangui Kameru's is a proper Claimant in this Case?
 - e) In light of issues (b) (c) and (d) above, are the claims by Renos Muteti Katiku & Rachel Wangui Kameru's merited?
 - f) Who should bear the cost of this suit?
12. The court found this was a claim for unfair termination and terminal dues. The court found the issues placed before the court for determination to be-
- a. Whether the termination of the employment of the grievants was proved on a balance of probabilities as unfair
 - b. Whether the grievants were entitled to relief sought
13. There was a counterclaim. No party submitted on the same. The court will determine whether the counterclaim was merited.

Whether the termination of the employment of the grievant was proved on a balance of probabilities as unfair

14. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- ‘45(2) *A termination of employment by an employer is unfair if the employer fails to prove—*

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.’ To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

15. At the hearing 2 of the grievants were not called as witnesses. The claimant did not submit on this issue but the respondent submitted as follows- grievants number 2 and 5 failed to appear and have their cases heard. What then happens when a party fails to appear on the set date for their cases’ trial? When a party fails to appear on the date of the trial, upon proof of their knowledge of the date, the Court is enriched with powers under Rule 60 (2) of the Employment & Labour Relations Court (Procedure) Rules, 2024, to without justifiable reasons, dismiss such claims. On the material date of the hearing, 26th June, 2025, the Claimant’s representative presented two witnesses; Renos Muteti Katiku & Rachel Wangui Kameru. On the rest of the grievants, he stated that he communicated to them but they failed to appear and did not, the record will bear witness, seek the Court and opposing counsel’s indulgence to adjourn the matter to another date to allow him present the other two witnesses. If anything, and for the avoidance of doubt, the Claimant’s representative CLOSED the Claimant’s case at the end of the testimonies of the two

present witnesses paving way for the Respondent to be heard. They cannot thus claim they were not heard at a later date. On the basis of the aforesaid, the Respondent prays that the suits against it by grievants number 2 and 5 be dismissed with cost. They dragged the Respondent to Court, filed pleadings, the Respondent responded, attended Court from time to time including the trial date when its chief witness, Tehseen Omar, was present and ready to be heard.

16. The court had directed the parties to submit on the witnesses who had not been called. The instant claimant was the union bringing the case on behalf of the grievants, its members. The dispute by the claimant on the 5 grievants had been before the conciliator who upon hearing the parties made recommendations of which the respondent was not agreeable escalating the case to court. The court under section 20 of the Employment and Labour Relations Court Act is guided as follows- *'20. General powers of the Court (1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.'* The respondent only raised issues against the 2nd and 3rd grievances and not grievant 1 who also never testified. The court finds it is unfair to isolate the 2 grievants whose case was before the conciliator and the respondent had considered their case in defence. The court will consider the case of the said grievants based on documents and pleadings before the court.
17. On the termination, the claimant stated that the grievants were unfairly terminated without compliance with sections 41,43, and 45 of the Employment Act.

18. The claimants' submissions were that - the Respondent has failed to prove the reasons for the five (5) grievants dismissals/terminations hence it carried out unfair termination of the five grievants without following the due process of the labour laws. That Section 45 of the Employment Act, provides that: - '(1) No employer shall terminate the employment of an employee unfairly (2) (a); without prove that the reason for the termination was a valid (4) (b); if it is found that in all circumstance of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employees.'" That the Respondent has failed on this case and did not follow the law hence guilty and liable to pay the five grievants their full terminal benefits and Compensation for wrongful termination.
19. The respondent only submitted on merit of case of 4th and 3rd respondents as follows- Was Renos Muteti Katiku's dismissal justified in light of his own admission of diverting the employer's money meant for spare parts? This grievant was put to task during cross-examination as to the truth or otherwise of the fact that he was given Kshs. 9, 000.00. The witness answered the question to the positive and also upon being referred to his statement, which he never adopted, he confirmed that as a consequence of the said money not being returned to the Respondent when he was engaged, he was consequently summarily dismissed. To arrive at a determination of a fair or an unfair termination or dismissal, the reason(s) for the Claimant's summary termination, and the procedure adopted in effecting the termination are paramount. We shall delve into discussing the pertinent aspects of fairness on matters employment that is, procedural fairness which relates to the procedure followed in dismissing an employee and substantive fairness which relates to the existence of a fair reason to dismiss. Please walk with us through the journey plan below. The law

