

**REPUBLIC OF KENYA**

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

**ELRC APPEAL NO. E011 OF 2024**

*(Before Hon. Lady Justice Maureen Onyango)*

**SALOME KIGEN..... APPELLANT**

**VERSUS**

**STABEX INTERNATIONAL LIMITED.....**

**RESPONDENT**

*(Being an appeal against the Judgment of Honourable Barnabas K. Kiptoo delivered on 27<sup>th</sup> February 2024 in Eldoret CMEELRC No. 154 of 2022 between Salome Kigen v Stabex International Limited)*

**JUDGMENT**

1. The Appellant herein instituted proceedings against the Respondent before the lower court vide a Statement of Claim dated 8<sup>th</sup> September 2022 seeking the following reliefs:
  - a. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the Claimant is entitled to compensation of her terminal dues in the sum of Kshs. 1,345,167
  - b. Certificate of service

c. Costs and interest of the suit

d. Any relief the Court may deem fit and just

2. The Respondent filed a Response to the Memorandum of Claim dated 15<sup>th</sup> November 2021 denying that it unlawfully terminated the Appellant's employment. The Respondent averred that the Appellant was accused of aiding a customer service attendant by concealing the dispenser meter readings while the attendant improperly hung the dispenser pump nozzles in order to prevent automatic switch-off and reset after dispensing fuel.
3. Upon hearing the parties, the trial court found that the summary dismissal of the Appellant was neither unlawful nor unfair. Consequently, the trial court held that the Appellant was not entitled to the reliefs sought and dismissed the suit.
4. Aggrieved by the said judgment, the Appellant (the Claimant in the lower court) lodged the instant appeal vide a Memorandum of Appeal dated 22<sup>nd</sup> March 2024 on the grounds that:
  - a) The learned trial magistrate erred in law and in fact in not considering the evidence tendered by the Appellant.

- b) The learned trial magistrate erred in law and in not finding that the Claimant was unlawfully terminated.
- c) The erred in law and in fact by disregarding the submissions filed by the Appellant.
- d) The learned trial magistrate erred in law and in fact by considering irrelevant and or immaterial facts.
- e) The learned trial magistrate erred both in law and in fact by applying wrong legal principles in his entire judgement.
- f) The judgement of the learned trial magistrate is in the circumstance unfair and unjust.

5. Consequently, the Appellant seeks the following orders: -

- i. The entire judgement and decree of the Honourable magistrate in Eldoret CMELRC No. E154 of 2022 Salome Kigen v Stabex International Ltd be set aside and a proper finding be made by this court,
- ii. The Appellant's appeal be allowed,
- iii. The costs of the appeal be awarded to the Appellant.

6. The appeal was disposed of by way of written submissions. Both parties filed their submissions. The Appellant's

submissions are dated 18<sup>th</sup> July 2025 while the Respondent's submissions are dated 7<sup>th</sup> November 2025.

### ***Analysis***

7. This being a first appeal, the court is required to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not hear and see the witnesses who testified. See **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123.**
8. In her Statement of Claim, the Appellant sought compensation for alleged unfair and unlawful termination of her employment. She averred that she was employed by the Respondent as a Station Manager at Annex at a monthly salary of Kshs. 26,376/= and that it was an express term of her contract that the engagement was for a fixed duration of three (3) years commencing on 1<sup>st</sup> May 2020.
9. The Appellant's case was that she served the Respondent diligently, loyally and with full dedication until 7<sup>th</sup> April 2021 when she was issued with a show cause letter alleging that she had improperly handled a pump nozzle.

10. She averred that she duly responded to the show cause letter and appeared before the Human Resource Assistant as required, but was never accorded an opportunity to be heard. On this basis, the Appellant maintained that the Respondent unprocedurally, unlawfully and unfairly terminated her employment without affording her a fair hearing.

11. According to the Appellant, owing to the unfair termination she was entitled to terminal dues, which she tabulated as follows:

- i. Salary for the remaining period of the contract..... Kshs. 949,536
- ii. General damages for unfair termination..Kshs. 316,521
- iii. Severance pay.....Kshs. 26,367
- iv. Unpaid leave.....Kshs. 26,367
- v. Certificate of service
- vi. One month's salary in lieu of notice.....Kshs. 26,376
- Total.....Kshs. 1,345,167

12. In its defense, the Respondent in its Response to the Memorandum of Claim averred that the Claimant was caught aiding a customer service attendant by concealing dispenser

meter readings. The Respondent contended that a disciplinary hearing was conducted on 9<sup>th</sup> April 2021 during which the Claimant was given an opportunity to make representations before the disciplinary committee after which a decision was made to summarily dismiss her for gross misconduct.

13. The Respondent maintained that it acted in accordance with the terms of the contract of employment, the Employment Act and the Constitution in arriving at the decision to dismiss the Claimant.

### ***Evidence***

14. At the hearing, the Appellant testified as CW1 and adopted her witness statement dated 8<sup>th</sup> September 2022. It was her evidence that she was unlawfully and unfairly terminated from employment by the Respondent.
15. On its part, the Respondent called Anderson Kibii, its Retail Operations Manager, who testified as RW1. He adopted his witness statement and the documents filed on behalf of the Respondent.

