

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. E025 OF 2020

FREDRICK ASHORO.....CLAIMANT

VERSUS

CARGIL KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Let me start this judgment by stating this. Procedural fairness in the termination of employment transcends the narrow confines of Section 41 of the Employment Act; it encompasses faithful adherence to constitutional guarantees enshrined under Article 47 on the right to fair administrative action and Article 50 on the right to a fair hearing, observation of the cardinal principles of natural justice, and strict compliance with an employer's own disciplinary procedures set out in their human resource policies and practices.
2. Substantive fairness is not satisfied by an employer's mere assertion that it believed a ground for termination existed; the law demands cogent proof that a valid and fair reason

existed at the time of termination. A valid reason must be real, lawful, and objectively ascertainable, founded on verified facts rather than suspicion, conjecture, or caprice. It must relate to the employee's conduct, capacity, compatibility, or to the employer's operational requirements, and be supported by credible evidence capable of withstanding scrutiny. A fair reason, in turn, is one that is proportionate to the circumstances, arrived at after due inquiry, and consistent with equity, reasonableness, and the employer's own policies and standards. Anything less falls short of the statutory and constitutional threshold governing termination of employment.

Background

3. By his Statement of Claim dated 26th May 2020, the Claimant sued the Respondent herein, seeking the following reliefs against the Respondent, thus;
 - (a) Kshs.2,287,664.80/= plus interest thereon from the date of filing of this suit.
 - (b) Costs of this suit plus interest thereon.

4. He, in his said pleadings, particularised the reliefs as hereunder;
 - (a) 1 month's salary in lieu of Notice of Termination, Kshs.107,904/=
 - (b) Unpaid leave days for 2018, Kshs.107,904/=

(c) House allowance calculated at 15% of the basic salary, $16,185.6 \times 12 \times 4$ Ksh.776,908.80/=

(d) Certificate of Service

(e) Compensation for unlawful termination. Calculated at 12 months' salary ($107,900 \times 12$) Kshs1,294,848/=

TOTAL Kshs. 2,287,664.80/=

5. The Respondent resisted the Claimant's claim through a Memorandum of Response dated 13th August 2020, contending that the termination of the Claimant's employment was lawful and fair, having arisen from his gross misconduct. He is not entitled to the reliefs sought, therefore.
6. At the hearing, the parties adopted their witness statement filed herein as their evidence in chief and produced the documents filed under their respective lists of documents as their exhibits.

Claimant's case

7. The Claimant states that he started working for the Respondent, Cargill Kenya Limited, on 1st March 2014 as a warehouse clerk at Warehouse No. 1. He earned a basic salary of KShs. 19,000 plus a house allowance of KShs. 5,000, totalling a gross monthly salary of KShs. 24,000.

8. In December 2014, due to his exemplary performance, he was promoted to the position of Warehouse Supervisor with a monthly salary of KShs. 60,000. However, upon his promotion, the Respondent neglected to provide any house allowance.
9. In 2016, his salary was augmented to KShs. 90,000 per month, excluding house allowance. At the time of termination, he asserts that his gross monthly remuneration was KShs. 107,904, and he held the position of Warehouse Coordinator.
10. The Claimant asserts that during his period of employment, he was engaged in various warehouses located within the Respondent's premises, occupying different supervisory positions from March 2014 to August 2018. His final assignment was at Warehouse No. 4, commencing on 28th October 2017 and concluding with his dismissal.
11. He states that his responsibilities as a supervisor encompassed stock accounting, ensuring precise system entries for all products, tracking the origin of tea, recording truck and driver information, and managing shipment, storage, and export activities. He claims that system entries were regulated and could not be modified at the warehouse level without approval from the stock department.

12. The Claimant asserts that from the time he reported to Warehouse No. 4, no tea went missing under his watch, and he was never notified of any loss. He avers that on 9th July 2018, while on leave, he was summoned and issued a show cause letter dated 4th July 2018, placing him on compulsory leave until 7th August 2018.
13. He further states that, by a letter dated 11th July 2018, he was invited to a disciplinary hearing held on 18th July 2018. He contends that the hearing was procedurally unfair, as the individuals who made allegations against him were not present, and he was not provided with any investigation report regarding the alleged loss of tea, despite his requests for such documentation.
14. The Claimant avers that on 8th August 2018, he was summarily dismissed following a disciplinary hearing. He contends that the reasons given did not constitute valid grounds for summary dismissal and that he neither breached warehouse procedures nor committed any act of gross misconduct.
15. He asserts that, under the Respondent's warehouse procedures, no cargo could leave the warehouse without proper documentation verified by security officers and confirmation from the stocks department, making it

impossible for him to have been responsible for the alleged loss of tea.

