

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

CAUSE NO. E080 OF 2024

ANTHONY RAYA JAPINY CLAMANT

VERSUS

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

The respondent employed the claimant as a dock worker in 2019 and then issued him with a written contract from 9 June 2022. His monthly wage was ksh. 85,932.68.

The claimant was arrested and arraigned in court on a criminal charge on 2 February 2023, with the respondent as the complainant. On 6 February 2023, the criminal case was withdrawn.

On 9 May 2023, the complaint received a letter dated 2 May 2023 suspending him from duty and inviting him to show cause on the allegations that investigations carried out by the respondent's security had found him to be a suspect in the theft of two containers.

On 11 May 2023, the claimant replied to the show cause giving details of the matter. On 22 September 2023, the claimant was invited to the disciplinary hearing scheduled for 26 September 2023. He attended and was issued with notice dated 23 February 2024, terminating his employment and allowing him the right of appeal. He lodged an appeal that was dismissed on 14 March 2024 without the due process or being allowed to attend to argue his case. This was contrary to the policy that required the respondent to invite the claimant to make his representations before the appeal could be determined. He had not been supplied with any information regarding the investigations as required and hence he had a good appeal.

The claim is that there was unfair termination of employment. The termination of employment was tainted by procedural irregularities hence wrongful. He claimed him following:

- a) An order of reinstatement without loss of benefits.
- b) Salary withheld during the suspension period for 9 months Ksh. 773,394.12
- c) In the alternative, 3 months' notice pay ksh. 257,798.04
- d) Unpaid leave for 2023 Ksh. 85,923.68
- e) Certificate of service.
- f) 12 months compensation Ksh. 1,031,191.16
- g) Costs of the suit.

The claimant testified that his employment was terminated unfairly because, to date, he does not know the reasons leading to such action, despite asking the respondent to provide him with reasons, provide him with the evidence during the disciplinary hearing, none was supplied. The show-cause notice made various allegations, and he replied with his explanations. The criminal case where the respondent was the complainant was withdrawn. There was no evidence whatsoever to support the termination of his employment, and he should be reinstated to his position or paid terminal dues.

In reply, the claimant was employed as a Docker, as per a letter dated 15 August 2022. A report was made at Kilindini Port Police Station by the respondent's security team through OB No. 21 of 1 February 2023 regarding the offence of breaking and stealing of rice and sugar from containers SEGU360165/8 and GSLU205344/9. The crimes were committed on diverse dates between 29 December 2022 and 30 January 2023. It was discovered that the original seals on the containers had been tampered with, and an unknown quantity of cargo had been pilfered.

The police arrested the claimant upon a review of the CCTV which established that the claimant was sighted at the scenes of the crime for containers number SEGU360165/8 and GSLU205344/9. The CCTV footage show that the claimant in the company of a Port User, Kennedy Wachira of Port pass No. PU153707 had made numerous trips in and out of the respondent's premises using two different motor vehicles, Registration No. KCK 732R and KCW 183L.

Disciplinary proceedings were commenced against the claimant following the offence of theft contrary to section 279(g) of the Penal Code. The respondent adhered to the Human Resource Policies and Procedures Manual which prescribes the disciplinary procedures. The conduct of the claimant was found to be gross misconduct which justified summary dismissal. The claims made are not justified and should be dismissed with costs.

No witness was called.

At the close of the hearing, both parties filed written submissions which are analyzed and the issues which emerge for determination are whether there was due process leading to termination of employment; whether the order of reinstatement should be issued; and whether the alternative remedies are available to the claimant.

The only records filed regarding the claimant's employment are by the claimant.

The employment as a Docker is admitted through a letter dated 15 August 2022.

Through notice dated 19 February 2024, the respondent dismissed the claimant from his employment on the grounds that he was found culpable for an offence and had resolved to terminate employment.

Through notice dated 2 May 2023, the respondent invited the claimant to show cause why his employment should not be terminated after his arrest by the police for stealing from locked containers within CFS-K and Container Terminal at the Port of Mombasa contrary to section 279(g) of the Penal Code. The case is that there was breaking and stealing of rice and sugar from containers SEGU360165/8 and GSLU205344/9 between 29 December 2022 and 30 January 2023. The respondent discovered that the original seals of the referenced containers had been tampered with. CCTV reviews established that the claimant and another were cited at this location, making numerous trips using motor vehicles KCK 732R and KCW 183L.

