

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

CAUSE NO. E052 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

DANIEL OKONDA
OYOKO.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY..
.....RESPONDENT

JUDGMENT

The claimant filed the instant suit on 23rd June 2025 vide a Statement of Claim dated 11th June 2025 alleging unlawful termination of employment by the respondent and prayed for:

- (i) Salary in lieu of notice.....Kshs.424,000.00
- (ii) Unpaid salary for June.....Kshs.212,000.00
- (iii) Damages for unfair termination.....Kshs.2,544,000.00
- (iv) Service pay..... Kshs.742,000.00
- (v) House Allowance for June..... Kshs.40,000.00

(vi) *Transport allowance for June.....Kshs.22,000.00*

Total

Kshs.3,984,000.00

(vii) *Unremitted NSSF for June.*

(viii) *Certificate of Service.*

(ix) *Interest from date of filing until payment in full.*

(x) *Costs of the suit plus interest.*

(xi) *Any other relief the court deems fit to grant.*

Respondent's case

The respondent averred that the claimant's employment was terminated in accordance with the law as he absconded duty for 12 days contrary to the respondent's Code of Conduct and the Employment Act and all procedures were complied with and prayed for dismissal of the suit with costs.

Claimant's evidence

The claimant testified that he joined the respondent in 2018 as a Supervisor Intelligence and Strategic Operations stationed in Mombasa at Kshs.205,000.00 per month and served diligently until 10th June 2024 when his employment was terminated.

That at the time he had contracted red eye and had permission to be away from the office and was the Head Office in the 2nd week of February 2024 when he was alleged to have absconded duty.

According to the claimant, he had 12 days of planned official duty at the respondents Head Quarters seeking approval for pupillage attachment.

On cross-examination, the claimant confirmed that his supervisor had knowledge of the fact that he had contracted red eye but had no memo approving his absence from office and admitted not having attached any.

The claimant maintained that he had permission from the supervisor and Human Resource but could not trace a copy of the memo by which he sought permission to be away.

The witness admitted that he had no medical certificate or any document of having been attended to at any hospital for red eye.

CWI admitted that he was aware of the respondents Code of Conduct and absenteeism was a gross misconduct.

RWI, Roselyn Mamo, the Assistant Manager Human Resource confirmed that employees had supervisors at the branch level to whom they were answerable and communicated with first.

It was her testimony that the claimant absented himself from work for 12 days, responded to the notice to show cause within 3 days and attended the disciplinary hearing.

The witness admitted that minutes of the disciplinary hearing were not filed and learnt from the medical team that the claimant had contracted red eye.

That the claimant provided log-in at Times Tower as evidence of having had permission to be away from his work station.

On re-examination, **RWI** testified that minutes of the disciplinary hearing existed and the claimant had no medical certificate of having contracted red eye.

According to the witness, log-ins did not demonstrate that the claimant had permission to be out of the office and the supervisor was not aware of his whereabouts and is the one who reported his absence to Human Resource.

RWI testified that all procedures were complied with.

Claimant's submissions

As to whether termination of the claimant employment was unfair and unlawful counsel submitted that the claimant had proved on a balance of probabilities that he did not abscond duty as the supervisor was aware of all the days he was away and ordered for facilitation and the respondent did not avail minutes of the disciplinary hearing.

According to counsel, the claimant's evidence proved that he was at work at the head office.

Reliance was placed on Clause 5.1.4 and 5.1.5 of the Respondent's Code of Conduct to urge that the respondent did not comply with the clauses.

Counsel further submitted that the respondent's witness adduced no evidence to prove that the disciplinary

hearing panel recommended termination of the claimant's employment.

Reliance was placed on the decision in **Kenfreight (EA) Ltd V Benson K. Nguti [2016] eKLR** and **Council of Civil Service V Minister of Civil Service [1985] AC** as well as the provisions of Section 41 and 45(1) (2) of Employment Act to submit that termination of the claimant's employment by the respondent was not procedurally fair.

On entitlement to reliefs, counsel for the claimant submitted that the claimant was entitled to all the reliefs prayed for including costs of the suit and interest for the unlawful termination of employment by the respondent.