relating to termination of employment is well settled. The Respondent appreciates the provisions of Section 45 of the Employment Act, 2007 that decrees that no employer shall terminate the employment of an employee or dismiss them from employment unfairly. Undoubtedly, Section 45(2) (c) provides the foundation for adoption of a fair procedure in matters termination of an employee's contract of service and the consequence of failure to adhere to procedural fairness. 41. Sections 43, 45(2), and 47(5) of the Employment Act, 2007, places the burden of proof of the reasons for termination on the employer. Section 43 provides that where an employer fails to prove reasons for termination, the termination shall be deemed unfair. Here is a case that this grievant admitted to having converted the money he was given to buy parts with into his personal use. The grievant was issued with a notice dated 4th October, 2019 after having been given various warning, as were confirmed by the Respondent's witness, Tehseen Omar. Turning our focus back to the issue at hand, Section 43(2) of the Employment Act which defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee. In the case of *British Leyland UK Ltd v. Swift* (1981) I.R.L.R 91 Lord Denning described the test of reasonableness in the following words: - "The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the

dismissal must be upheld as fair even though some other employers may not have dismissed him.” But what is the legal position on what procedural fairness entails? The answer to this question is found under Section 41 of the Employment Act which provides, Section 41(1) of the Employment Act, 2007: “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.” In *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR it was held that the Court must look into the validity and justifiability of the reasons for termination before answering the question of procedural fairness. The Respondent adduced into evidence as cited in the preceding paragraphs that the Claimant’s services were terminated because of his misconduct, stealing from the company, which is nevertheless, a valid ground for termination per Section 41 of the Employment Act, 2007. The Employment Act anticipates that whenever an employee is faced with a disciplinary issue, he must be given sufficient if not reasonable time to Show Cause and/or prepare his defence for the (disciplinary) process to be seen to be fair. Subsequently, in adherence to the dictates of Section 41 (1) of the Employment Act, 2007 highlighted above, the Respondent invited the Claimant for a disciplinary hearing verbally as acknowledged by the Claimant during cross examination. Undoubtedly, the Employment Act contemplates that the burden of proving the lawfulness of a termination lies with the employer; this includes the employer demonstrating that he/she complied with the procedural dictates of section 41 of the Employment Act as read with sections 43 and 45 of the Employment Act.

During the hearing of this matter, it was demonstrated that the Respondent sufficiently accorded the Claimant procedural fairness. The procedure adopted in the dismissal of the Claimant was in line with the statutory threshold. It then follows that the summary termination of his services was procedurally and substantively fair. The former employee herein at trial admitted to converting money meant for spare parts and this gave the employer every reason to terminate him. ISSUE IV: Whether Rachel Wangui Kameru's is a proper Claimant in this Case? It is not in doubt that the 3rd grievant is a deceased. It is also not in doubt that the Claimant's representative made an oral application to substitute the 3rd grievant with the wife. Equally it is not in doubt that the deceased grievant died in the year 2020 and not 2025. Paragraph 53 above presents various challenges that warrants our address. Firstly, did the suit abate? Secondly, if the suit did not abate, can Rachel Wangui really fill up the shoes of the deceased husband in an employment claim? On the issue of abatement of suit. The instant situation presents a unique case. This flows from the law on abatement of suits and the history of the suit herein both of which we shall summarize here. The law governing abatement of suits is found in Order 24 Rules 3 and 4 of the Civil Procedure Rules. Order 24 Rule 3 takes care of a situation where the Plaintiff or several plaintiffs die. It provides as follows: "3 (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit". (2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the

court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.” Provided the court may, for good reason on application, extend the time.