The show cause notice further directed the claimant to explain his conduct, which investigations and revealed that his phone calls and SMS data had constant communication with several numbers regarding the transactions believed to be involved in theft and disposal of cargo from the port. Some of the phone numbers were assigned to port security and to a port user who was arrested.

The claimant was thus invited to respond to these allegations. His reply was on 11 May 2023 to the effect that:

I humbly request a personal hearing so that I can explain myself against the alleged breaking of containers and 10 bags of rice, which the accuser had put his words to my mouth just to tarnish my reputation in the eyes of the right-thinking persons. ...

The claimant did not specifically address the allegation made against him in the notice to show cause. He requested a physical hearing, which was granted on 26 September 2023. He was advised to attend with another employee of his choice.

Upon a claim of alleged unfair termination of employment, the law places the burden of proof upon the employee under section 47(5) of the Employment Act (the act). **Odhiambo v Fast-Track Management Consultants Limited [2025] KEELRC 1392 (KLR)**, the court held **that** the employee must discharge this burden before the employer is called to justify the reasons leading to termination of employment under section 43 of the Act.

The rationale is that an employer may terminate the employment of an employee upon giving him notice for valid and fair reasons which the employer genuinely believes to exist and are related to the employees conduct, and upon according the employee fair procedure before termination section 43(2) and 45(2) of the Act as held in **Ratemo & 2 others v Dufourg [2025] KECA 1359 (KLR)**. The employee must thus be issued with notice over the allegations the employer finds valid and genuine based on his conduct. The employee is thus required to give explanations of his conduct to enable the employer to appreciate his circumstances and hence make a determination, as held in **Nation Media Group Limited vs. Onesmus Kilonzo**. See also **Ondari v National Hospital Insurance Fund [2025] KECA 687 (KLR)**

In this case, the claimant faced grave allegations of theft from two containers, numbered SEGU360165/8 and GSLU205344/9. The particulars of the allegations are well addressed in the notice to show cause. The claimant was also suspended during this period. He thus had ample time to make his responses; he needed no materials or evidence from the CCBT footage referenced in the notice to show cause. He did not request these records in his response. All he wanted was to be accorded a physical hearing.

An employee who is thus accorded the right to reply to allegations of gross misconduct and opts to squander the opportunity cannot turn around and allege the employer acted wrongfully, unlawfully or unfairly, as held in **Colnet Limited v Kamau (Employment and Labour Relations Appeal E043 of 2024) [2025] KEELRC**. The court emphasized that where an employee squanders the chance to be heard, the employer cannot be found to have acted unfairly, even if great effort was taken and demonstrated to have been applied to have

the employee heard, but the employee remained adamant and made irrational demands to avoid a hearing.

In the case of **Adpack Limited v Nyamasage [2025] KEELRC 262 (KLR)**, the court reiterated that:

... an employee who squanders the internal grievance handling mechanisms provided by an employer cannot come and claim he was not heard. That the Respondent was terminated due to gross misconduct of theft under sections 44 and 47(5) of the Employment Act.

In this case, the court finds that the respondent complied with the mandatory provisions of section 41 of the Act. The claim was issued with notice of particulars of allegations made against him. He was invited to reply but opted to ignore and instead seek a physical hearing. He was allowed to attend a physical hearing, yet he still did not provide satisfactory explanations for his conduct.

The court finds that the respondent complied with due process, and the reasons for the termination of employment were justified.

The claim for reinstatement is not justified.

This addresses the alternative remedies sought. These cannot issue upon the finding that employment termination was procedural and the reasons justified.

Notice pay is not due.

By a notice dated 19 February 2024, the respondent invited the claimant to attend and obtain clearance for the payment of his terminal dues.

On costs, the claimant is found without merit. The respondent did not call any witness. Each party should bear its costs.

Accordingly, the claim is dismissed. Each party to bear its costs.

Delivered in open court at Malindi, this 11th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Davis Wekesa

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