

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAKURU
CAUSE NUMBER E025 OF 2024**

BETWEEN

BEVERLYN LEBENECLAIMANT

VERSUS

KENYA REVENUE AUTHORITY
RESPONDENT

*Rika J
Court Assistant: Emmanuel Kiprono*

Elizabeth Wangari & Company Advocates for the Claimant

Muhoro Kiriiri Advocate for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, dated 23rd April 2024.
2. She states that, she was employed by the Respondent around December 2007, as an Office Assistant. She rose through the ranks, to the position of Border Control Officer.
3. She was unfairly dismissed on 9th September 2021.
4. She worked 2 shifts, from 8.00 a.m. to 6.00 p.m. and 6.00 a.m. to 8.00 p.m. respectively.

5. On 28th March 2019, she was assigned the 2nd shift, from 6.00 p.m. to 8.00 a.m.
6. She fell ill at the commencement of her shift, owing to pregnancy complications, necessitating that she visits a doctor for a scan, at Planar Imaging Centre within Busia border town.
7. She arrived at office, Busia border point, at around 5.00 p.m. She requested her colleague, who was in the day shift, Francis Nyaundi, to stand in for her, until she came back from the medical facility. Nyaundi agreed to stand in.
8. On 30th March 2019, the Claimant was summoned by a Manager, Festus Nyamache, and questioned about 2 trucks that had illegally exited the border point, on 29th March 2019, at around 6.30 p.m.
9. She was not at the office, when the trucks were said to have exited, having gone to see a doctor.
10. She was subjected to extensive interrogation and harassment by officers from the Respondent's intelligence and strategic operations unit, and the DCI. She resumed duty after this interrogation.
11. On 29th April 2019, she was advised that she had been transferred to Mombasa with immediate effect, her late pregnancy notwithstanding.

12. She appealed successfully, and transfer was deferred to 1st January 2020.
13. It was while in service at Mombasa, that the Respondent issued her a letter to show cause, dated 6th July 2021, alleging that she was involved in 2 acts of negligence while at Busia border point: that, she un-procedurally allowed trucks with registration KAZ 790E/ZE 539 and KBM 094V/ZD 6887 to exit the customs yard, before being properly processed; and that, she allowed the said trucks, to exit the OSPB without capturing their details in the gate 2 register.
14. She replied, denying the allegations, on 14th July 2021.
15. She was summoned to attend disciplinary hearing. She attended, on 18th August 2021.
16. Subsequently, she was denied her work access credentials, without notice. On 9th September 2021, she was issued a letter of termination.
17. She appealed the decision. She requested for the disciplinary hearing proceedings. She was not supplied with the proceedings. She did not receive response to her appeal.
18. She went to the Respondent's head office at Nairobi, to enquire about her appeal. She was handed a letter dated 18th October 2021, dismissing her appeal.

19. The Claimant states that termination was unfair, unlawful, malicious, capricious, irregular, contrary to the principle of fair labour practices and protection of wages.
20. Her last salary was Kshs. 106,000 monthly.
21. She pays for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. Unconditional reinstatement, without loss of salary and other benefits.
 - c. 1-month salary in lieu of notice at Kshs. 106,000.
 - d. 4 months' salary from September to December 2021 at Kshs. 424,000.
 - e. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,272,000.
 - f. General damages for wrongful and unfair dismissal.
 - g. All accrued penalties and interest on statutory dues.

h. Costs.

i. Interest.

22. The Respondent filed its Statement of Response, dated 31st May 2024. It is conceded that the Claimant was employed by the Respondent. She was on duty at the Busia border point, when the 2 trucks illegally exited.
23. The Claimant was guilty of various malpractices. The trucks were ferrying consignment of sugar, imported from various custom numbers. This was contrary to provisions of Sections 6. 1. 6 and 6.1.7 of Busia One Stop Border work procedure.
24. The Claimant allowed the trucks to exit, without capturing their details in the gate 2 register, which was against procedure for processing imports at the point. These acts of negligence were subjected to investigation and established.
25. It is true that the Claimant was issued a letter to show cause, on account of negligence of duty on 6th July 2021. She replied on 14th July 2021. She was invited for disciplinary hearing, which she took place on 18th August 2021.