20. Was this Court furnished with good reason for the Claimant’s failure to have Rachel Wangui substitute the deceased as a substitute, besides the fact that the representative of the Claimants is a layman? No. The adage position on knowledge of the law is, ‘ignorance of the law is no defense’. The Claimant’s representative cannot claim ignorance whereas it is a fully fledged union with resources to engage legal counsel for advice from time to time to enable them adhere to the dictates of the law. The above provision, under Order 24, relates to a situation where a Plaintiff dies and a suit survives him or her. In the circumstance, the legal representative is legally under the obligation to file an application within one year for substitution of the deceased Plaintiff. It is incumbent on the surviving relatives to move quickly within one year to make the application. If they think it is not possible to do so within the period, they can ask for leave of the Court for extension of the period, and it behooves them to move the Court within that extended period if granted, which never happened in the case herein. However, if after the lapse of one year after the death of the Plaintiff or after the extended period an application for substitution is not made, then the suit abates automatically by operation of law. The grant of leave for extension of time to file an application for substitution happens where the applicant gives good reason for delay in filing the application for substitution. It is thus our submission that the Court having allowed the Claimant to substitute the deceased grievant later in the day should not hold any water. We seek to thus draw the courts attention to the following

authorities from Courts of equal status and Court of Appeal on abatement of suits. In the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others Civil Appeal No.16 of 2015 [2015] eKLR the Court of Appeal expressed this point as follows: - “The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.” Also, in Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others Civil Appeal No.283 of 2015 [2017] eKLR, the same Court sitting at Malindi stated that: - “The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death...”. In the persuasive case of Wallace Kinuthia v Anthony Nd'ung'u Muongi & 3 Others [2013] eKLR her Ladyship Nyamweya P. J. stated “The effect of a suit that has abated is that it ceases to exist in law.” She then cited the definition of abatement in the Black’s Law Dictionary as being “the suspension or defeat of a pending action for a reason unrelated to the merits of the claim”. Earlier, in Kenya Farmers Cooperative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate, (2005) e KLR his Lordship Waweru J held: “If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any

time.” It is our prayer therefore that the suit by Mwifadhi Hamisi be declared to have abated ‘Actio personalis moritur cum persona’ (a personal right of action dies with the person). Onto this second issue, the instant suit is an employment suit. It seeks to, with respect to Mwifadhi Hamisi, to enforce a claim for wrongful termination from employment, a personal relationship that only him had with the employer. Section 10 of the Employment Act requires an employee to provide the employer with details with the employer shall keep. These detail at no point never entail the fact that in the absence of the employee, the wife shall take over the employment or enforce rights accruing therefrom. It is our submission therefore that, these nature of personal rights are not transferrable and they thus die with the person. May your Ladyship be persuaded by the authority in James Mwangi Kamau v Barclays Bank of Kenya Ltd (2022) eKLR. Further we echo the sentiments of the Court of Appeal in Savings & Loans (k) Ltd v Kanyenje Karangaita Gakombe & another (2015) eKLR on the doctrine of privity of contract and enforceability of contracts by 3rd parties. The wife was not privy to the contract between the deceased husband and the Respondent. Clearly this was evidenced by her staggering during cross-examination. She either did not know or did not see nor understand.

Decision

1st grievant- Hagai Esiyai Inonda

21. The grievant was not called as witness for claimant. In this claim, the respondent filed in court a discharge agreement where the 1st grievant signed as settlement of his claim with the employer that he was paid Kshs. 60,000 as settlement and copy of cheque which he signed was produced. The court finds no basis to consider the 1st grievant’s claim having discharged the employer and not appeared to explain any fault on the discharge.(discharge

and release agreement dated 22nd September 2022 produced under respondent's list of document dated 28th September 2022.) The claim for the 1st grievant is disallowed.

