

REPUBLIC OF KENYA

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

APPEAL NO. E160 OF 2025

VIPINGO RIDGE LIMITED APPELLANT

VERSUS

LILIAN WAWIRA MURIITHI RESPONDENT

**[Being an appeal from the judgment of Hon. L. Sindani delivered on 24 July 2025 in
Mombasa CMELRC No. E465 of 2022]**

JUDGMENT

The appeal arises from the judgment delivered on 24 July 2025 in Mombasa CMELRC No. E465 of 2022. The appellant is seeking that the judgment and decree thereof be set aside in its entirety.

The background to the appeal is a claim filed by the respondent before the trial court.

The claim was that in 2015, the appellant employed the respondent as a personal assistant to the general manager at a salary of Ksh. 55,000 per month, which increased to Kh. 70,000 per month. She worked for 6 years, and on 24 January 2020, a show cause was issued following an investigation into allegations of theft of food items. The show-cause notice did not provide the particulars of the food stolen or the dates. The respondent replied to the notice on 26 January 2020, denying the claims. On 27 January 2020, the respondent was invited to a disciplinary hearing, which took place on 30 January 2020, but the witnesses were coached to change their evidence in favour of the appellant, leading to summary dismissal. The claim was that there was unfair termination of employment, since the respondent was not provided with the investigation report, was not allowed to call witnesses, or was not allowed to appeal. The summary dismissal by notice dated 17 February 2020 was unfair and unjustified. The appellant started sending anonymous letters to prospective employers, particularly Umoja Rubber Products Limited, denying the respondent a fair chance to secure new employment. The clams were:

- a) Notice pay ksh. 70,000.

- b) 34 accrued leave days ksh. 79,333.
- c) 12 months' compensation Ksh. 840,000.
- d) Salary for 17 days in February 2020 Ksh. 39,666.
- e) Certificate of service.
- f) Costs of the suit.

In reply, the appellant admitted that the respondent was employed as a personal assistant to the general manager on the company premises in Vipingo, Kilifi, from 14 May 2015. She was not diligent and engaged in gross misconduct, resulting in termination of employment. On 8 January 2020, the respondent proceeded to the appellant's store at the workshop where she parked her vehicle No. KCS 496S. The security officer, Boniface Naalwa, saw her and the storekeeper discreetly loading items into the vehicle and alerted the security manager. Immediately, the security team searched all vehicles leaving the premises. When the respondent arrived at the gate at 1630 hours, her vehicle was searched, where several items were found, including:

- a) 2 kg of Sunrise rice,
- b) 2 cartons of KCC Gold Milk,
- c) 2 packets of Pink n Peel juice
- d) Personal items.

Upon inquiry, it was discovered that the respondent did not have a gate pass authorizing her to carry the goods in her vehicle from the premises. She explained that Mary Syokau, the human resources manager at Superior Homes, had given her the goods. When asked, Mary said there were instructions from Gerald Kimongo to issue the goods to the respondent. Gerald denied giving such instructions and that the respondent was not at Superior Homes as alleged.

The response stated that the appellant conducted investigations and that a report dated 12 January 2020 was filed. On 14 January 2020, a notice to show cause was issued to the respondent. She was suspended for 14 days to allow for further investigations. On 24 January 2020, another show cause notice was issued with particulars and allegations to enable her to file a response. The respondent replied on 26 January 2020. She was invited to the disciplinary hearing on 30 January 2020 as required under section 41 of the Employment Act (the Act). She was allowed to bring another employee of her choice.

During the disciplinary hearing on 30 January 2020, the appellant's officers were in attendance, as were witnesses and the respondent, with her appointed colleague, Miriam Ndunge. Gerald testified to the matter and that he had not authorised the respondent to carry any goods out of the stores. The respondent was allowed to cross-examine the witnesses, and it emerged that she was not authorised to take the goods found in her possession without a gate pass. The claims of unfair termination of employment are not justified; there was due process leading to the termination. For gross misconduct, section 44(4)(g) of the Act allows summary dismissal. Notice issued on 17 February 2020.