26. She was found culpable and dismissed through a letter dated 9th September 2021. She was found to have violated Respondent's Code of Conduct, and Section 44[4] [c] [g] of the Employment Act.
27. The Claimant appealed against the decision. Her appeal was dismissed through a letter dated 18th October 2021, on the ground that there was no new evidence to warrant interference with the earlier decision.
28. The Claimant denied that she released the trucks, in her response to the letter to show cause. On appeal, she changed her story, alleging that she was away seeking medical attention on the material day. The explanation that she was away, on a medical emergency, was made in afterthought.
29. Termination was fair and lawful, and in accordance with the Employment Act, and the Respondent's Human Resource Policy. It was procedurally fair and substantively justifiable
30. The Respondent urges the Court to uphold its position, and dismiss the Claim with costs.
31. The Claimant gave evidence on 24th April 2025. Her Witness, Dr. Mandala Emukule, gave evidence on 20th June 2025, when the Claimant rested her Claim.
32. Francis Nyaundi, an Officer from the Respondent's Human Resource Department, gave evidence for the Respondent, on 29th July 2025. His colleague Jackson Kimeu, Assistant Manager Human Resource Division,

gave evidence on the same date, and on 14th October 2025. Respondent's Investigator William Ogola, gave evidence on 14th October 2025 closing the hearing.

33. The Claimant adopted her Witness Statement and Documents [1-24] [25-28] in her evidence-in-chief. She abandoned Document [5], explaining that it was erroneously filed.
34. She restated the contents of her Statement of Claim, as summarized at the beginning of this Judgment. She did not release the 2 trucks on 28th March 2019. She was not in office, having gone to see a doctor within Busia border town, at around 6.00 p.m. She had pregnancy related illness. She was attended to by Dr. Emukule, and returned to work at around 7.00 p.m. The incident is said to have taken place at around 6.30 p.m.
35. She exhibited medical records, including ultrasound test, showing that she was attended to by Dr. Emukule. She told the Court that the Respondent carried its own investigations, and was provided the medical records by Dr. Emukule. She had a history of birth miscarriage, and her pregnancy was high-risk. She appealed against the decision to dismiss her, highlighting that she was away, seeing a Doctor, when the incident took place. Her appeal was declined.
36. She was transferred to Mombasa from Busia while pregnant. The disciplinary process took place while she was stationed at Mombasa.

37. Cross-examined, the Claimant told the Court that the trucks were released on 28th March 2019 [not 18th March 2019]. They were released at 6.28 p.m. according to the Respondent. The Claimant was supposed to be on duty from 6.00 p.m. to 8.00 a.m. She reported at 5.00 p.m. and asked her colleague Francis Nyaundi, to stand in for her. It was an oral request. The Claimant did not inform her supervisor about the arrangement.
38. She saw an investigation report, where Nyaundi is recorded to have said that he handed over to her at 6.00 p.m. Constable Kennedy who manned the gate, also stated that the Claimant was present, and directed him to open the gate. She was not able to say, if she left her workplace to seek medical attention, in accordance with the Respondent's policies and procedures.
39. She emphasized that she was at the medical facility at 6.43 p.m. Dr. Emukule availed her records to the Respondent. The Claimant surrendered her original medical records to the Respondent and DCI officers who investigated the matter. She returned to work at 7.00 p.m. She did not sign in or out.
40. Redirected, the Claimant told the Court that her arrangement with Nyaundi was informal. He was away for about 1 hour. Her supervisor Elizabeth, was away. Nyaundi lied in his statement to the investigators. The sonograph [ultrasound] test report, shows that the Claimant was attended to by Dr. Emukule at 6.43 p.m.