16. The Claimant asserts that he filed an appeal against the decision of the disciplinary board on 13th August 2018; however, the appeal was ultimately dismissed, thereby upholding the summary dismissal.
17. He maintains that throughout his employment, he served the Respondent diligently, honestly, and professionally, and that his termination was unfair and unlawful.
18. Cross-examined by Counsel for the Respondent, the Claimant testified that on 25th October 201, he was a warehouse controller at warehouse number 4. The tea that was alleged to have been tipped was received in the Respondent's warehouses in June 2017. Any tipping had to be authorised by the Management.
19. He further testified that Mr. Matano and Mr. Mulwa were both working under his supervision.
20. When he was informed that the tea was missing, he went to confirm and ascertained that it was indeed missing.
21. During the disciplinary hearing, he was accompanied by Joel Ekiom, a warehouse clerk. He was afforded an opportunity to

explain himself. The termination of his employment followed the disciplinary hearing.

22. In his evidence in re-examination, the Claimant testified that he was informed of the missing tea in 2018. At that time, he was in charge of warehouse No. 4. The tea alleged to have gone missing was in warehouse No. 1. His other Co-supervisors, for warehouse Nos. 3 and 5 had access to the missing tea.

Respondent's case

23. The Respondent, Cargill Kenya Limited, presented two witnesses, Geoffrey Ndai Mwangi [RW1], and Linet Anyika, its Human Resources Manager, to testify on its behalf.

24. RW1. testified that at the material time, he was a Security Manager with the Respondent stationed at its Lesiolo Grain Handlers Limited, a subsidiary of the Respondent. His position entailed ensuring the facility's security and safety, managing the Respondent's security, and conducting investigations and gathering intelligence.

25. On 20th May 2018, he was commissioned by the Respondent's Management to conduct investigations into the circumstances surrounding the tea that was discovered missing from the Respondent's Mombasa premises on 26th April 2018.

26. He duly conducted the said investigations and presented his findings via a report dated 20th May 2018 to the management.
27. Cross-examined by Counsel for the Respondent, Ms Nyange, the witness stated that he prepared the investigation report while he was employed by the Respondent. In September 2018, he was still employed by the Respondent and, as such, was still employed when the disciplinary hearing against the Claimant was conducted. However, he was never called to participate in the hearing in any capacity.
28. His report contained specific findings concerning certain individuals, in addition to the Claimant. In his report, he relied on a statement by Matano Rundu. The report doesn't state whether he relied on any records or any evidence from the stores department. Further, in the report, he stated that the tea in issue disappeared mysteriously from the warehouse.
29. He further stated that whenever tea was stored in the main office, it was the duty of the staff at that office to keep records of it.
30. It was alleged that the tea was taken to the main office. The main office is not within the same compound as the warehouse. He could not confirm whether or not the tea ever

reached the main house. The Claimant was not the Supervisor of the main office. There was confirmation from more than three people that the tea left the warehouse for the main office.

31. He further testified that Raphael Mwadime, who was then the Respondent's Business Manager, gave him records showing that the tea was missing. However, these records are not included in his investigation report.
32. In his evidence in chief, the witness stated that the tea disappeared between the warehouse and the main office.
33. RW2 stated that at all material times, the Respondent was involved in the buying and selling of tea, and in connection with the business and through its elaborate warehousing system, the Respondent would also handle varying quantities of tea for various customers.
34. The Claimant was at all material times an employee of the Respondent in the position of a warehouse Supervisor. He was stationed at the Respondent's business premises in Mombasa.
35. The Claimant was terminated on the 8th August, 2018, and before the decision to terminate his employment was reached, procedural fairness dictates were duly adhered to.

