**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL NO. E085 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**MODERN MAIL LTD.....APPELLANT**

***VERSUS***

**GEORGE ODHIAMBO OTIENO.....RESPONDENT**

# JUDGMENT

Aggrieved by the Judgment of Hon. Maureen Nyigei, SPM delivered on 21st October 2025 in Kisumu MCELRC NO. E006 of 2022 **George Odhiambo Otieno V Modern Mail Ltd**, the appellant filed the instant appeal vide a Memorandum of Appeal dated 28th October 2025.

The brief facts of the case before the trial court are that the claimant was employed by the respondent as a Booking Clerk effective 1st April 2019 and served until 24th February 2021 when his employment was terminated by the respondent allegedly for opening the office late on 20th and 21st February 2021.

The claimant was issued with a notice to show cause dated 23rd February 2021 requiring him to explain "why he opened at 5:57" and was by the same letter summoned to the office in Nairobi on 24th February 2021 at 10:00am to explain himself. A written statement was also required and termination of employment took place on 24th February 2021.

The respondent did not avail minutes of the disciplinary hearing.

The respondent's case was that the claimant had two warning letters dated 17th July 2019 and 23rd September 2020, was accorded the opportunity be heard, and was heard and elected not to call witnesses.

That the summary dismissal of the claimant was fair.

After considering the respective cases and submissions by counsel, the learned trial magistrate found that the termination of the claimants employment was unfair and awarded the claimant one months salary in *lieu* of notice, 6 month's salary compensation, certificate of service, costs and interest at court rates.

This is the judgment appealed against by the appellant.

The learned trial magistrate was faulted on seventeen (17) grounds for having erred in law and fact by: holding that termination of employment was unfair yet the respondent was heard, premising her holding that the appellant began by complying with the process but held that the process was unfair, holding that the disciplinary process was hurriedly done, suggesting and assuming that the disciplinary process should be long, failing to appreciate that the charge against the claimant was not complex, and the appellant complied with the provisions of Section 41 of the Employment Act, failing to appreciate that the respondent did not raise the issue of speed of the process, introducing unpleaded issues, assuming that the respondent was not informed of his rights during the hearing, awarding one month's salary in *lieu* of notice yet the procedure was fair and it was a summary dismissal, awarding six (6) month's gross salary, holding that termination of employment was unfair yet the respondent opened the office late, holding that termination of employment was unfair yet the contract of employment provided for summary dismissal holding that the appellant failed to prove that the procedure employed by the appellant was fair, awarding costs against the

appellant, failing to recognize that the respondent did not discharge the burden of proof and the decision arrived at occasioned miscarriage of justice.

In sum, the learned trial magistrate was faulted on appreciation of evidence, findings and awards.

**Appellant's submissions,**

On the finding that termination of the respondent's employment was unfair counsel submitted that the appellant had a valid reason and the court found as much and the procedure was fair because the respondent was given an opportunity to be heard in consonance with the provisions of Section 41 of the Employment Act.

Reliance was placed on the sentiments of the court in **Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd** [2013] KEELRC 920 (KLR), on procedural fairness, as were those in **John Jaoko Otieno V Intra health International** [2022] KEELRC 327 (KLR) to urge that the notice to show cause dated 23rd February 2021 informed the respondent the charge and invited him for a hearing scheduled for 24th February 2021.

That the decision was reached after the hearing and consideration of the respondent's representations and termination was faultless as no law prescribed the duration of disciplinary proceedings citing the decision in **CFC Stanbic Bank Ltd V Mwakuwona** [2015] KECA 919 (KLR)

It was submitted that no notice was necessary because the separation was by way of summary dismissal under Section 44(1) of the Employment Act.

Reliance was placed on **James Chutha Gathere V Nation Media Group Ltd [2013] eKLR** to submit that there was sufficient evidence of misconduct by the respondent.

Counsel submitted that respondent did not adduce evidence to discharge the burden of proof under Section 47(5) of the Employment Act.

Reliance was placed on **Josephine M. Ndungu & others V Plan International Inc.** [2019] KEELRC (KLR) on proof of a *prima facie* case of unfair termination by the employee.