On 27 February 2020, the appellant tabulated the terminal dues of Ksh. 75,004 comprising 34 leave days paid through cheque No. 000375. A certificate of service dated 21 February 2020 was issued. Notice pay or compensation is not due since the termination of employment was justified. The respondent did not work in February 2020; hence, the claim for a salary is unwarranted. Immediately upon the disciplinary hearing on 30 January 2020, the respondent was informed of her summary dismissal.

The learned magistrate heard the parties and held that there were no valid or justified grounds for termination, and that the termination was substantively unfair. The following awards were issued:

- a) 5 months' compensation Ksh. 350,000.
- b) Notice pay Ksh. 70,000.
- c) Certificate of service.
- d) Costs of the suit.

Aggrieved by the judgment, the appellant has 16 grounds of appeal. These summaries state that the learned magistrate erred in law and fact in finding that there was unfair termination of employment, by disregarding the notice to show cause and allegations of theft of food items. There were thus valid reasons, since the respondent admitted possession of stolen items belonging to the appellant. The trial court elevated the procedures for termination of employment upon disclosure of the investigation report, whereas notice was issued, and the respondent replied. An investigation was carried out, and witnesses were called during the disciplinary hearing. The trial court hence failed to address the totality of the case and the weight of the evidence.

Other grounds of appeal are that the awards of notice pay and compensation are unjustified, having regard to the reasons for the termination of employment.

The appellant submitted that the respondent was subjected to a procedurally sound disciplinary process. She was issued a detailed notice to show cause specifying allegations of theft of food items, attended a disciplinary hearing, responded in writing, and was accompanied during the hearing. The disciplinary minutes reflect that the respondent was also given the opportunity to question witnesses. The respondent also admitted to being in possession of the appellant's food items in her vehicle without authorization and without a gate pass, an admission which, under Section 44(4)(g) of the Act, constitutes gross misconduct warranting summary dismissal without notice.

The appellant challenges the trial court's findings on procedural fairness. It argues that the court misapplied evidentiary standards akin to a judicial trial to an internal disciplinary process, particularly by elevating the timing of the investigation report as a procedural breach. The appellant contends that the report was furnished during the disciplinary hearing, where the respondent cross-examined witnesses, and no prejudice arose. Section 41 of the Act requires that an employee be notified of the reason for termination, be given the opportunity to be heard, and be allowed representation, which were met.

On substantive fairness, the appellant maintains that the respondent admitted to possessing the appellant's food items without authorization, which directly justified summary dismissal. The appellant relies on the case of **George Morara Nyakioba v Mini Bakeries (Nairobi) Limited [2016] eKLR**, where the Court examined the claimant's conduct during the course of his employment and the respondent's reaction to it. The claimant was found to have fallen short of the expected standards of performance under his employment contract due to his misconduct. The respondent's decision to terminate the claimant's employment was therefore justified. In **Samsung Electronics East Africa Ltd v K M [2017] eKLR**, the Court observed that the burden of proving unfair termination rests on the employee, while the employer bears the burden of justifying the grounds for termination.

The appellant contends that the respondent did not discharge her burden of proving unfair termination, as required by Section 47(5) of the Act. The respondent failed to challenge the authenticity of the disciplinary minutes, produce evidence contradicting the appellant's account, or dispute the investigation findings, which showed that the recovered food items matched the appellant's inventory. The appellant further argues that the respondent never

requested the investigation report before the hearing, and thus the trial court erred in treating the timing of disclosure as a procedural violation.

Regarding remedies, the appellant challenges the trial court's award of five months' salary and one month in lieu of notice, asserting that these were excessive and unsupported by law. The respondent's admission of misconduct and the procedural safeguards followed justify summary dismissal without notice, as provided under Sections 44 and 49 of the Act. The appellant submits that the trial court erred in awarding compensation that ignored the respondent's admitted culpability and the overall fairness of the disciplinary process.