2nd grievant – Juma Omar

He was summarily dismissed for failure to deliver goods. Matter was reported to police. The court finds the reasons were valid and related to his job. The failure to be charged and convicted is not related to the internal process. The employer had a basis to terminate on the belief of theft. 1 month notice granted for lack of procedural hearing as he was dismissed without procedural process compliance on 7th October 2019.

3rd grievant Mwifathi Hamisi (deceased and substituted by Racheal Mwangui Kameru)

22. Hamisi was a driver and was dismissed for careless driving summarily without hearing vide letter of 18th October 2019 (page 16). The court finds the reasons were related to his work as a driver. 1 month notice pay is granted for lack of procedural hearing.

4th grievant Renos Muteti

23. His case was that on the 2nd October 2019 he was given Kshs.9000 to purchase spare parts for the company/employer. He stated that he lost/misplaced the money and reported the incident to the company, following which he was dismissed. The grievant said he had reported the matter to conciliator and the recommendation was he be paid notice pay and terminal dues. The letter of summary dismissal dated 4th October 2019 was produced (page 17 of the claim). The court holds there was a lawful reason for termination,

but the procedure was not followed. Award 1 month's salary given for notice as compensation.

5th Grievant – John Khalwale

24. He as summarily dismissed for failure to deliver goods. Matter was reported to police. The court finds the reasons were valid and related to his job. The failure to be charged and convicted is not related to the internal process. The employer had a basis to terminate on the belief of theft. 1 month salary notice granted for lack of procedural hearing as he was dismissed without procedural process compliance on 7th October 2019.

Whether the grievants were entitled to reliefs sought

25. The appellant submitted as follows-2ND GRIEVANT - MR. JUMA OMAR- Date Employed: Date of Terminated: Position Held: Period of Service: Monthly Salary: GRIEVANT CLAIMS: - a) February 2011 7/10/2019 Loader then promoted to General Clerk-2015 8 years Kshs. 16,299.50pm -(Underpayment Contrary to Section 48 of the Labour Institutions Act -2007 & Ministry of Labour Wages Order -w.e.f. 1st May, 2018- Stipulated monthly pay -General Clerk - Kshs. 20,904.90 plus 15% House Allowance Kshs. 3,135. 70 pm = Kshs. 24,040.60 pm). - Daily wage- Kshs. 1,005.10 per day Pay in lieu of notice -1 month salary - Kshs. 24,040.60 pm b) Withheld/Unpaid July, 2019 salary Balance - Kshs. 5,107.00 c) Unpaid -August & September, 2019 salary(s) -@Kshs. 24,040.60 pm x 2 = Kshs. 48,081.20 d) e) g) 7 days wages for October, 2019@ Kshs. 1,005.10 per day = Kshs. 7,035.70 3 years pending annual leave days - Year 2017-2019 - @ 21 days per year = 63 days wages x Kshs. 1,005.10 per day = Kshs. 63,321.30 9 years'

service pay@ 15 days per year - 135 days wage x 1005.10 per day = Kshs. 135,688.50
Underpayment of statutory Minimum wages w.e.f. 1/5/2018- Sept, 2019. (Section 48 of the
Labour Institution Act -2007 L.K.) Stipulated Monthly pay - Kshs. 24,040.60 p.m. less
Company pay - Kshs. 16,299.30 p.m. Monthly underpay - Kshs. 7,741.10 p.t. x 12 months
= Kshs. 92,893.20 g) Certificate of service. h) Nine (9) months salary compensation for
wrongful termination - Kshs. 24,040.60 pm x 9 = Kshs. 216,365.40 TOTAL -KSHS.
592,532.90.