Respondent's submissions

As to whether the respondent had valid reasons to terminate the claimant's employment, counsel submitted that the claimant adduced no evidence to prove that those who had contracted red eye were not supposed to report to work and equally failed to avail any medical certificate from a health institution or provide any to the employer which was necessary under the respondent's Code of Conduct.

Counsel urged that the claimant was absent from the workplace without permission and the respondent had a reason to summarily dismiss him from employment.

On the forensic evidence relied upon to show that the claimant was at the Head Office, counsel submitted that the evidence violated the provisions of Section 106B of the Evidence Act on account of absence of a certificate of Elections Evidence.

Reliance was placed on the Court of Appeal decision in **John Lokitare V IEBC [2018] eKLR.**

Counsel, further submitted that even assuming that the evidence was admissible, which was not the case, it showed that the claimant was not at his place of work on the alleged dates and the evidence did not show that the claimant had permission to be away from his work station and adduced no evidence to show that his supervisor had granted him permission to be away from work.

According to counsel, the claimant violated the respondent's Code of Conduct and his conduct fell within the ambit of Section 44(4)(a) of the Employment Act.

Counsel submitted that although evidence showed that the claimant sought permission to attend pupillage, his application had not been approved by 8th March 2024.

That the claimant had two reasons for being away from work namely, red eye disease and being at the respondent's head office on matters pupillage and was thus approbating and reprobating which implicated his credibility as a witness.

It was submitted that if the claimant was unwell, and received treatment as alleged, verifiable evidence would effortlessly have demonstrated it and availed to the respondent, coupled with evidence of authority to be away from the work place but failed to do so, which accorded the respondent a fair and valid reason to terminate his employment.

As regards procedural fairness, counsel submitted that the claimant did not request for minutes of the disciplinary hearing.

Reliance was placed on the decision in **Postal Corporation of Kenya V Andrew K. Tanui [2019]**

eKLR to highlight the elements of procedural fairness and urge that the respondent met the threshold prescribed by Section 41 of the Employment Act because the claimant was informed of the charges against him, was accorded an opportunity to be heard and informed of the right to be accompanied by a fellow employee of his choice.

Concerning the reliefs sought, counsel submitted that none was merited and the instant suit was for dismissal.

Analysis and determination

It is common ground that the claimant was an employee of the respondent from 2018 to 10th June 2024 when his employment was terminated by the respondent.

Strangely, neither the Statement of Claim nor the claimant's written statement dated 11th June 2025 had the date of employment. As regards salary, while the Statement of Claim had a figure of Kshs.212,000.000 per month, the witness statement had a figure of Kshs.205,000.

It is not in dispute that the claimant was stationed at Mombasa.

Although a document availed by the claimant revealed that the claimant contracted red eye in the month of February 2024, he furnished no evidence of having been attended to at any medical facility or having been accorded sick off or when he contracted the disease.

The unauthenticated document on record dated 12th February 2024, was the only indication that the claimant contracted red eye and lacked details of when he was certified to have contracted the disease or whether he was on sick off.

Documents on record also revealed that at the same time, the claimant was seeking approval and clearance of the employer to attend pupillage in the legal department at the respondent's Headquarters in Nairobi.

According to the claimant, the supervisor allowed him to be out of the office for an unspecified duration and because he had not secured approval and release to commence pupillage, proceeded to Nairobi to consult the relevant officers, who in his view approved his release to commence pupillage.

The claimant availed long-ins at the respondent's Headquarters from 13th February 2024 to 21st February 2024 a total of 7 days.

According to the claimant, he was on duty at Times Tower following up on his pupillage. The respondent on the other hand was of a different view because the claimant's duty station was Mombasa and had not been released to proceed to Nairobi. This is what led to termination of the claimant's employment.

While the claimant averred and submitted that termination of his employment was unfair, the respondent maintained that he absconded duty for 12 days and the process was fair.