On costs, the appellant relies on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR**, citing **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd**, holding that costs follow the event to compensate the successful party.

The respondent contends that for a termination of employment to be fair, it must satisfy both substantive and procedural fairness. Section 43 of the Act places the duty on the employer to prove the reasons for termination, which will only be deemed fair if those reasons are valid and a fair procedure is employed. The respondent relies on the case of **Evans Misango v Barclays Bank of Kenya Limited [2015] eKLR**, where the Court held that an employer bears the burden of demonstrating that the reason for termination is valid and would lead a reasonable employer to terminate employment.

In the instant case, the respondent submits that the appellant accused her of stealing food items from its store on 8 January 2020, yet the show cause letter neither specified the alleged items nor attached the investigation report to enable her to respond comprehensively. Despite this, she responded on 26 January 2020, explaining the items in her possession. At the disciplinary hearing, the appellant's witnesses could not confirm that the items belonged to the appellant, no inventory was produced, and no batch numbers were tendered. The investigation report itself confirmed that storekeepers did not know the opening stock, no milk, rice, or other items were issued on the alleged day, and some items were lawfully owned or paid for by the respondent. The appellant called gave contradictory evidence regarding ownership of the items. The trial court rightly found that the appellant did not have

evidence proving the respondent stole any items and therefore failed the substantive fairness test.

On procedural fairness, Section 45(2)(c) of the Act provides that termination is unfair if the employer fails to terminate employment in accordance with a fair procedure. The respondent relies on the case of **Naima Khamis v Oxford University Press (E.A) [2017] eKLR**, which held that termination must satisfy both substantive and procedural fairness. The respondent submits that she was never provided with the investigation report at the time the show cause letter was issued, contrary to procedural requirements, and only received it at the disciplinary hearing. The report contained witness statements of individuals who did not testify, placing the respondent on the defensive against evidence she had never seen before. This, the respondent submits, denied her the opportunity to adequately prepare her defence and violated the principles of natural justice and her constitutional right to a fair hearing. The trial court rightly found that this procedural failure rendered the disciplinary process unfair.

Regarding damages, the respondent submits that the trial court awarded five months' salary, but under Section 49(1)(c) of the Act, the Court may award compensation of up to twelve months' salary where termination is unjustified. Considerations under Section 49(4)(b), (e), (g), and (j) include the circumstances of termination, the employee's length of service, opportunities for securing comparable employment, and any expenses incurred due to termination. The respondent contends that she had served diligently for six years without valid cause for dismissal, and the appellant's conduct has made it difficult for her to secure alternative employment. Accordingly, she urges the Court to award the maximum twelve months' compensation.

The respondent also seeks payment for the 16 days worked in February 2020, as her employment effectively ceased on 17 February 2020. She submits that the appellant's own investigation absolved her of any wrongdoing and that branding her a thief while knowing the allegations were untrue was unjustified, degrading, and inhumane, warranting maximum compensation.

Determination

This is a first appeal. I am required to re-evaluate and reconsider the evidence on record, taking into account the lack of an opportunity to see and hear the witnesses firsthand, and to draw my conclusions and inferences.

Through a notice dated 17 February 2020, the appellant terminated the respondent's employment following a disciplinary hearing on 30 January 2020. She was found culpable of theft and possession of unauthorised company property, both of which constitute gross misconduct. The appellant noted that there were investigations in which the respondent was found in possession of the goods on 8 January 2020, and that the goods were traced to its stores.

The respondent was issued with a notice to show cause setting out the allegations made against her. She was allowed to file a response, which she did on 26 January 2020.

In her response, the respondent admitted that on 8 January 2020, she was stopped at the company gate, and when the security team searched her vehicle, they found the following:

- a) Two boxes of pizza were given to her by the chef.
- b) Box of tomatoes, delivered to the office through the gate.
- c) Two boxes of juice, two boxes of milk, 2kg of rice, given to her by Mary.
- d) Assorted Eastnat products, given by a friend.

