

REPUBLIC OF KENYA
IN EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

ELRCA APPEAL NO. E011 OF 2024

JOHN MOKUA NYANGECHEI.....

APPELLANT

VERSUS

URGENT
LIMITED.....

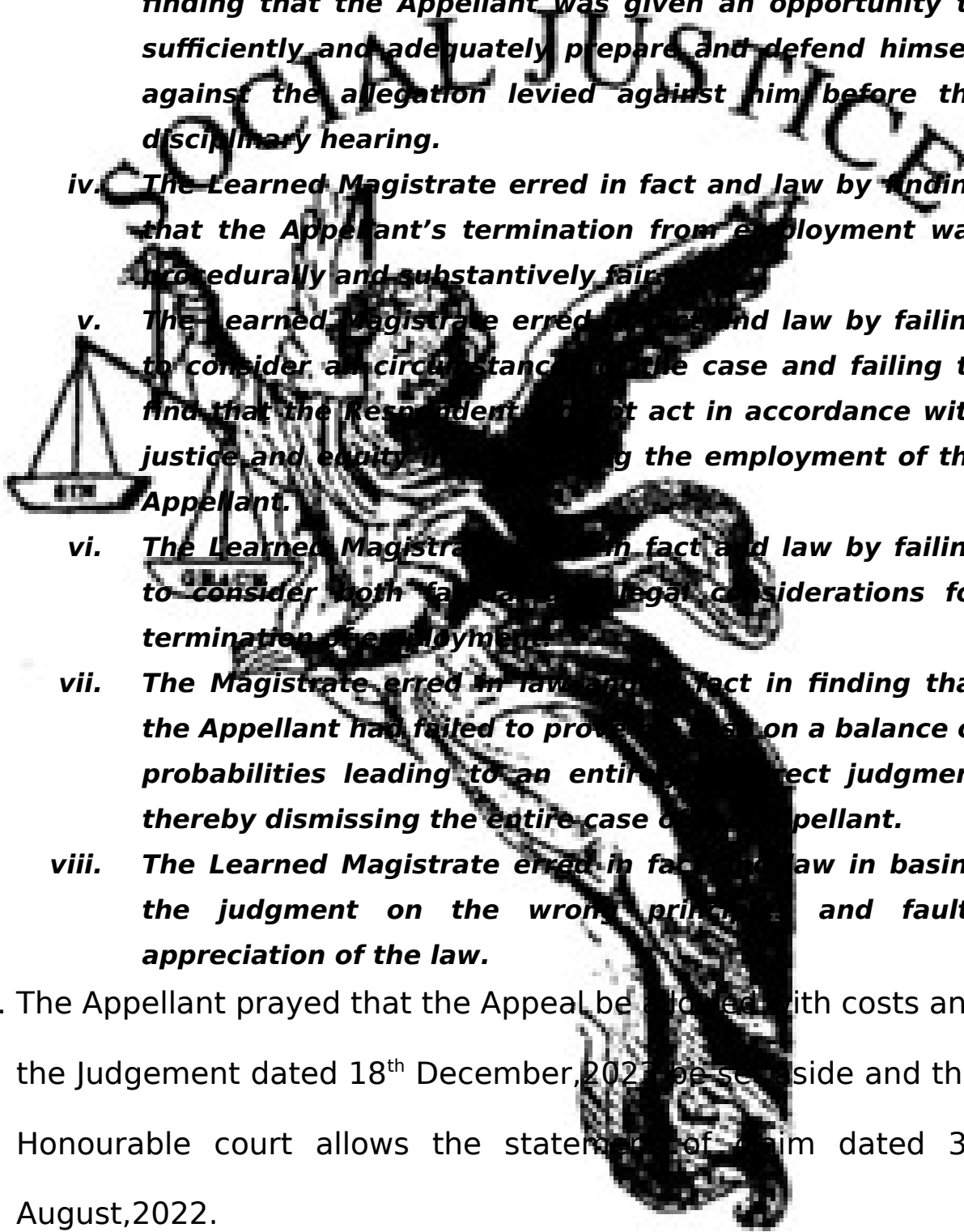
RESPONDENT

LOGISTICS

(Being an appeal from the Judgment of the Honourable Paul K. Rotich delivered on 18th December 2023 at the Milimani Chief Magistrate's Court in Case No. E020 of 2022)