The issues for determination are:

- (i) Whether termination of the claimant's employment by the respondent was unfair.*
- (ii) Whether the claimant is entitled to the reliefs sought.*

As to whether termination of the claimant's employment was unfair, it is trite law that for a termination of employment or dismissal to pass the fairness test, it must be demonstrated that the employer had a valid and

fair reason to do so and conducted the termination of employment or dismissal in accordance with a fair procedure as ordained by the provision of Section 41, 43, 44, 45 and 47(5) of the Employment Act.

Similarly, in **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR Ndolo J held;

“... However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness”.

Similarly, in **Naima Khamis V Oxford University Press (EA) Ltd** [2017] KECA 480 (KLR) the Court of Appeal held as follows;

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2) (c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or

procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required”.

Reasons for termination

It is common ground that the respondent terminated the claimant’s employment vide letter dated 10th June 2024 on account of absenteeism from the place of work for 12 days.

The notice to show cause, which the claimant admitted having received and responded to had a similar accusation.

As adverted to elsewhere in this judgment, the claimant denied having absented himself from the work place. His defence was that after he contracted red eye on an undisclosed date, his supervisor allowed him to stay at home verbally and because he had also sought permission to undertake pupillage in the Legal Services

and Board Co-ordination Department in January 2024, as records reveal, he had time to follow up on the approval at Nairobi.

According to him, he was on duty but at the respondent's Headquarters consulting various individuals on his impending attachment. He availed log-in at Times Tower for seven (7) days, which the respondent contested for want of certificate of electronic evidence.

It is trite law that admissibility of electronic evidence is governed by the provisions of Section 106B of the Evidence Act.

Section 106A of the Evidence Act provides:

The contents of electronic records may be proved in accordance with the provisions of Section 106B.

Section 106B reads as follows

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a

document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

Section 106B catalogues four (4) conditions essential for the admissibility of electronic evidence.

The party adducing electronic evidence is required to provide a certificate of electronic evidence failing which the electronic evidence is inadmissible.

In **County Assembly of Kisumu & 2 Others V Kisumu County Assembly Service Board & 6 others**, the Court of Appeal stated that:

“Section 106B of the evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document” if the conditions mentioned in this section are satisfied in relation to the information and computer”. In our view, this is a mandatory requirement which was enacted for good

reason. The court shall not admit into evidence or record rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced”.

Similarly, in **John Lokitare Londinyo V Independent Electoral and Boundaries Commission & 2 others** [2018] KECA 439 (KLR) The Court of Appeal stated as follows:

“It is at this juncture that the provisions of Section 106B of the Evidence Act come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and description of the manner in which the electronic evidence was produced together with particulars of any device involved in the production of that document, which the appellant did not do”.

The foregoing sentiments apply on all fours to the circumstances of the instant case.

Although the claimant availed log-ins at the respondent's Head Office as documents and counsel submitted that the forensic evidence showed that the claimant was at work at the Head Office, he did not provide a certificate of electronic evidence, which is mandatory for the evidence to be admissible.

Consequently, the log-ins produced by the claimant were inadmissible as evidence.

However, the foregoing finding notwithstanding the court considered the evidence to ascertain whether the finding would have been different if the evidence was admissible.

Copies of emails on record show that indeed the claimant sought approval for the attachment to complete his pupillage in late 2023 and early 2024 through his supervisor.

The Chief Manager Human Resource informed the claimant via email that the Human Resource Division had no policy provision on pupillage as legal services were in another department. He was advised to write to the

Commissioner Legal Services and Board Co-ordination for guidance.

Puzzlingly, none of the emails on record attached approval for the claimant's transfer to the Legal Services and Board Co-ordination Department to commence his 3 months pupillage, the claimant's insistence that he had approvals notwithstanding.

The claimant admitted, on cross-examination that he had not filed the memo through which he sought approval to undertake pupillage or any memo approving the same. The numerous meetings he allegedly held at Times Tower notwithstanding.

Intriguingly, although the claimant's case was that he travelled to Nairobi when he contracted red eye after the supervisor allowed him to stay at home for an undefined duration, email records reveal that the list of those affected was supposed to be prepared by one Denis vide email dated 31st January 2024 and only the claimant and one Naomi Kingori - office driver had been affected.