41. Dr. Mandala Emukule, told the Court that he is a radiologist. He made the report dated 28th March 2019, concerning the Claimant. He carried out a pregnancy scan on her. It was the second time he was doing this. The pregnancy was 20 weeks old. She was to deliver around 22nd August 2019.
42. He carried out sonography. His machine was old and decommissioned, and would not have saved all the information relevant to the proceedings. Dr. Emukule noted that the time written on the report was 6.48 p.m. The Claimant was the 4th last patient to be attended to. She was charged Kshs. 1,500 and issued a receipt. She had a high-risk pregnancy, and suffered hepatitis B. Another doctor was treating her for hepatitis B.
43. Dr. Emukule was contacted by DCI. An officer visited his facility, and confirmed that the Claimant was treated there. Dr. Emukule was told later that the original medical reports were misplaced. He retrieved copies.
44. Cross-examined, he told the Court that his facility is about 300 metres, from the Respondent's border post. Time it takes to attend a patient, depends on the number of patients being attended. Procedure would take about 15 minutes per patient. It is not possible to tell exactly, how long it would take per patient. At the time the documents were certified, the machine was still in use. The scan exhibited in Court is a photocopy. Dr. Emukule gave the original to the DCI. The handwritten date was not from the machine. He stamped the document. He could not recall all the

details. 6.45 p.m. would refer to the time the scan was printed. The Claimant was otherwise healthy. She walked herself into the facility.

45. Redirected, Dr. Emukule told the Court that he generated the report, and the date was clear at the time he did so. He submitted the report to the DCI. Scan takes about 15 minutes. Dr. Emukule's duty was to perform the ultrasound.
46. Francis Nyaundi relied on his Witness Statement dated 23rd June 2025. He denied that he agreed to relieve the Claimant, as she went to see a Doctor, at the time the trucks were released. Her shift started at 6.00 p.m. Nyaundi left at 6.00 p.m. The trucks left after 6.00 p.m.
47. Cross-examined, Nyaundi confirmed that he still works for the Respondent at Bungoma County. The Claimant was his colleague at Busia. He did not work during her shift. He was not aware of her disciplinary hearing.
48. The trucks would be processed elsewhere, before reaching Nyaundi and the Claimant. Staff signed attendance register. The register would show that Nyaundi worked from 8.00 a.m. to 6.00 p.m.
49. The DCI and the Respondent investigated. Nyaundi wrote a statement to the effect that he left at 6.00 p.m. The report prepared by the Respondent states that he left at 6.36 p.m. He denied that the report was correct. He left at 6.00 p.m. not 6.36 p.m.

50. Nyaundi received a report from a young man, that certain persons wished to move sugar irregularly. Nyaundi did not have the name of the young informer. He did not know if a criminal case followed. Nyaundi was never called as a witness.
51. He did not recall the Claimant handing over duty, and rushing to hospital. She was required to inform her supervisor on leaving the workplace. Nyaundi did not know that the Claimant was pregnant and gave birth later that year. He did not know if other persons were investigated or charged. Nyaundi denied that he was part of a sugar smuggling ring. He did not have bad blood with the Claimant.
52. Redirected, he told the Court that there were verification officers who verified the documents, before sugar was removed. Nyaundi was involved in sugar removal at the gate. The Claimant was also at the gate. Nyaundi did not write the report alleging that he left at 6.36 p.m. Page 197 of Respondent's documents, has a statement by Nyaundi, in which he corrected the time he left duty, to 6.00 p.m., not 6.36 p.m. The Claimant ought to have involved her supervisor, before leaving her workstation. Nyaundi was a whistleblower. He escalated the report he received from the young man, to surveillance officer, Onyikwa. Nyaundi reiterated that he was not at the gate, the time the truck left.
53. Jackson Kimeu relied on his Witness Statement, and exhibited Documents [1-10] filed by the Respondent, in his evidence-in-chief. The Claimant was issued a letter to show cause. Allegations were set out. She responded. Her response was not satisfactory. She was invited to a

disciplinary hearing and advised on her procedural rights. She was heard and found culpable. She irregularly released the trucks at the Busia post.