26. The respondent adopted witness statement Tehseen Omar dated 14th July 2022 on the claim which the court considered. On the underpayment, the representative stated that there was no evidence of promotion of the grievant. The grievant did not produce any evidence of the promotion, and the same has not been proved. He who alleges proves. The court then awards 1 month notice pay for lack of procedural fairness of **Kshs. 16,299.50**
27. On Withheld salary of July 2019 – the respondent stated that the salary for July was paid in full. The respondent said there was an advance for Ksh 22000, but no proof was produced for the August salary, and payment of September had been withheld. The court allows claim for salary for August and September thus Kshs 16,299.50 x2 thus **Kshs, 32599.**
28. The claimant said the 2nd grievant had not gone on leave for 3 years. The respondent stated the outstanding leave days were 6.5 days and there was no reply. The court accepts the uncontroverted response and awards leave for 6.5 days, thus **Kshs. 3,532.**

29. On service pay, the respondent said it was on NSSF but produced no evidence of the same. The 4th witness testified and was not cross-examined on the same. It was the same employer for all grievants. RW1 told the court he had no evidence of the payment to NSSF. The court finds on balance of probabilities the claim for service pay was justified and is allowed. The period of service was not disputed. Thus 9 years of service pay at 15 days for each year Kshs 16,299.50 x15/30x 9 years thus service pay awarded **Kshs. 73,347.75.**

30. Certificate of service to issue under section 51 of the Employment Act.

3rd grievant- deceased and substituted vide leave of court and Adlitem Order to RACHEL WANGUI

31. The court accepted the Respondent's position that the grievant was a light commercial driver as these were the same submissions of the respondent before the conciliator. The salary was thus accepted as paid. Notice pay awarded for **Kshs. 24000.**

32. No evidence of salary payment for August and September and the same amount awarded. Thus, **Ksh. 48000.**

33. 18 days of October awarded as he was dismissed on 18th October thus 118/30x24000- Kshs. **14400.**

34. The leave days are declined as the witness was not able to substantiate the same.
35. Service pay of 7 years allowed as no evidence of NSSF by the respondent. Thus $15/30 \times 24000 \times 7$ – **Kshs. 84,000.**

4th Grievant -Renos Muteti

36. Notice pay Kshs. 14000 awarded for lack of procedural fairness.
37. September wages- the employer ought to have produced the alleged payment evidence- the court believed it was not paid and **awarded Kshs. 14000.**
38. 4 days in October –employer said it was deducted for loss of Kshs. 9000. The court accepted the defence and disallowed the claim for 4 days.
39. Leave days- the claimant sought 3 years' leave. The respondent said he had 18 days' outstanding leave. There was no reply to this. The grievant is awarded as untaken leave pay $Kshs. 18/30 \times 14000$ thus **Kshs. 8,400** as untaken leave days.
40. Service pay.- period of service not in dispute. No evidence of NSSF deduction and remittance. Service pay is awarded for 15 days each year thus $20 \times 15/30 \times 14000$ **-Kshs. 140,000.**
41. Certificate of service to issue under section 51 of the Employment Act.

5th grievant – John Khalwale

42. Notice pay for lack of procedural fairness awarded for 1 month's salary, **Kshs. 20000.**
43. Unpaid August and September wages- the respondent said it was withheld to recover losses. The same is awarded **Kshs. 40,000.**
44. 7days salary in October - letter of dismissal was dated 7th October and the same is awarded for 7 days thus **Kshs4,666.66.**
45. Leave days- the claimant sought 3 years leave. The respondent did not submit on this. Leave is limited to 18 months under section 28 of the Employment Act; thus, leave awarded **Kshs. 30,000.**
46. Service pay.- period of service not in dispute. No evidence of NSSF. Awarded for 15 days each year thus $5 \times 15 / 30 \times 20000$ -**Kshs. 50000.**
47. Certificate of service to issue under section 51 of the Employment Act.
48. Judgment is entered for the claimant against the respondent as above with Interest on all the awarded amounts to apply at the court rate from the judgment date.
49. The claimant is awarded costs of the suit.

50. Stay of 30 days.

51. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY
OF NOVEMBER, 2025.**

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Ndege

Respondent: Kimotho h/b for Okoth Obera