This perhaps explains why the claimant did not avail his medical certificate or any other document on treatment

at the Aga Khan Hospital in Mombasa or any other medical facility because it may have contradicted the dates bearing in mind the email from Mr. George Reinhard Konyango enquiring about those affected by red eye was dated 31st January 2024 and the claimant was one of them.

Even assuming that the claimant was under medication at home, it could not be for the entire month of February 2024 as he alleged.

More significantly, the log-ins on record, which **RWI** admitted were from Times Tower reveal that the claimant was frequently moving from place to place in the building for seven (7) days. The claimant had no log-ins for 5 days.

Relatedly, and as **RWI** testified on re-examination log-ins merely showed that the claimant was at Times Tower as opposed to showing that he had permission to be out of the office as Times Tower was not his work station.

Contrary to the claimant's testimony that his supervisor was aware of his whereabouts, RWI testified that the supervisor was unaware and he is the one who reported

the matter to the Human Resource Officer, Southern Region for action to be taken against the claimant.

The court finds it implausible that the claimant's supervisor permitted him to be away from the 2nd week of February 2024 and reported his absenteeism from work. The claimant led no evidence to show that he requested his supervisor or any other person he had met at the Head Office to testify that he had permission to be away from his Mombasa Office and be at Times Tower.

Finally, the claimant did not account for 5 out of the 12 days he was out of the office.

In **Naima Khamis V Oxford University Press (EA) Ltd** (Supra) the Court of Appeal held:

"It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both employer and employee in regard to the terms and conditions of work set out in a contract".

These sentiments are based on the provisions of Section 43(2) of the Employment Act which has been construed

to mean that “All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out it, in fact did not” as held in **Galgalo Jarso Jillo V Agricultural Finance Corporation** [2021] KEELRC 323 (KLR).

Similarly, in **Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others** [2019] eKLR, the Court of Appeal stated as follows:

“The standard of proof is on a balance of probabilities, 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”.

The court also relied on the Halsbury’s Laws of England on the band of reasonable responses test explained by Lord Denning MR in **British Leyland (UK) Ltd V Swift** [1981] 1KLR 91.

Section 44 of the Employment Act exemplifies matter which amount to gross misconduct to justify summary dismissal.

Under section 44(4)(a) if an employee without leave or other lawful cause absents himself from the place of appointed for the performance of his work.

In the instant case, the claimant failed to provide documentary evidence to demonstrate that he had been authorised to be away from the office at Mombasa for 12 days or that he was on sick off on account of red eye or that the respondent had approved his request to transfer to the Legal Services and Board Co-ordination Division for purposes of completing his pupillage.

From the evidence on record, the court is satisfied that the respondent had a substantive justification to terminate the claimant's employment. The claimant absented himself from his appointed place of work for 12 days without leave or other lawful cause.

Procedure

The provisions of Section 45(2)(c) of the Employment Act provides that termination of employment must be conducted in accordance with a fair procedure and Section 41 prescribes the elements of procedural fairness.

In **Postal Corporation of Kenya V Andrew K. Tanui** [2019] (KLR), the Court of Appeal isolated the constituents of procedural fairness under Section 41 of the Employment Act as follows:

“Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;*
- (ii) the reasons for which the employer is considering termination;*
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;*
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”*

In the instant case, the claimant confirmed on cross-examination that he received and responded to the notice to show cause. He also admitted that he was invited for a disciplinary hearing and attended but complained that the hearing was unfair in that he provided all evidence the respondent required to exculpate him but failed to do so yet according to him it was overwhelming.

As to what transpired during the hearing, including whether the claimant's evidence was considered, the respondent's evidence adduced by **RWI** was conspicuously silent because the most important piece of evidence was not availed by the respondent.

RWI admitted on cross-examination that minutes of the disciplinary hearing were not filed stating that the claimant did not request that they be filed.

Needless to belabour, minutes tell the story of what happened during the hearing. They reveal how the proceedings were conducted, membership of the disciplinary panel, those in attendance whether or not the charges were read out to the employee, was accorded an opportunity to present his/her evidence and cross-examine witness as well as present his case and whether the disciplinary panel considered the representations made by the employee and/or the person chosen by the employee.