54. She violated procedure on release of goods. She did not capture details of the trucks. The Respondent cited its Code of Conduct and the Employment Act, in taking the decision against the Claimant. She was given the opportunity to appeal. The Respondent relied on its investigation report and the Claimant's own evidence. The investigation report included witness statements. If another officer was to relieve her, it would have to be done in writing. AP Kennedy Opere was present, and confirmed that the Claimant was at the gate, when the trucks were released. Kennedy opened the gate, on the instructions of the Claimant.
55. On cross-examination, Kimeu told the Court that he was employed in August 2021. The Claimant was issued a letter to show cause. Her response was considered.
56. The Claimant supplied medical records, showing that she was away seeking medical attention. The records were from Dr. Emukule. They included a sonographic report. The original documents were not availed at the disciplinary hearing. The date on the report is 28th March 2019. The records showed that she was pregnant and suffered Hepatitis B. There were additional medical documents from the Karen Hospital, showing she was pregnant, with expected date of delivery in August 2019, and had been treated there, and supplied with tablets, antibiotics and folic drugs.

57. She was confirmed to have been pregnant, at the time the incident took place. She told DCI and Respondent's investigators, that she was at the hospital at 6.30 p.m. around the time the trucks were released.
58. Kimeu read the statement made by Nyaundi. He stated he was on duty between 8.00 a.m. and 6.00 p.m. The investigation report states he checked out, at 6.36 p.m. Nyaundi was not called at the disciplinary hearing as a witness.
59. AP Kennedy Opere stated that he was instructed by the Claimant to open the gate. The Claimant stated in her response to the letter to show cause, that Opere had made sexual advances to her which she rebuffed, and that there was therefore, bad blood between Opere and herself. Opere was likewise not presented at the disciplinary hearing as a witness. He was not an Employee of the Respondent.
60. The Respondent was fair and objective to the Claimant, and acted in accordance with its Code of Conduct. Kimeu was aware that the Claimant was dismissed, but not aware if she was criminally prosecuted.
61. The charge sheet on record shows that a person named Adan, was charged over the smuggling of sugar. It is not stated in the charge sheet, that Adan acted with the Claimant. A customs verification officer Vivian Lokoba, stated that she assigned the entries concerning the 2 trucks. This is not an admission that Vivian, allowed the lorries to leave. She was senior to the Claimant.

62. The Claimant appealed unsuccessfully against the decision to dismiss her. The malpractice was clear. Kimeu did not know who wrote the comments on the appeal letter, stating that the appeal disclosed no new evidence. The appeal was considered by the Commissioner, Corporate Services. The comments were made, a day after the appeal was received.
63. The Claimant had been rated very good by the Respondent, in her performance appraisal. She stated that she had no warnings in her record, in her appeal. This was considered. The Respondent acted fairly and objectively.
64. The Claimant was not sacrificed to protect big fish. She was transferred from Busia to Coast on 30th May 2019. She appealed against transfer, on the ground that she was pregnant. Transfer was not harassment. It was deferred for 8 months.
65. Redirected, Kimeu told the Court that termination did not have anything to do with her performance. It was about gross misconduct. She violated the law and the Respondent's procedural manual. She was negligent and dishonest. Investigation report recommended disciplinary action against the Claimant and her colleagues. No big fish was involved. She was not harassed.
66. Investigator William Ogola relied on his Witness Statement, including the investigation report. He received intelligence on trucks irregularly released from the Busia customs post. The trucks were ferrying sugar from Uganda. Involved officers were investigated.