36. The termination was for a valid reason. There was sufficient evidence clearly demonstrating that the Claimant was involved in the unauthorised tipping of 100kg of a client's tea. An inquiry found that the client's tea was distributed free of charge to members of staff of the Respondent on the Claimant's instructions. Following the loss of the client's tea, the Respondent had to account for and make good the related financial loss of USD 2,500.00.
37. Under the Respondent's Warehousing Procedure Manual, the Claimant's responsibilities as a Warehouse Supervisor included overseeing all tea stock and all warehouse stock, and being accountable for all warehouse operations and all warehouse staff.
38. On or around 26th April 2018, it came to the Respondent's attention that even though the warehouse records kept until then were to the effect that 100kg of tea received from a client and identified as Tinderet Uniliver Charity Tea, the same was, as a matter of fact, not physically available in the Respondent's Warehouse No. 1 as expected.
39. The Claimant's claim for house allowance is unfounded. He earned a consolidated salary.
40. Cross-examined by Counsel for the Claimant, the witness testified that at the time of termination, the Claimant was

earning a monthly salary of KShs. 107, 904. An employer is bound to give an itemised pay slip to an employee. The Claimant's pay slip did not have an item for house allowance. At the time of termination of his employment, he was a Warehouse Coordinator at Warehouse Number 4.

41. The disciplinary process started with a show cause letter dated 3rd July 2018, being issued to the Claimant. The letter required him to address three issues.
42. The Claimant was not at any time working at the main office, which was far away from the warehouse.
43. The termination of his employment was effected through a termination letter. The letter did set out three grounds for the termination. One of the grounds for the termination set out was that he led the Respondent to suffer a loss of KShs. 250,000, which put the Respondent's name to disrepute. This ground was not one of those that he was invited to answer through the show cause letter.
44. At the time the discovery of the disappearance of the tea from warehouse No. 1 was made, the Claimant had been transferred to warehouse No. 4.
45. The Respondent has a checks system. Among them, warehouse audits are typically conducted by the finance, supplies, and supply chain departments. They do physical stock-taking and cross-check it against what is recorded in

the system. This is a monthly exercise. After the exercise, they print out a reconciliation sheet. The report is then kept both at the finance department and the supplies department.

46. At the same time, the Respondent has external auditors who carry out annual audits on the affairs of the Respondent. In the event of any loss, they would point it out in their reports.
47. The Respondent hasn't placed before this court the stock reconciliation sheets for 2017 and 2018.
48. She further testified that the tea in question was received by the Respondent on 27th June 2017. The prompt date for the invoice regarding this tea was 9th May 2025. The invoice was an auction invoice as the tea was purchased in an auction.
49. The Respondent kept records for tea that moves from one department to another, among them, the daily movement sheet. The recipient must sign the sheet to acknowledge receipt of the tea. The Respondent has not presented any document to show the movement of the tea in question.
50. She further testified that at all material times, the Human Resources Manual guided disciplinary processes within the Respondent enterprise. Clause 14.5.3 provides for instances of minor or gross misconduct. The Clause provides for 1st and 2nd warnings. In this case, the Claimant was not issued with any.

51. Under clause 14. 6. 1.8, even in serious cases, at least one warning has to be issued. Clause 14.1.3 provides for summary dismissal. It has to be preceded by a final warning. The Claimant was not given any final warning. He was only issued a show-cause letter.
52. At the time of issuance of the disciplinary hearing, only two statements had been recorded from staff. Clause 17. 4.1 requires a detailed inquiry before dismissal of an employee. The Claimant was not supplied with the investigation report contemporaneously with the show cause letter or at any time before the hearing.
53. Per the Manual, before a disciplinary process against an employee is undertaken, there must be a recommendation from the affected employee's higher-level management, in this case, the Warehouse Manager. There was none as regards the disciplinary proceedings against the Claimant.
54. Clause 17. 5.6 provides that the contents of the investigation report must be made known to the employee. Nothing in the disciplinary hearing minutes shows that the investigation report was made available to the Claimant.
55. The statements by the witnesses were handed over to the Claimant during the hearing, when Raphael handed the same over to him to read some portions thereof. The

statements were undated. The witnesses were not presented to testify at the hearing. As such, the Claimant didn't have an opportunity to cross-examine them.