JUDGMENT

1. Through the Memorandum of Appeal dated 15 January, 2024 the Appellant appeals against the whole of the Judgment of Honourable Paul K. Rotich.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in fact and law by finding that the Appellant was to blame for the accident as a result arriving at a completely erroneous judgment dismissing the entire case of the Appellant.*
 - ii. The Learned Magistrate erred in fact and law by finding the Respondent had sufficient reason to summarily dismiss the Appellant from employment.*



- iii. The Learned Magistrate erred in fact and in law by finding that the Appellant was given an opportunity to sufficiently and adequately prepare and defend himself against the allegation levied against him before the disciplinary hearing.**
- iv. The Learned Magistrate erred in fact and law by finding that the Appellant's termination from employment was procedurally and substantively fair.**
- v. The Learned Magistrate erred in fact and law by failing to consider all circumstances of the case and failing to find that the Respondent did not act in accordance with justice and equity in terminating the employment of the Appellant.**
- vi. The Learned Magistrate erred in fact and law by failing to consider both factual and legal considerations for termination of employment.**
- vii. The Magistrate erred in law and in fact in finding that the Appellant had failed to prove his case on a balance of probabilities leading to an entirely incorrect judgment thereby dismissing the entire case of the Appellant.**
- viii. The Learned Magistrate erred in fact and law in basing the judgment on the wrong principles and faulty appreciation of the law.**

3. The Appellant prayed that the Appeal be allowed with costs and the Judgement dated 18th December, 2022 be set aside and this Honourable court allows the statement of claim dated 3rd August, 2022.

4. The Appeal was disposed of by written submissions.

SOCIAL JUSTICE

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocates Nyandwaro Boya & Advocates filed written submissions dated 17th March 2024.
6. On the issue of whether the trial magistrate erred in finding the Appellant to blame for the accident despite lack of police evidence and whether this finding affected the outcome of the case counsel submitted that the police abstract presented in evidence indicated the investigation was incomplete, marked PUI (Pending Under Investigation) and no conclusive determination of fault was established by law enforcement authorities. That despite this the Respondent incorrectly claimed in the dismissal letter that the Appellant admitted to having seen the police abstract which evidence was accepted by magistrate wrongly.
7. Counsel submitted that the Appellant provided a credible alternative explanation for the accident but the Respondent failed to produce any internal investigation report establishing

the Appellants negligence. That this was against section 43 of the Employment Act which puts the burden of proving reasons for termination on the employer. That the motor accident report form dated 22nd November, 2021 which was filed, signed and stamped by the Respondent indicated that the Appellant was not to blame for the accident and he had no previous accident record.

8. Counsel submitted that the court went against the established principle in the case of **Mzee v Simzia Kenya Limited (2020)** that by accepting the Respondent's unsubstantiated claim without proper evidence the trial court fundamentally misapplied the law regarding burden of proof and valid reasons for termination directly leading to an unjust dismissal of the Appellant's rightful claims.
9. On the issue of whether the dismissal of the Appellant was procedurally and substantively fair considering the alleged insufficient opportunity to prepare and defend himself before the disciplinary committee, counsel submitted that the trial court erred by upholding the Appellant's termination when there were substantive and procedural unfairness. That the

Respondent did not adhere to procedural fairness under section 41 of the Act as the Appellant was given only two hours' notice to his disciplinary hearing. That the allegations of negligent driving in the show cause letter charged him with failure to follow company procedures and insubordination at the hearing.

10. Counsel further submitted that the Tribunal misapplied the provisions of section 41, 43, and 45 of the Act and disregarded the Appellant's credible explanation of the accident hence the decision was a miscarriage of justice which requires a reversal.

11. On the issue of whether the oral judgment of the Trial Judge on December, 18, 2023 was different from the written judgment of May 7, 2024 counsel submitted that the oral judgment was substantially different from the oral judgment which constituted a grave procedural impugning demanding appellate intervention. That the five month delay raises serious concerns about judicial efficiency that the same violated the Appellant's right to fair hearing.

12. On the issue of whether the lower court failed to evaluate the Appellant's evidence and written submissions rendered the judgment legally deficient counsel relied on the case of

Jeremiah Chelanga(Suing as the guardian Ad Litem of John Chelanga Chepkonga) vs Board of Management Kamatony Primary School & 3 Others(2021) eKLR

on failure of court considering submissions on record. That the same amounted to miscarriage of justice. That the trial court ignored the Respondent's own motor vehicle accident report form which exonerated the Appellant from blame and the document contradicted the court's dismissal.