67. 2 officers, including the Claimant, were manning the gate. Attendance register showed the Claimant reported at 5.00 p.m. The trucks left the post at 6.28 p.m. She was on duty. She was to ensure that the trucks were verified, duties paid and details recorded at the gate register. They were not recorded. It was only private security officer Vincent Makori, who recorded details showing the trucks left at 6.28 p.m. The Claimant did not. Nyaundi recorded a statement. He handed over to the Claimant at 6.00 p.m. AP Kennedy Opere similarly recorded a statement, confirming that the Claimant was present, and instructed Opere to open the gate.
68. Cross-examined, Ogola told the Court that he was formally instructed by his Manager to investigate. Ogola and his team travelled to Busia, and took witness statements, including that of the Claimant. He did not visit any doctor. He did not talk to Dr. Emukule.
69. The Claimant recorded a statement, saying she reported at 5.00 p.m. She did not disclose that she went to hospital. The medical records were availed at the disciplinary hearing. Ogola did not interact with the medical records. He attended disciplinary hearing as an investigator. He gave evidence. He heard about the medical records there. He did not have the letter to show cause and her response. His role ended with his presentation of the investigation report.
70. Francis Nyaundi was a whistleblower. Ogola did not know who informed Nyaundi about the intended smuggling. Nyaundi stated that he left work

at 6.36 p.m. The attendance register confirmed that Nyaundi left at 6.36 p.m. The incident took place at 6.20 p.m. Nyaundi later clarified that he left at 6.00 p.m. Daily attendance register indicated he left at 6.36 p.m.

71. AP Kenndy Opere stated he was instructed by the Claimant to release the trucks. Opere was in a supporting role. By the time the trucks reached the gate, they would have been processed and verified by other officers.
72. Verification officer Viviane, recorded a statement saying she allowed the trucks in. It was not about the transaction that took place on 28th March 2019. There was another attempt on 30th March 2019 to recycle the entries made on 28th March 2019.
73. Supervisor Elizabeth was off-duty, at the time of the incident. She was authorized to be away by the Station Manager, through a WhatsApp message. It was not regular to authorize off-duty through social media. The Respondent did not encourage Employees to have informal off-duty arrangements. An officer from a private security service provider Winguard, made the entries in the Winguard registry. Respondent's own officers did not make any entries. There were other trucks cleared that night. Ogola did not agree that it was Francis Nyaundi, who made entries for these other trucks.
74. Ogola told the Court that CCTVs were not working, and he could not therefore retrieve useful footage. No criminal charges were preferred against the Claimant.

75. The importer, one Gulleh, was charged for duplication of clearance papers. The charges related to 2nd April 2019. This was after 28th March 2019. Ogola was not clear on the status of the criminal proceedings.
76. Redirected, Ogola told the Court that he did not have control of the criminal process. His role was internal. The Claimant did not mention that she was ill, when she recorded her statement. Francis Nyaundi corrected his statement, showing he left work at 6.00 p.m. not 6.36 p.m. He was corroborated by AP Kennedy Opere. The Claimant instructed Opere to open the gate. Viviane was involved in a transaction that took place on 30th March 2019, not the relevant transaction of 28th March 2019. There was no document from the Claimant, asking for sick-off. It was established that she was at the gate, when the trucks were released. The Claimant did not bring up her medical evidence, at the time Ogola recorded her statement. Other officers were recommended for disciplinary action. The Respondent lost taxes.
77. The issues are whether dismissal of the Claimant, was procedurally and substantively fair under Sections 41, 43 and 45 of the Employment Act; and whether the Claimant merits the prayers sought.

The Court Finds: -

78. The Claimant was employed by the Respondent around December 2007, as an Office Assistant. She rose over time, to become a Border Control Officer.

79. Her contract was governed by the Employment Act 2007 and the Respondent's Code of Conduct.
80. She held this position, at Busia One Stop Border Post [OSBP], as of 28th March 2019. She was alleged to have illegally allowed 2 trucks, registration KAZ 790E and KBM 094V, which were ferrying a consignment of imported sugar, to exit the customs yard. The trucks were not properly processed. Their details were not recorded at the gate register.
81. The Claimant was issued a letter to show cause, communicating the allegations. She responded. She was called for disciplinary hearing. She was heard, and a decision taken to summarily dismiss her, pursuant to Section 44[4] [c] and [g] of the Employment Act, and clauses 6.1. and 6.2 of the Code of Conduct. She appealed. The appeal was declined.
82. Her last salary was Kshs. 106,000 monthly.
83. **Procedure:** The smuggling of sugar on 28th March 2019, was investigated by the Respondent's Intelligence & Strategic Operations Department. An investigation report dated 20th December 2019 was generated, recommending certain courses of action.
84. The Claimant was implicated in the report. The Respondent issued her a letter to show cause dated 6th July 2021. The allegations against her, and the law and clauses said to have been violated, were stated in the letter.