56. In his statement, Mr. Matono expressly stated that he conveyed the tea to the main office, and that if it was distributed, then it was by the Human Resource Manager, who must have had the relevant documents and approval.

57. The Respondent has no document to show that the Claimant ever took leave for the period in question.

58. Mr. Matano and the investigation officer did not appear during the hearing.

Analysis and determination

59. I have carefully considered the pleadings, the evidence, and submissions by the parties herein, and the following issues emerge for determination;

a) Whether the termination of the Claimant's employment was fair.

b) Whether the Claimant is entitled to the reliefs sought.

60. Before I delve further into these identified issues for determination, I find it imperative address an issue raised by the Respondents' Counsel in his submissions. Counsel

submits that the Claimant didn't in his pleadings assert aver that termination of his employment was unfair for want of procedural fairness, and that as such, nothing turns on his evidence that he tendered geared towards establishing that the termination was procedurally unfair. To support this point, Counsel cites the holding in **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR.**

61. It is one thing for a disciplinary hearing to take place; it is quite another for that hearing to comply with the requirements of procedural fairness as prescribed by statute, the Constitution, the Human Resources policy of an enterprise, and the principles of natural justice. I see nowhere in the Claimant's pleadings where he states that the termination was procedurally fair. All he did was acknowledge in his pleadings that there was a disciplinary hearing and then demonstrated, with evidence, that it didn't meet the fairness threshold. I am not persuaded that the principle set out in the case cited by the Respondent's Counsel militates against the Claimant's case.

62. In the case **Chief Registrar of Judiciary & 2 others v LMN [2025] KESC 53 [KLR]**, the Supreme Court of Kenya stated;

“We begin this judgment by declaring that the fairness of any disciplinary process is today a

constitutional imperative, irrespective of the status of the officer involved. The process must uphold all the tenets of fair administrative action under Article 47 and the right to a fair hearing under Article 50 of the Constitution. In addition to these constitutional safeguards, by the provisions of the Judicial Service Act and the Fair Administrative Action, Cap 71, the disciplinary bodies, including the Judicial Service Commission [JSC], are bound to ensure that any disciplinary action against a judge, judicial officer and staff must strictly comply with both constitutional and statutory requirements.”

63. Section 41 of the Employment Act stipulates a mandatory procedure that any employer considering termination of an employee’s employment must follow. This process comprises three components: first, the employer shall notify the affected employee of their intention and the grounds for such an intention; second, the employer shall provide the employee with a sufficient opportunity to prepare and present their case regarding the grounds; and third, the employer must consider any representations made prior to making a final decision on the matter.

64. Focusing on procedural fairness within the limited scope of Section 41, it is easy to conclude— and this is what the

Respondent has done—that the disciplinary process was fair. However, a thorough review of all relevant events, when assessed against the Respondent’s Human Resource Policy, the principles of a fair hearing, and fair administrative action, reveals otherwise.

65. The Claimant complained that despite the Respondent’s Human Resources policy providing for it, the Respondents did not furnish him with the investigator's report prior to the hearing or at any time. Indeed, in her evidence during cross-examination, the Respondent’s witness admitted that the report was not supplied to the Claimant. Clause 17.5.6, which, in my view, is intended to enable an employee who is to face a disciplinary process prepare adequately for the process, and enable a disciplinary process which conforms with the tenets of natural justice and the requirements of a fair hearing, provides;

“For purposes of observing the principles of natural justice, the contents of the report on the offence committed shall be made known to the employee, but not the observations/recommendations of the Unit management. Copy of the report shall be sent to the Head of Human Resources.”

66. It is not in dispute that the basis of the charges against the Claimant was vitally, the statements that were allegedly

given by two members of staff, Mr Matano and Mulwa. Undoubtedly, as the Respondent's witness [RW2] admitted, the witness didn't appear before the disciplinary hearing for cross-examination by the Claimant. Further, the Claimant was not given their statements prior to the hearing. I note that the statements were simply given to him at the hearing by Mr. Raphael for him to read the contents to the panel. This was, with respect, a very casual way of handling a disciplinary process. It doesn't align with the dictates of a fair hearing and the tenets of natural justice.