13. On the issue of whether the complete and summarized recording of the proceedings resulted in a trial record too deficient for proper appellate review, constituting grounds for a retrial counsel relied on the case of **HE (2019) eKLR** on when to order a retrial where the Appellant submitted that a retrial was important in the case. That the trial court selectively recorded evidence, omitting the Appellant's evidence regarding the circumstances of the accident as well as cross-examination, was inadequately captured with the record not capturing consistencies of timelines of the disciplinary process among others.

RESPONDENT'S SUBMISSIONS

14. The Respondent's Advocates, Munyithya, Mutugi, Umara & Muzna Co. Advocates filed written submissions dated 26th May, 2025.

15. On the issue of whether the trial court correctly found that the Appellant was to blame for the accident based on evidence on record and whether that finding justified the Respondent to summarily dismiss the Appellant, Counsel submitted that the Appellant's submissions that the police abstract was inconclusive because of stating that the vehicle was under investigation ignored the fact that the abstract clearly described the accident as self-involving. That meant there was no involvement of a 3rd Party vehicle or person. That at all times the Appellant was solely to blame for the accident. That the Respondent incurred unnecessary costs in repairing and towing the company vehicle due to damages that arose from the accident.

16. Counsel submitted that the Appellant admitted during the disciplinary hearing that he left the company road and used a reserve road without permission, he saw the police abstract and agreed it showed he was at fault and he gave false

information to management, claiming the main road was closed by police which he later admitted was untrue.

17. Counsel submitted that the Appellant in his submissions, heavily relied on the Motor Accident Report Form dated 22nd November 2021, claiming it cleared him of blame. However, this form was based only on the driver's account. It was not an expert report or a final investigation. The police abstract being an official report being used as evidence.

18. Counsel submitted that the Respondent met its burden under Section 43 of the Employment Act by presenting key evidence, including the Show Cause letter and response, signed disciplinary hearing minutes, the police abstract and internal records.

19. Counsel submitted that the Learned Judge correctly applied the law by evaluating the credibility of both parties and giving more weight to the Appellant's own statements and actions, the Police abstract as an official record and the Respondent's adherence to due process.

20. Counsel submitted that the reasons for the dismissal were genuine and justified. The Claimant acted in breach of the

Respondent's code of ethics, resulting in the loss of his tool of trade (the motor vehicle involved in the accident), reputational damage and financial loss to the organization.

21. On the issue of whether there was procedural fairness adopted when effecting the termination, counsel submitted that the Respondent issued a show cause letter dated 23rd November, 2021 informing the Appellant of the allegations against him and inviting him to respond. The Appellant acknowledged receipt of the letter on the same day and subsequently responded in writing on 24th November, 2021.

22. Counsel submitted that the Appellant's response to the notice to show cause letter was unsatisfactory thus necessitating management to accord a disciplinary hearing. That the Appellant was invited to attend a disciplinary hearing vide a letter dated 10th December, 2021 with the hearing scheduled for the 14th December, 2021, which he attended.

23. Counsel submitted that the Appellant did not raise any objection to the timing of the hearing or request an adjournment. The minutes of the hearing demonstrate that he

was afforded an opportunity to be heard and gave an oral explanation regarding the events in question.

24. Counsel submitted that the Appellant's claim that he was only given "two hours' notice" prior to the hearing was both misleading and unsubstantiated. The language of the invitation letter was clear and distinguished the date of issuance from the date of the hearing:

25. Counsel submitted that the Appellant did not request to be accompanied by a fellow employee or a union representative, a right provided for in the invitation to disciplinary hearing letter. That the charges brought against the Appellant pertained to carelessness and recklessness driving resulting in an accident. The disciplinary process focused on the Appellant's failure to adhere to company procedures including an unauthorized deviation from the assigned route. The charges arose from the same factual incident and were not, as alleged by the Appellant, "entirely different".

26. Counsel submitted that the invitation letter outlined the reasons for the hearing and the intended disciplinary action in a language the Appellant understood. He was explicitly advised

that he had a right to be accompanied by a representative of his choice but chose not to exercise this right.

27. Counsel submitted that the Appellant did not challenge the disciplinary process at the time nor did he express an intention to appeal the outcome despite the termination letter clearly informing him of the right to do so. The disciplinary process was procedurally fair and in compliance with the requirements of the Employment Act.

28. On the issue of whether there was a significant discrepancy between the oral judgment given on 18th December, 2023 and the written judgment issued on 17th May 2024, counsel submitted that the Appellant failed to adequately substantiate these alleged contradictions in a manner that demonstrates prejudice.