85. She responded on 14th July 2021, denying the allegations. She highlighted that the investigator failed to capture her evidence, that she was away on medical treatment, at the time the sugar was smuggled from Busia OSBP, on 28th March 2019, at around 6.30 p.m.
86. The Respondent invited her for disciplinary hearing, to be held on 11th August 2021. The invitation letter is dated 4th August 2021. She was advised that she could be accompanied to hearing, by a colleague of her choice.
87. She attended the hearing and was heard. There is nothing of note raised by the Claimant, to suggest that the actual hearing, was in any way procedurally flawed.
88. It is noted however, that certain witnesses, who the Claimant felt should have been presented by the Respondent, were not presented. This however would only affect the weight of the evidence presented against the Claimant, and was not a flaw in the procedure.
89. She was summarily dismissed on 9th September 2021. The reasons justifying the decision are shown in the letter of summary dismissal.
90. She appealed through her undated letter, which was received by the Respondent on 2nd September 2021.
91. The appeal was unsuccessful. She was advised through a letter dated 18th October 2021, issued by the Respondent's Commissioner for

Corporate Support Services, that there were no new grounds raised in her appeal, to warrant interference with the summary dismissal decision.

92. The Court does not find any significant departure in the procedure followed by the Respondent. The process appears to have taken longer than perhaps would be ideal, from 28th March 2019 when the sugar smuggling took place, to 18th October 2021, over 2 years, when the Claimant's appeal was declined. It is noted that there was a complicated maternity interlude, followed by the transfer process, and perhaps the Respondent was being cautious, not to appear to rush the Claimant through a disciplinary process, while she was experiencing a difficult pregnancy and Hepatitis B.
93. The Claimant in any event, does not complain about the time the disciplinary process took. The Discipline Manual For The Public Service, it must be noted, requires that all disciplinary cases in the public service, are heard and finalized within 6 months.
94. He transfer from Busia to Mombasa was communicated by the Respondent through a letter dated 29th April 2019.
95. Transfer was during the period of investigation of the sugar smuggling, but it was not the Claimant's position, that she was being transferred on account of her involvement in the smuggling.

96. She wrote an appeal on 13th April 2019, imploring the Respondent to defer the transfer, on the ground that she was heavily pregnant, and that her pregnancy was difficult, impairing her mobility.
97. The Respondent treated her fairly, deferring transfer to January 2020.
98. The Court is persuaded that procedure was fair, consistent with the minimum standards of fairness, under Sections 41 and 45 of the Employment Act.
99. **Reason[s]**: Central to the establishment of valid reason[s], in justifying dismissal, is whether the Claimant was present at the Busia border point, on 28th March 2019, at around 6.30 p.m. when the 2 trucks left the customs yard.
100. Her evidence is that she was not. She reported to office at 5.00 p.m. Her shift was from 6.00 p.m. to 8.00 a.m.
101. She was taking over from Francis Nyaundi, whose shift ended at 6.00 p.m., having come in the morning, at 8.00 a.m.
102. She fell ill, having been pregnant and also suffering from Hepatitis B. She had a history of miscarriages. She had an informal arrangement with Francis Nyaundi. He would carry over, standing in for the Claimant from 6.00 p.m. until she returned from the medical facility.

103. Nyaundi was therefore standing in for the Claimant, when the sugar left the yard, at around 6.30 p.m.
104. The Claimant was contradicted in her account of events, by Francis Nyaundi and AP Kennedy Opere, who recorded statements with the internal investigator.
105. Nyaundi maintained that he handed over shift to the Claimant as scheduled, at 6.00 p.m. He denied that he was standing in for her, when the crime was committed.
106. AP Kennedy Opere told the investigator that he was instructed by the Claimant to open the gate for the trucks to exit. He placed the Claimant squarely, at the scene of the crime.
107. Both Nyaundi and Opere were not called as witnesses at the disciplinary hearing. Jackson Kimeu, Human Resource Manager, confirmed in his cross-examination, that Nyaundi and Opere were not called as witnesses at the disciplinary hearing.
108. Why was Nyaundi not called , yet he remains an Employee of the Respondent, working at Bungoma border post?
109. The Respondent also failed to call Opere at the hearing in Court, to establish that the Claimant instructed him to open the gate .