As to whether the learned trial magistrate considered the procedural fairness accorded to the respondent, reliance was placed on the decision in **Alomba V Green Park Golf and County Complex t/a The Great Rift Valley Lodge & Golf Resort** [2025] KECA 373 (KLR) on the salary in *lieu* of notice to urge that it was not deserved in this case.

Concerning unpleaded issues, reliance was placed on **John Kamunya & another V John Nginyi Muchiri & 3 others** [2015] KECA 767 (KLR) and other decisions of the Environment and Land Court to urge that the issue of timeline was not raised and the respondent was prepared and participated in the hearing and the trial court erred in raising the issue.

By 21st January 2026 when the court retired to prepare this judgment, the respondent had not filed notwithstanding service of the appellant's written submissions on 19th December 2025.

**Analysis and determination**

Before proceeding to the grounds of appeal, it is essential to underscore the role of a first appellate court which is to reconsider the evidence on record, evaluate it and make

its own conclusions bearing in mind that it neither saw nor heard the witnesses and make due allowance in that respect.

See in this regard **Selle and another V Associated Motor Boat Co. Ltd & others** [1968] EA 123, **Abdul Hameed Saif V Ali Mohamed Shulan** [1955] 22 EACA 2010 and **William Diamonds Ltd V Brown** [1970] EAI.

In this appeal, the learned trial magistrate was faulted on the evidence, issues for determination, findings and awards. The trial court was faulted wholesomely.

As regards the evidence before the trial court and from which issues and findings were made, the only verifiable evidence was a Letter of Appointment dated 27th March 2019, notice to show cause, email dated 8th December 2020 on various administrative matters, letters from the Ministry of Labour and Social Protection, demand letter, warning letters dated 17th July 2019 and 29th September 2020 respectively claimants payslip for February 2021 and a blank clearance form.

On termination of the respondents employment, the trial court made no finding as to whether the appellant had a

substantive justification to summarily dismiss the respondent.

The notice to show cause accused the respondent of opening (presumably) the place of work at “5:57”, the letter was silent on whether it was morning or afternoon. The written witness statement of one Gloria Destiny Mlanya stated that when the respondent was informed that the Kisumu Offices were opened late on 20th and 21st February 2021, it investigated the issue and issued a notice to show cause.
The statement made no reference as to the time when the respondent was supposed to open the offices and no investigation report was provided to show that indeed the offices were opened late and by how many hours or minutes.

The appellant provided no verifiable evidence of the alleged complaint of lateness.

It is trite law that for a termination of employment to pass the fairness test the employer must prove that it had a substantive justification to do so and conducted the termination in accordance with a fair procedure.

Section 45 of the Employment Act provides that:

**(1) No employer shall terminate the employment of an employee unfairly.**

**(2) A termination of employment by an employer is unfair if the employer fails to prove—**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason**

**(i) related to the employee's conduct, capacity or compatibility ;or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure.**

See **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR **and Naima Khamis V Oxford University Press (EA) Ltd** [2017] eKLR on the two elements of fair termination of an employment contract namely, substantive justification and procedural fairness.

Concerning the reasons for termination of employment, Section 43 of the Employment Act states:

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair withinthemeaningofsection45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

Notably, Section 45(2)(a) of the Employment Act uses the term "valid" which denotes having a sound basis in logic or fact reasonable or congent or legally sufficient.

The notice to show cause on record dated 23rd February 2021 stated:

*"You will be required to respond to: Why on 20th and 21st February 2021 for opening at 5:57".*

Similarly, the termination letter dated 24th February 2021 stated

*"You were unable to explain why you have been opening the office late on 20th and 21st February 2021. This warrants summary dismissal in accordance to Employment Act Section 41 Sub Section 3 whereby your conduct you have indicated that you have fundamentally breached your obligations arising under the contract of service".*

Puzzlingly, the appellant did not avail a copy of minutes of the disciplinary hearing conducted on 24th February 2021. The minutes would have shown what transpired at the hearing and which culminated in the summary dismissal of the respondent.

Without any other form of credible evidence that the respondent violated any internal policy or procedure by allegedly opening the office at 5:57, it is exceedingly difficult for a court to make a finding that the respondent demonstrated that it had a valid or fair reason to summarily dismiss the respondent.