The respondent further admitted that:

... I ought to have had a gate pass for all these times, but I didn't. However, the security personnel called to confirm all the above and came back and asked me to leave behind the group items 2, 3, and 4. I was allowed to proceed with item 1.

I take this early opportunity to apologise for the misdeed and will, in future, make sure that, for anything I have, a duly signed gate pass will be in my possession whenever I exit the gate.

...

During the disciplinary hearing, the appellant called several witnesses, including Gerald. He denied giving the respondent the items found in her vehicle on 8 January 2020. He further explained that Mary called him to assist the respondent who had been caught with some items at the gate.

Under section 44(3) of the Act, an employee who is in breach of a fundamental provision of the employment contract is subject to summary dismissal, as held in **Donald Odeke v Fidelity Security Limited [2012] eKLR**. further, in Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] KEELRC 793 (KLR) and Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR), the

court emphasised that where the employee is in fundamental breach of the employment contract, such is subject to summary dismissal. The safeguard to the employee is under section 41(2) of the Act. The employer must invite the employee to a hearing and allow her to make representations.

In this case, upon the show cause notice, the respondent admitted that she had tried to exit the company premises with various goods without a gate pass. Several items, including two boxes of juice, two boxes of milk, and 2kg of rice, were withheld. The respondent asserts that these were given to her by Mary. When Mary was called, she indicated it was Gerald. When Gerald was called, he denied ever giving these items to the respondent. During the disciplinary hearing, he reiterated the same message.

The respondent does not claim ownership of the goods: two boxes of juice, two boxes of milk, and 2kg of rice. The appellant traced these goods to its stores.

Theft in employment is a fundamental breach of the employment contract. It justified summary dismissal. It is further defined under section 44(4)(g) as criminal conduct subject to summary dismissal.

In the circumstances of the case, taking into account the respondent's written response of 26 January 2020, there were justified reasons for the termination of employment. Indeed, where the employer genuinely believes there are reasons to warrant termination of employment as the case herein, such justified termination of employment as held in Kenya Power & Lighting Company Ltd v Wasike [2017] KECA 446 (KLR) that;

Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof

of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

This is buttressed in the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] KECA 300 (KLR) that:

*The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “**genuinely believed to exist,**” causing it to terminate the employee’s services. That is a partly subjective test. In the case of **Bamburi Cement Limited vs. William Kilonzi [2016] eKLR. ...***

In this case, the court finds that there existed reasons that allowed the appellant to believe that there existed justified grounds of gross misconduct. The learned magistrate indeed elevated the investigation report to a standard beyond the required threshold.

Employment terminated for justified grounds.

Notice pay and compensation are not available.

On the claim for unpaid leave days, these were tabulated and paid immediately upon cessation of employment.

Regarding the claim for 17 days' pay, indeed, at the disciplinary hearing, a decision was taken to terminate employment. However, notice was not issued until 17 February 2020. To backdate the notice to 30 January 2020 is an unfair labour practice. Employment terminated following the written notice as required under the Act, 17 February 2020.

The pay claimed for 17 days in February 2020 is justified at Ksh. 39,666.

The respondent argued that she has been denied employment opportunities because the appellant has given negative information about her. Under section 51 of the Act, the appellant is required to serve the respondent with a Certificate of Service. Issuing a letter of recommendation is not mandatory. Employment has been terminated lawfully; the respondent is at liberty to secure new employment without the appellant's interference.

On costs, the appeal was successful; each party should meet its costs for the appeal and the trial court.

Accordingly, the appeal is allowed, save that the respondent is entitled to 17 days' pay for February 2020 at KSh. 39,666. This is to be paid within 30 days, after which, the

same shall accrue interest at the court rate. Each party is to bear its costs for the appeal and the trial court.

Delivered in open court at Nairobi, this 18th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Marion

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