67. This Court notes further the admission that the investigator was not called to present evidence during the disciplinary hearing.
68. The principles governing a fair disciplinary process were comprehensively and authoritatively articulated by the Supreme Court in **Shollei vs Judicial Service Commission & another [2022] KESC 5 [KLR]**. This Court affirms and adopts the principles in their entirety. It is not a matter of discretion or managerial preference whether an employer adheres to standards of procedural fairness; it is a constitutional and legal imperative. The safeguards pronounced in the *Shollei* case constitute binding guidance on the minimum requirements of fairness in disciplinary proceedings, including adequate notice of the allegations, disclosure of material, a genuine opportunity to be heard,

impartiality of the decision-maker, and a reasonable determination.

69. In my considered view, employers who disregard these principles do so at the peril of their decisions being found unfair. Workplace discipline cannot thrive in an atmosphere of arbitrariness. Fair process is not an inconvenience to be tolerated; it is the very foundation of lawful and sustainable human resource management.
70. By reason of the foregoing premises, I come to the inevitable conclusion that the summary dismissal against the Claimant was procedurally unfair.
71. I now turn to consider whether the summary dismissal of the Claimant was substantively justified. Counsel for the Respondent submitted that, under Section 47[5], the Claimant had a legal duty to prove that a wrongful dismissal occurred. Further, the Claimant did not discharge this legal burden, hence his case should fail. The question that arises here is what this legal burden entails. Inarguably, for some time after the enactment of the Employment Act, there was confusion about what discharging the burden entailed. However, through judicial precedent, the confusion has been cleared, and the position is trite. The employee is required to demonstrate prima facie that the dismissal was without adherence to the edicts of procedural and substantive fairness.

72. Having found as I have hereinabove on procedural fairness, and considering the Claimant's evidence on the investigation report, the evidence of RW1, on the fact that the Claimant is not mentioned specifically in the report, the evidence that came out on the contents of statement of Matano, the fact that the dismissal of the Claimant was based on *inter alia* a ground that was not in the show cause letter that he responded to, It isn't difficult to concluded that *prima facie* the termination was substantively unfair. See also **Mirera v Barclays Bank Limited [2018] eKLR.**

73. Having discharged his burden under the provisions of Section 47[5], the burden was shifted to the Respondent to justify the dismissal. See **Pius Machafu Isundu vs Lavington Security Guards Limited [2017] eKLR.**

74. There isn't no doubt that the disciplinary process against the Claimant was initiated through a show cause letter dated 3rd July 2018. On the accusations against the Claimant, the show cause letter read;

“Upon Management’s enquiry into the whereabouts of the above tea, it was established that the same had been tipped following your instructions and under supervision and allegedly given to staff in November 2017. The tipping exercise proceeded without the necessary Management approval or tipping instructions,

which is in breach of the Company procedure on warehousing as found in our QMS Warehouse procedure.

Further, during the weekly Operations meetings, you consistently reported that the tea was intact, whereas this is not the case.”

75. Time and again, this Court has held that the reasons for terminating an employee’s employment cannot be fair if they were not the subject of a show cause letter issued to the employee, or, where applicable, an invitation letter for a disciplinary hearing. Looking at the invitation letter dated 11th July 2018, it isn’t difficult to note that the accusation the Claimant was intended to defend himself against at the hearing was the one set out in the show cause letter, and on which he had made a response.

76. Further, I note that during the disciplinary hearing, the discussion focused solely on the single ground set out in the show cause letter. The dismissal letter explicitly stated the reason for the termination, thus;

“In view of the above, this matter serves to confirm the Company’s decision to summarily dismiss you from employment effective from the date of this letter on account of our having reasonable and sufficient grounds to believe that you carelessly and improperly performed your role as Warehouse Co-ordinator,

resulting in the financial and reputational loss to the company. Your dismissal is in accordance with Clause 18 of the Terms and Conditions of your employment contract and Section 44[4][c] of the Employment Act 2007.”

77. This isn't a ground that appeared in the show-cause letter or the invitation letter. In fact, it didn't even arise during the disciplinary hearing. As such, it cannot be held to be a fair and valid reason under section 45[2] of the Employment Act.

