

REPUBLIC OF KENYA

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

APPEAL NO. E128 OF 2025

**SINOHYDRO CORPORATION LIMITED
APPELLANT**

VERSUS

RAMADHAN DZIMBA MGANDI RESPONDENT

**[Being an appeal from the judgment of Hon. M. S. Kimani delivered on 1 July 2024 in
Mariakani CMELRC No. E004 of 2024]**

JUDGMENT

The appeal arises from the judgment delivered on 1 July 2024 in Marakani CMELRC No. E004 of 2024. The appellant is seeking that the judgment be set aside. The grounds of appeal are:

- 1. The learned magistrate erred in law in his judgment by allowing the respondent's claim on grounds that the appellant had informed the respondent that he should come with a witness for the disciplinary hearing instead she should he should have told him that he was to be accompanied by a fellow employee.*
- 2. The learned magistrate erred in law by allowing the respondent's claim on grounds and arguments raised during the hearing by either party in their respective submissions, hence biased.*
- 3. The learned magistrate erred in law in the judgment by granting prayers not sought in the claim.*

The background of the appeal is the respondent's claim. He claimed that on 27 June 2023, he was employed by the appellant as a health and safety officer based in the Mwache Multi-purpose Dam Project. On 26 February 2024, the respondent was subjected to a disciplinary hearing and his appeal was also rejected. He claimed that the termination of his employment was unfair, contrary to section 41 of the Employment Act (the Act), and that he was not

allowed to bring another employee of his choice to the disciplinary hearing. He claimed the following terminal dues:

- a) Notice pay Ksh. 34,425.
- b) 12 months' compensation.
- c) Certificate of service.
- d) Costs of the suit.

I replied that the appellant denied the claims and that the respondent had not met the threshold of Section 47 of the Act. He was given a hearing before employment was terminated and had the right of appeal. The claims are not justified.

In his judgment, the learned magistrate held that the appellant failed to comply with the provisions of section 41 of the Act, resulting in the unfair termination of employment.

The learned magistrate awarded the respondent the following:

- a) Notice pay Ksh. 28,763.
- b) Compensation Ksh. 28,763.
- c) Certificate of service.
- d) Costs and interests of the suit.

On the appeal, the appellant argued that the trial court's finding that the due process under section 41 of the Act was not followed was an error. In a letter dated 23 January 2024, the appellant invited the respondent for a hearing. He was permitted to bring a witness of his choice. He was allowed to invite someone to be his witness. The trial court concluded that this person should not have been classified as a witness, but instead another employee of his choosing should have been. Section 44(4)(g) and section 41 of the Act authorised the appellant to dismiss the respondent summarily, as he was found with a stolen item. Before the summary dismissal, the respondent was invited to a disciplinary hearing in the presence of his witness, which is permitted under section 41 of the Act, as held in **Galgalo Jarso Jillo v Agriculture Finance Corporation [2021] eKLR**.

The appellant submitted that under Section 41 of the Act, the employer is allowed to issue a notice to the employee before summary dismissal. In **Margaret Auma Ingwe v Kenya Power and Lighting Co. Ltd [2015] eKLR**, the court held that the employee has the right to choose his witness. In **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, the court held that an employee is entitled to

bring a witness of their choice to a disciplinary hearing. This is meant to secure the right to a fair hearing.

The findings that the application failed to advise the respondent to bring another employee of his choice to the disciplinary hearing, and instead indicated to get a witness, were in error. The appeal should be allowed and the judgment set aside with costs.

The respondent did not attend. This was despite the service.

Determination

The appeal raises two fundamental issues: the question of bringing a witness or another person to the disciplinary hearing, and the question of interpreting Section 41 of the Act. In undertaking the analysis, the court is guided by the record, the trial court's assessment to make its conclusions.

In his evidence in chief on 29 January 2024, the respondent testified that through notice dated 23 January 2024, he was not allowed to bring another employee of his choice to the disciplinary hearing. Instead, the appellant directed him to bring a witness of his choice.

The respondent produced the notice dated 23 January 2024. It indicated that:

... you are hereby invited to a disciplinary hearing on Wednesday, 24 January 2024, at 4.30 pm at the main campsite boardroom.

You are asked to keep time and are welcome to come with your witness.

Section 41(1) of the Act requires that:

(1) 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.

(2) ...

The employee attending disciplinary hearing is entitled to bring another employee of his choice or where there is unionization, the union representative should attend. This is the persons required to attend and witness the proceedings at the shop floor.

The invitation to the respondent to bring a witness and not another employee of his choice is merely a matter of semantics. The substantive issue is for him to have another person of his choice present during the disciplinary hearing.

The invitation to bring a witness can further be understood to mean that if he had any witnesses to support his response and defence during the disciplinary hearing, he was at liberty to do so. This entrenched the right under section 41 of the Act and did not take it away.

In **Okoth v Jamii Telecommunication Limited [2023] KEELRC 1643 (KLR)**, the court, in interpreting section 41 of the Act, held that a witness is to be understood as the person the employee should bring to the disciplinary hearing.

This is the position adopted in **Macharia v Pearl Beach Hotels Limited T/A (English Point Marina [2022] KEELRC 1219 (KLR)** and in **Mwaura v Sala Terrena Creative Construction Limited [2024] KEELRC 1425 (KLR)**. The respondent was thus invited to attend a disciplinary hearing with his witness, which, in the ordinary conduct of shop floor disciplinary procedures, is the employee available therefrom.

The trial court overreached in finding that the notice of 23 January 2024 was not in tandem with Section 41 of the Act. This was in error.

This being the sole basis of finding fault with the disciplinary hearing, the notice pay and compensation awarded were in error.

The respondent is only entitled to his Certificate of Service upon termination of employment.

Accordingly, the appeal is with merit and is hereby allowed with costs. Judgment in Mariakani CMELRC No. E004 of 2024 is set aside.

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

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Davis Wekesa

..... and