This is clearly evidenced by the letter of termination of employment which made no reference to the internal policy procedure or practice which the respondent breached and by what magnitude.

It is unclear to the court what standard the appellant employed to determine that the alleged lateness of the respondent amounted to gross misconduct. This was important because the Employment Act does not identify lateness as a ground on which an employee may be summarily dismissed. Equally, none of the warnings on record related to lateness.

Notably, the provision of the Employment Act allegedly violated cited does not exist.

As discernible from the foregoing, the court is satisfied that the appellant failed to demonstrate that it had a valid and fair reason to summarily dismiss the respondent from employment on 24th February 2021.

As regards the procedure employed, the appellant maintained that it was fair in every respect contrary to the finding by the trial court that it was unfair.

It is trite law that the requirements of the provisions of Section 41 of the Employment Act are mandatory as held in **Pius Machafu Isindu V Lavington Security Guards Ltd** [2017] eKLR.

The elements of procedural fairness have been itemised in a catena of decisions including the Court of Appeal decision in **Postal Corporation of Kenya V Andrew K. Tanui** [2019] eKLR where the court identified them as explanation of the grounds of termination in a language understood by the employee, the reasons for which termination of employment was being considered, entitlement of the employee to the presence of another employee of his choice or shop floor representative when the explanation of the grounds of termination is made and hearing and considering any representations by the employee and the person chosen by the employee.

The trial court was faulted for having found that termination of the respondent's employment was procedurally unfair under grounds 1 and 2 of the Memorandum of Appeal.

It is common ground that the respondent issued a notice to show cause to the respondent requiring him to explain "why on 20th and 21st February 2021 for opening at 5:57".

The notice required a written statement of the respondents account and a hearing was scheduled for the

following day at 10:00am in Nairobi. Thus, the respondent had to make arrangements to travel to Nairobi.

Clearly, the respondent was neither accorded time to write his statement nor prepare his defence.

Contrary to the appellant's contention that trial court erred for having found that the process was conducted hurriedly, the learned trial magistrate was expressing an obvious fact on account that the appellant concluded the entire process in less than 24 hours.

Timelines are essential to the court in determining whether the employee was accorded time to prepare him/herself for the hearing as well as respond to the notice to show cause.

The disciplinary is not a mechanical process nor is it conducted to tick the boxes. It is a legally prescribed process designed to ensure fairness of termination of the employment contract.

The purpose of a notice to show cause is to provoke the employee to reduce his/her response into writing and it is the basis on which the employer determines whether or not a hearing is necessary. Indeed, a response to the

notice to show cause often terminates the contemplated disciplinary process.

It is therefore essential for the employer to accord the employee reasonable time to respond to the notice to show cause and prepare for the hearing.

In this case, the respondent was accorded less than one (1) day to respond, prepare and attend a hearing which implicated the procedural fairness of the process.

In the court's view, and as already observed elsewhere in this judgment, the trial court cannot be faulted for having stated that the process was conducted hurriedly as it was a factual observation.

Relatedly, the notice to show cause dated 23rd February 2026 did not inform the respondent that he had the right to be accompanied by a fellow employee of his choice, could call witness and had the right to cross-examine witnesses, if any.

This was a serious omission and again implicated the fairness of the process and in particular the right to be heard of which fair hearing is part.

The fact that the appellant did not inform the respondent of his rights and did not accord him reasonable time to respond to the notice to show cause, the nature of the charge notwithstanding, impaired his right to fair hearing.

The sentiments of the Supreme Court in **Gichuru V Package Insurance Brokers KESC 12 (KLR)** relied upon by the trial court were apt:

*"The procedure followed to terminate the contract was in breach of Section 41 and 45(2)(c) of the Employment Act for the reason that the appellant was not accorded a chance to defend or respond to the allegations against him. Although the letter of appointment provided for no prior notice when terminating the employment due to gross misconduct, that stipulation could not be used to oust a mandatory and express statutory provision in Section 41 of the Employment Act. The failure to follow fair procedure rendered the termination of the appellant's employment unfair within the meaning of Section 45 of the Act".*

These sentiments apply with equal force to the circumstances of the instant appeal.