29. Counsel submitted that while a five-month delay between the oral and written judgment may be unfortunate, delay alone was not sufficient ground to invalidate a judgment unless it resulted in a miscarriage of justice. The Appellant has not demonstrated how the delay prejudiced his case or led to an unfair outcome.

30. Counsel submitted that oral judgments are often less structured than written ones and may include broader commentary or remarks not ultimately included in the formal written decision. This does not mean the written version is flawed or invalid.

31. On the issue of whether the trial court adequately evaluated, analysed and referenced the parties' evidence and written submissions, in reaching its judgment, counsel submitted that the trial court's judgment was not legally deficient, as it engaged with the legal issue raised by both parties including whether the trial was substantively and procedurally fair.

32. Counsel submitted that the absence of specific citations to each submission or document does not amount to non-consideration. What matters is that the court addressed the substance of the dispute which it did.

33. On the issue of whether there exists a legal and factual basis to warrant a mistrial in the circumstances of this case, counsel submitted that there was no statutory requirement under Kenyan law that obliges a trial court to produce a

verbatim record of all proceedings. What is required is that the essential components of the hearing namely the pleadings, key evidence and reasons for judgment be properly captured to enable an appellate court to assess the decision reached.

34. Counsel submitted that the judicial officer has the discretion to determine what aspects of the proceedings to note down. Parties cannot dictate the specific phrasing or content of court notes.

35. Counsel submitted that if the Appellant or his counsel had concerns regarding the adequacy of the court note taking or recording of evidence at any point during the trial, the appropriate course would have been to raise the issue at once.

36. Counsel submitted that the Appellant's testimony, the cross-examination of the Respondent's witness, the disciplinary documents and the police abstract were all considered by the trial court. There is nothing on record to suggest that critical portions of evidence were excluded or that the record is so defective as to hinder appellate review.

37. Counsel submitted that the Appellant relies on **SM v HE [2019] eKLR** to argue that an incomplete record may justify a

retrial. However, in that case the trial process was wholly unsatisfactory and key aspects of the hearing were entirely missing or irregular while in the present case, proceedings were conducted in a fair, orderly, and regular manner and the judgment was grounded in the evidence tendered by both parties.

38. Counsel relied on the case of **Mwambi and another v Shah [1968] EA 93** to submit that a retrial or mistrial may only be ordered where the irregularities were so grave as to constitute a miscarriage of justice. The Appellant has not demonstrated any such miscarriage.

DETERMINATION

39. The court has considered the grounds of appeal, the record of appeal and submissions filed by both parties herein and observes that it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions. As held in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal stated that: -

"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

40. In this case, the Judgment of the trial court was a declaration that the Claimant's termination by the Respondent was procedurally and substantively fair. The Claimant was not entitled to any of the reliefs sought. The Claimant was dismissed with costs to the Respondent. The Appellant being aggrieved by the whole judgment appeals on the same raising 8 grounds.

41. The court finds that the issues placed by the parties for determination in the appeal and in the grounds could be condensed to two issues namely: -

- a. *Whether the trial court erred in finding that the Appellant was lawfully and procedurally terminated.*
- b. *Whether the trial court erred in not awarding the Appellant his terminal dues and reliefs sought*

Whether the trial court erred in finding that the Appellant was lawfully and procedurally terminated.

42. It was uncontested that the Appellant was an employee of the Respondent from March 2017 to December 2021 where the Appellant was engaged as a driver with a gross pay of Kshs 30,000/=.

43. It was also clear that the reason the Appellant's services was terminated by the Respondent was due accusation of reckless driving where the Appellant was involved in an accident along KAPA Mombasa Road on 19th November, 2021. The Appellant raised the issue of the court finding that he was to blame for the accident relying on the accident report form. Just as observed by the trial court this court notes that the Police Abstract was a key document in this case which clearly stated that the accident was self-involving. It did not matter that there were police investigations.

44. This court therefore upholds the court finding that the Appellant was to blame for the accident. During the disciplinary hearing it was clear he lied to management that the road was blocked by the police when in reality, he used a reserve road which was against the company regulations for the role of a driver.

45. This court is awake to the requirement that the employers must terminate the services of employees for fair and valid reasons as required by section 43 of the Employment Act which

becomes unfair under section 45 when there is no valid reason and procedure followed unfair.