110. These were the only eye witnesses, who alleged that the Claimant was at work, when the offence was committed.
111. AP Opere was said to have made sexual advances to the Claimant which she rebuffed, and would have abundant motive in telling lies against her. He was probably acting in cahoots with other staff such as Nyaundi, to smuggle the sugar, and place blame on the Claimant. He should have been called at the disciplinary hearing and in Court, to allow the Claimant cross-examine him, on his assertion that she instructed him to open the gate.
112. Nyaundi's statement recorded by the investigating officer, and his evidence in Court, was shaky, inconsistent and self-incriminating.
113. The attendance register confirmed that Nyaundi left office at 6.36 p.m. He shifted position in a statement recorded later, alleging to have left at 6.00 p.m. to fit in with his scheme, placing the Claimant at the scene, at the time the trucks exited.
114. He was not a truthful witness, and the Court is persuaded that he was in office, at the time the trucks exited the border point.
115. The investigating officer Ogola, established in his report, that Nyaundi left at 6.36 p.m. It was not clear why the investigating officer was ready to accommodate Nyaundi's changing position, while quick to turn away his eye from the Claimant's concrete evidence on having been away on medical ground, at the time the trucks exited.

116. There was evidence available to the Respondent, that the Claimant left Nyaundi at the office, to seek the attention of Dr. Emukule.
117. There was evidence that she was pregnant, and had a history of difficult pregnancies. She suffered Hepatitis B. She had been treated at Busia and Karen Hospital. There were medical records available to the Respondent and its investigator, who both turned a blind eye, and went on to usher the Claimant out of service.
118. The investigating officer was informed by the Claimant that she had stepped out, leaving Nyaundi at her desk, to see Dr. Emukule. He however told the Court that he did not interact with Dr. Emukule, and that the Claimant's medical records only came to his attention at the disciplinary hearing.
119. Why did he travel to Busia to investigate, and fail to visit the medical facility only metres from the border post, and engage Dr. Emukule? DCI officers who investigated the offence, engaged Dr. Emukule, obtained the Claimant's medical records, and did not prosecute the Claimant for the grave offence of involvement in smuggling of sugar.
120. Dr. Emukule was availed to the Court on 20th June 2025. He confirmed that he attended to the Claimant, on 28th March 2019. He confirmed that she was pregnant, expected to deliver 5 months later, on 22nd August 2019. He carried out a sonography on the Claimant. There was indication from the medical records that this was done at 6.48 p.m.

121. It is highly unlikely that the medical records, were manufactured, to afford the Claimant an alibi. Her pregnancy and illness were real.
122. Dr. Emukule's evidence was not contradicted by the Respondent. He placed the Claimant at his sonography machine, at the time the crime was unfolding at the border point. It is not possible that a pregnant woman, experiencing a difficult pregnancy and Hepatis B, was both at a medical facility, under a sonography machine, and at the border point instructing a gate-keeper to open the gate for sugar barons to flee, without paying tax.
123. Nyaundi appears to have been at the centre of the smuggling. He stated that he had been approached earlier in the day, by a young man, whom he had seen severally. The young man was nameless. The young man sought help, to have some trucks released " *unprofessionally.*" Nyaundi stated that he told the young man he does not involve himself with " *bad deals.*"
124. The young man is said by Nyaundi, to have made a second approach at around 3.00 p.m. asking Nyaundi if he was willing to " *facilitate his mission.*" Nyaundi allegedly told the young man off, and chased him away.
125. At 6.00 p.m. he stated that he left office, handing over to the Claimant. He went to a restaurant within Busia, for an evening meal.