78. Assuming I am wrong on this, I still find that the summary dismissal was substantively unfair by dint of the stipulations of Section 45 of the Act. Throughout, it was maintained that the tea was tipped under the Claimant's instructions and supervision. However, when the evidence of the Respondent's second witness is considered with care, and especially that under cross-examination, a version emerges that isn't aligned with this. The distribution was supervised by the Human Resources Manager. This speaks to the fact that the Respondent didn't have a valid reason to summarily dismiss the Claimant.

79. Furthermore, the issue of whether Matano Gavana and Mr Mulwa Misili were instructed by the Claimant to transfer the tea for tipping was heavily contested both during the

disciplinary hearing and from the outset and throughout the proceedings before this court. These individuals were crucial witnesses whom the Respondent ought to have summoned. They are central to the controversy at hand. Inexplicably, they were not called to testify before this Court. Under the circumstances, I can only draw an adverse inference that, had they been called, their testimony could have been detrimental to the Respondent's case.

80. Considering the evidence presented to this Court, one cannot be off the mark in concluding that, during the disciplinary hearing and even before this Court, it was not established exactly when the tea was removed from the warehouse, whether it was when the Claimant was still serving in warehouse No. 1 or after he had been transferred to warehouse No. 4. No record was presented to establish this vital aspect.

81. In sum, the foregoing premises do not align with the Respondent's position and submissions that there was proof that the summary dismissal was with a valid and fair reason. It aligns with the Claimant's contention that the termination was without a valid and fair reason, and I so find.

82. Having found as I have hereinabove, I now turn to consider whether the reliefs sought are available for the Claimant.

1 month's salary in lieu of Notice of Termination, Kshs.107,904/=

83. Undoubtedly, pursuant to the employment contract and Section 35 of the Employment Act, 2007, the Claimant's employment could be terminated with one month's notice. It was not issued. I determine that he is entitled to receive one month's salary in lieu of notice in accordance with Section 36 of the Employment Act.

Unpaid leave days for 2018, Kshs.107,904/=

84. There was no evidence placed before this Court, and the Respondent's second witness admitted so in her evidence under cross-examination, to discount this claim. I would have no reason, therefore, to decline it.

House allowance calculated at 15% of the basic salary: $16,185.6 \times 12 \times 4$ KShs. 776,908.80/=

85. This relief cannot be granted. I have carefully considered the Claimant's employment contract; it stipulates that his salary was consolidated. In its literal sense, consolidated salary includes other emoluments over and above basic salary, such as house allowance, transport allowance, telephone allowance, etc. Good practice would require the employer to provide an itemised pay slip, but a failure to do so cannot be a basis for granting a house allowance, even when, as here, it is clear from the contract that the salary was consolidated.

I am not persuaded to grant the relief sought under this head.

Certificate of Service

86. A certificate of service is a statutory entitlement to an employee, regardless of how he leaves his employment. The same should be issued to the Claimant.

Compensation for unlawful termination. Calculated at 12 months' salary (107,900 x 12) Kshs1,294,848/=

87. Section 49[1][c] of the Employment Act 2007 authorises courts to grant compensatory relief to an employee who has successfully challenged their employer's decision to terminate their employment or summarily dismiss them. However, the authority is discretionary and exercised in light of the circumstances of each case.

88. I have carefully considered the manner in which the Claimant's employment was terminated, including the fact that the termination process did not even adhere to the Respondent's own policies, the casualness with which the disciplinary hearing was conducted, the fact that, in the circumstances of the matter, it was not proven that he contributed to his summary dismissal, the length of his service, and the fact that he was summarily dismissed in circumstances that would not justify such a grave sanction,

and have concluded that he is entitled to the compensatory award of ten[10] months' gross salary, KShs. 1,079, 040.

89. In the upshot, Judgment is hereby entered for the Claimant in the following terms;

- a) A declaration that the summary dismissal against him was wrongful and unfair.
- b) One month's salary in lieu of notice- KShs. 107, 904.
- c) Compensation for leave days earned but not utilised- KShs. 107,904.
- d) Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, 2007, ten [10] months' gross salary- KShs. 1,079, 040.
- e) Interest at court rates from the date of this Judgment till full payment.
- f) The Respondent to issue the Claimant a certificate of service within 30 days of this Judgment.
- g) Costs of the suit.

Read Signed and Delivered this 19th Day of February 2026.

OCHARO KEBIRA
JUDGE