2. This court is also aware of the respective burden of proof under section 47(5) of the act where the Appellant ought to illustrate that a termination which was unfair took place and the Respondent has a duty to justify the reasons for the termination. In this particular case, this court is not convinced that the Appellant has shown that termination occurred before the Respondent could be held upon to justify the grounds of absenteeism. Reference is made to the case of **Pius Machafu Isindu v Layman Security Guards Limited [2017] eKLR on the respective burdens.**

46. This court and the trial court was not required to undertake a burden of proof beyond reasonable doubt as is in criminal matters but that of civil matters of balance of probabilities. In other words, would a reasonable employer act the same. Further, the Court will not replace its subjective views of what constitutes a valid reason for termination of an employment contract with that of the employer. Justice Professor Ojwang' in the case of **Kenya Revenue Authority Vs Menginya Salim**

Murgani, Civil Appeal No. 108 of 2009 as cited in **Republic Vs National Police Service Commission, Exparte Daniel Chacha Chacha JR 36 of 2016 (2016) eKLR** observed as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are prescribed by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed."

47. And the Court of Appeal in **Civil Appeal No. 66A of 2017, Kenya Revenue Authority v Revenue Authority, withaka Gitahi & 2 others [2019] eKLR** stated as follows:

"...It is improper for a court to expect that an employer would have to undertake a near forensic examination of the employee and seek proof beyond reasonable doubt as in a criminal trial where it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and the employer is required to prove are the reasons that were genuinely believed to exist," causing it to terminate the employee's services."

48. Drawing from the above cited cases, once the Court is persuaded that there existed reasonable grounds upon which a reasonable employer would consider termination of service as commensurate to the infraction perpetrated by the employee,

judges as humans presiding over the matter must not substitute their own view or feeling of what is reasonable with that of an employer unless unavoidable in the circumstances.

49. This court therefore agrees with the trial court that the Respondent had reasonable grounds to terminate the Appellant's services where he was involved in a self-involving accident causing it incur towing and repair costs to its vehicle which was used in normal business of the Respondent's businesses.

50. On the procedural provisions is provided for under section 41 of the Employment Act which is couched in mandatory terms as seen in the case of **Kanya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** that

Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be null as the affected employee has not been accorded a hearing in the presence of their union representative.

51. This court notes that the Appellant was given a show cause letter dated 24th November, 2021 which he responded the same date and he was invited to a disciplinary hearing on 10th

December, 2021 to take place on 14th December, 2021. The minutes of the disciplinary hearing were filed at trial court despite the Appellant stating that he was given two hours' notice there was no evidence of him requesting for more time to attend the hearing. He was advised to attend the hearing with a colleague but he did not attend.

52. The Appellant did not appeal the outcome despite the same being clearly stated in the letter of 14th December, 2021. The Appellant also signed a clearance form and his terminal dues were paid. The Appellant followed the laid down procedure as per the law in terminating the Appellant's services.

53. This court therefore agrees with the court that the Appellant's termination was lawful substantively and procedurally and this ground of appeal fails.

54. The Appellant raised the issue of discrepancy of the oral judgment and written judgment pointing out any discrepancy. This ground fails as well as that of the Appellant considering his evidence and submissions. The trial court considered all the evidence and submissions while arriving at its judgment.

Whether the trial court erred by not awarding the Appellant his terminal dues and reliefs sought

55. The trial court having found that the Appellant was fairly terminated was justified in not awarding compensation and notice pay however, there are terminal dues payable to an employee regardless of a fair or unfair termination.

56. The Appellant claimed salary for November and December 2021 yet there were payments of the same. This court upholds the trial court decision on this award.

57. On the claim for leave pay, the respondent produced leave approvals as the custodian of employment records under section 74 of the Employment Act. The Appellant ought to illustrate that with precision that he never went on leave. This court upholds the trial court finding on this claim.

58. The claims of overtime and public holidays were also not precisely pleaded by the Appellant and this court agrees with the trial court on this position that the Appellant was not entitled to the same.

59. On the claim for service pay as observed by the trial court the Appellant was a member of NSSF which falls under the

exceptions of section 35(6) of the Employment Act. This court upholds the trial court position on this claim. The Appellant should collect his certificate of service if he has not collected as observed by the trial court.

60. **In the upshot the Appeal is devoid of merit and is hereby dismissed with costs to the Respondent.**

61. **It is so ordered.**

Dated at Nairobi this 19th day of December 2025

Delivered virtually this 19th day of December 2025

Abuodha Nelson Jorum

Presiding Judge Appeals Division