126. Instead of treating Nyaundi as a suspect, the investigating officer alleged that he was a whistleblower. What kind of a whistleblower was Nyaundi? He was approached by a criminal at the gate twice, who asked him to assist in smuggling of goods, and instead of having the young man apprehended, merely chased him away, reassuring the criminal that he does not engage in *bad deals*?
127. Why did not Nyaundi make use of the various Police Officers available at the Border point, and have the smuggling nipped in the bud, by having the criminal who approached him twice, arrested? How would any investigator characterize Nyaundi as a whistleblower?
128. The events of the day, involving the young man and Nyaundi, most likely progressed to the smuggling of the sugar about 6.30 p.m. later that day. That young man interacted with Nyaundi latest 3.00 p.m. About 3 ½ hours later, at 6.30 p.m., the trucks exited.
129. The investigators, external and internal, ought to have focused on Nyaundi and his young man at the gate, rather than strain logic, by placing a pregnant woman under a sonography machine, at the scene of the crime.
130. The Court is convinced that the Claimant was away at Dr. Emukule's when sugar was smuggled. The persons who aided in the smuggling, were kept away from the disciplinary hearing.

131. There was no valid reason, to justify dismissal of the Claimant, under Sections 43 and 45 of the Employment Act.
132. **Remedies: *It is declared that termination of the Claimant's contract by the Respondent, was unfair and unlawful.***
133. Termination took place on 21st September 2021. This is approximately 4 years and 5 months ago. While Section 49 [3] [a] and [b] of the Employment Act allows the Court to grant an order or reinstatement or re-engagement, subject only to the considerations under Section 49 [4] of the Employment Act, the E&LRC Act places a time limit on the remedy.
- .
134. The latter day statute, E&LRC Act, under Section 12 [3] [vii] places a limitation of 3 years, from the date of dismissal, on award of reinstatement. It is not clear why limitation was placed in the latter date statute, while the comprehensive Employment Act, 2007, did not deem it necessary to include limitation of time, as a condition under Section 49 [4] of the Employment Act.
135. The imposition of time-limit, is perhaps a testament to the gains made by Employers, at chipping away the gains made by Employees, under the Employment Act, 2007.
136. The Court is barred from granting the award of reinstatement, under Section 12 [3] [vii] of the E&LRC Act.

137. ***The prayer for notice is granted at Kshs. 106,000.***
138. The prayer for salary from September to December 2021 at Kshs. 424,000 is unmerited. The Claimant ceased to be an Employee on 9th September 2021. She appealed and a decision was made declining her appeal, on 18th October 2021. She does not explain to the Court why she should be paid salaries for a period she was a former Employee of the Respondent. The prayer is declined.
139. The Claimant worked from December 2007 to September 2021. This is a period of 14 years. She is not shown to have caused or contributed, to the circumstances leading to her dismissal. She told the Court that she remains unemployed. Her wish was to be reinstated, and the remedy would have been merited and awardable, if not for the limitation imposed on the Court under Section 12[3] [vii] of the E&LRC Act. The Respondent did not state before the Court, what benefits if any, were paid to the Claimant, after 14 years of service. ***She is granted equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 1,272,000.***
140. The prayer for general damages for wrongful and unlawful dismissal, in addition to compensatory award, has no foundation. It is declined.
141. ***Certificate of Service to issue.***
142. ***Costs to the Claimant.***

143. *Interest granted at court rate from the date of Judgment till payment is satisfied in full.*

IN SUM, IT IS ORDERED: -

- a. It is declared that termination was unfair.*

- b. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,272,000 and notice at Kshs. 106,000 - total Kshs. 1,378,000.*

- c. Certificate of Service to issue.*

- d. Costs to the Claimant.*

- e. Interest granted at court rate, from the date of Judgment, till payment is made in full.*

Dated, signed and delivered electronically at Nakuru, under Rule 68[5] of the E&LRC [Procedure] Rules, 2024, this 30th day of January 2026.

James Rika
Judge