Finally, the absence of minutes of the disciplinary hearing further dented the appellant's submissions that it subjected the respondent to a fair disciplinary process and he had the opportunity to defend himself.

Minutes of a disciplinary hearing speak for themselves. They indicate the date, time and place of the meeting, the members of the disciplinary panel, other attendees, who was chairing the committee meeting, those absent, agenda of the meeting, and whether the charges were read out to the employee in a language he/she understood.

Similarly, minutes reveal whether the employee had any objections or reservations sought an adjournment or raised any issue or was comfortable proceeding on that day. They also show how the proceedings were conducted and reveal whether the employee was given a chance to make his submissions or state his/her case or adduced evidence.

Finally, they show whether the disciplinary committee or panel heard and considered the representations by the employee and/or the employees he/she appears with.

These facts cannot be established to the required standard by oral testimony for obvious reasons. People forget, memories fade and witnesses often dramatize their positions for acceptability.

The fact that the respondent attended the hearing on 24th February 2021 cannot avail the appellant whose duty was to prove that it conducted the respondent's summary dismissal in consonance with the provisions of Section 41 and 45(2)(c) of the Employment Act which prescribe the standards of procedural fairness.

The foregoing clearly shows that the appellant failed to evidentiary prove that the respondent's summary dismissal on 24th February 2021 was procedurally fair.

In the end, the court is in agreement with the finding of the trial court that termination of the respondent's employment by the appellant was procedurally unfair.

From the forgoing, it is clear that the respondent's summary dismissal was neither substantively nor procedurally fair and the court so finds.

The respondent prayed for a declaration that termination of the respondent's employment was unfair and having found as above, the declaration sought was merited.

As regards salary arrears, the respondent adduced no evidence of any pending salary. The prayer was not proved and it was disallowed by the trial court.

Similarly, the respondent did not deny that he signed the letter dated 16th June 2020 by which he confirmed that he was on unpaid leave and rendered no services to the appellant.

The trial court was faulted for having awarded salary in *lieu* of notice on the premises that the respondent was subjected to a fair and procedural summary dismissal, but having found that the summary dismissal was not only substantively but also procedurally unfair, the award was merited and it is upheld Kshs.23,000.00

The respondent availed no evidence of the leave days pending, when they arose or whether he was prevented from proceeding of leave. The claim was unmerited.

Concerning service pay, which is awardable pursuant to the provisions of Section 35(5) of the Employment Act, the respondent's payslip for February 2021 showed that the respondent was a member of the National Social Security Fund (NSSF) and deductions were made. The respondent adduced no evidence to prove that deductions were not being remitted to the NSSF.

Section 35(6)(d) of the Employment Act disqualifies members of the NSSF from being awarded service pay. The claim was unproved.

Finally, as regards compensation for unfair termination of employment, the trial court was faulted for awarding the equivalent of six (6) months gross salary, yet according to counsel, the summary dismissal was conducted fairly.

In the court's view, the only thing the learned trial magistrate may be faulted for is that she did not demonstrate the relevant parameters the court took in consideration in arriving at the six (6) months and not two (2) or three (3).

Taking in account that the respondent was in employment for about 1 year and 10 months which is

fairly short had a warning dated 17th July 2019 and another dated 29th September 2020, did not express his wish to remain in employment or appeal the decision, the equivalent of four (4) months gross salary was sufficient compensation, Kshs.92,000.00

The failure by the trial court to justify the award of six (6) months salary as compensation justifies the court's interference with the exercise of discretion by the trial court in accordance with the principles enunciated in **Price and another V Hilder** [1986] KLR 95 as well as **United India Insurance Co. Ltd and another V East African Underwritters (Kenya) Ltd** [1985] eKLR.

See also **Mbogo & another V Shah [1968] eKLR** and **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** [2003] KLR 125.

The upshot of the foregoing is that the decision of the trial court is interfered to the extent that the award of six (6) months gross salary as compensation is adjusted to four (4) months Kshs.92,000.00.

All other awards by the trial court are upheld.

In light of the partial success of this appeal, parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 28TH 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**