The minutes also reveal whether the employee was comfortable proceeding with the hearing or raised any objection or issue or requested for any document or an

adjournment and whether it was granted or not and on what basis. The minutes tell it all.

Although **RWI**, Roselyne Mamo testified that the minutes were in the claimant's file and mentioned that the meeting was attended by Human Resource, the claimant's supervisor and the claimant, it could not avail the respondent for the simple that she was not among those in attendance and could not tell whether the charges was explained to the claimant and in what language among other requirements. Certainly, the absence of minutes of the disciplinary hearing significantly undermined the respondent's case on the procedural front.

The respondent failed to evidentiary demonstrate that the procedure it employed in terminating the claimant's employment met the threshold prescribed by the provisions of Section 41 and 45(2)(c) of the Employment Act.

For these reasons, it is the finding of the court that termination of the claimant's employment by the respondent on 10th June 2024 was procedurally unfair

under the provisions of Section 45(5) of the Employment Act.

Appropriate reliefs

The claimant sought various reliefs and the court will proceed as follows:

(i) Salary in lieu of notice

Paragraph 6 of the letter of termination of services clearly stated that the claimant would be paid one (1) month's salary in *lieu* of notice and the claimant did not deny having received the same.

In a similar vein, having found that the respondent had a valid reason to terminate the claimant's employment pursuant to the provisions of Section 44 of the Employment Act, no salary in *lieu* of notice was payable

(ii) Unpaid salary for the month of June

Puzzlingly, the letter of termination of the claimant's employment did not indicate that he would be paid his salary up to 10th June 2024, which he had earned and was thus payable under Section 17(1) of the Employment Act.

Needless to belabour the claim for salary for the entire month of June was unjustifiable.

The claimant is awarded salary for 10 days in June 2024 Kshs.73,214.30

It is trite that an employee's salary comprises the basic salary, house allowance, transport allowance and other allowances due to an employee. These elements constitute the employee's gross salary from which statutory and any other authorised deductions are made.

The claimant's salary for February 2024 reveals that he had only three items, namely; basic salary, house and transport allowance and a gross salary of Kshs.205,000 and it was the only payslip he availed.

The house allowance and transport allowance claimed by the claimant are unjustifiable and the prayers are dismissed.

(iii) Unremitted NSSF for June 2024

The NSSF deductions for the 10 days worked in June 2024 are due to the NSSF not the claimant and shall be remitted to the NSSF.

The claim is dismissed.

(iv) Service pay

The claimant's payslip for the month of February 2024 showed that he was a member of the

National Social Security Fund as well as the respondent's pension scheme which disqualified him from service pay by dint of Section 35(6) of the Employment Act.

The claim is unmerited and it is dismissed.

(v) Damages for unfair termination

Having found that the termination of the claimant's employment by the respondent was procedurally unfair, the claimant is eligible for compensation by dint of the provisions of Section 49(1)(c) of the Employment Act.

In determining the quantum of compensation, the court is enjoined to take into account the relevant factors under Section 49(4) of the Employment Act.

Considering that the claimant was an employee of the respondent for about six (6) years only, had no previously recorded cases of misconduct, did not indicate his wish of remaining in the respondent's employment or appeal the decision by the respondent and further considering that he substantially contributed to the termination of employment, the equivalent of 3 months gross salary is fair compensation, Kshs.615,000.00

(vi) Certificate of service

It is unclear why the respondent did not issue the claimant with a certificate of service, which is statutory entitlement by dint of Section 51 of the Employment Act.

A certificate of service to issue within 30 days.

(vii) Damages for breach of contract

Neither the provisions of the Employment and Labour Relations Court Act nor the Employment Act recognises a remedy in damages for breach of the contract of employment by reason of termination of the employment relationship.

The claim is dismissed.

In conclusion, judgment is entered in favour of the claimant against the respondent in the following terms:

(a) Salary for 10 days in June 2024 Kshs.73,214.30

*(b) Equivalent of three (3) month's gross salary
Kshs.615,000*

Total

Kshs.688,214.30

(c) Certificate of service.

(d) Costs at half scale.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 21ST DAY OF JANUARY 2026.**

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

ORIGINAL