16. On cross-examination, RW1 testified that the Claimant was served with a notice to show cause dated 8<sup>th</sup> April 2023 for a disciplinary hearing scheduled for 10<sup>th</sup> April 2023. RW1 stated that the hearing took place on 9<sup>th</sup> April 2023. He further stated that the Claimant attended the disciplinary hearing accompanied by a fellow employee.
17. The trial court dismissed the Claimant's suit on the basis that she failed to prove that the termination of her employment was unlawful or unfair.

### ***The Appellant's Submissions***

18. In her submissions the Appellant addressed each of the six grounds raised in the Memorandum of Appeal.
19. On the first ground, the Appellant submitted that although she acknowledged receipt of the notice to show cause inviting her to attend a disciplinary meeting scheduled for 8<sup>th</sup> April 2021, she stated that no such meeting took place on that date and that she did not attend any other disciplinary hearing. She further submitted that at page 65 of the Record of Appeal, RW1, during cross-examination, stated that the purported

disciplinary meeting took place on 10<sup>th</sup> April 2023, whereas the notice to show cause invited the Claimant to attend a disciplinary hearing on 8<sup>th</sup> April 2023. The Appellant also submitted that RW1, in his testimony, stated that the disciplinary meeting was held on 9<sup>th</sup> April 2023.

20. On this basis, the Appellant submitted that the contradictions as to the date the alleged disciplinary hearing was held is material and goes to the root of the Respondent's case, and that the trial court erred in law and fact by disregarding this evidence, which would have led to a finding that the Appellant was not subjected to any disciplinary hearing.
21. On the second ground, the Appellant submitted that she was invited to attend a disciplinary hearing scheduled for 8<sup>th</sup> April 2021 at 10:00 a.m. pursuant to a letter dated 7<sup>th</sup> April 2021 but no disciplinary hearing took place on that date, and she was instead instructed to go home and await further communication.
22. The Appellant further submitted that the Respondent produced purported disciplinary minutes dated 9<sup>th</sup> April 2021 alleging that she attended the said meeting. This according to the

Appellant was contradicted by the testimony of RW1, who stated in his testimony that the meeting was held on 10<sup>th</sup> April 2023. The Appellant contended that although the trial court, at page 5 of its judgment, acknowledged that the prescribed procedure was not followed, it nonetheless proceeded to hold that the Respondent had substantive justification to terminate her employment.

23. The Appellant submitted that the trial magistrate erred in law by finding that the termination was lawful despite the Respondent's failure to comply with the mandatory procedural requirements under Section 41 of the Employment Act.
24. On the third ground, the Appellant submitted that at the close of the trial, the court directed the parties to file written submissions. According to the Appellant, at page 67 of the Record of Appeal, the trial court acknowledged that only the Claimant had filed submissions. The Appellant contended that in her submissions, she expressly raised the issue that her termination was unfair for failure to comply with the prescribed termination procedure, and that the Respondent did not file any submissions in response to those issues. It was therefore

her submission that the trial magistrate failed to consider her submissions in their entirety, thereby arriving at an erroneous conclusion.

25. On the fourth ground, the Appellant submitted that at page 71 of the Record of Appeal, the trial court stated that it was convinced that the Claimant operated the fuel pump in a manner suggesting manipulation for her own gain. According to the Appellant, this finding was speculative and based on matters that were neither pleaded nor proved by evidence during the trial, and therefore amounted to consideration of irrelevant and immaterial facts.
26. On the fifth ground, the Appellant submitted that although the trial court found that the Respondent did not follow the prescribed procedure before dismissing her, it nevertheless upheld the dismissal on the basis of alleged substantive justification without cogent evidence of gross misconduct or breach of contract. Relying on ***Nicholas Muasya Kyule v Farnham Limited* [2012] eKLR** and ***Kennedy Muriuki Gichangi v County Government of Kirinyaga* [2019] eKLR**, the Appellant submitted that having found non-

compliance with Section 41 of the Employment Act, the trial court misapplied the law by validating the termination. She contended that the judgment therefore had no legal basis and was unfair and unjust.

27. In the end, the Appellant urged the Court to set aside the entire judgment and decree of the Honourable Magistrate delivered on 27<sup>th</sup> February 2024 and to make a proper finding.

### ***The Respondent's Submissions***

28. In its submissions, the Respondent contended that the Appellant's assertion that the trial court failed to consider her evidence was misleading and unsupported by the record. The Respondent submitted that the trial court properly evaluated and weighed the Appellant's evidence against the Respondent's consistent and corroborated evidence, including the disciplinary hearing minutes and the testimony of RW1.
29. The Respondent further submitted that the Appellant's allegation that the disciplinary hearing was a sham was contradicted by the disciplinary minutes, her admitted presence at the hearing, and the testimony of RW1. It was

contended that the Appellant's denial of signing the minutes did not invalidate the disciplinary process and that the requirements of procedural fairness were satisfied. The Respondent argued that substantial compliance with Section 41 of the Employment Act was sufficient in the circumstances. In this regard, the Respondent submitted that the judgment of the trial court clearly captured that the Appellant confirmed during cross-examination that she was present at the disciplinary hearing, as reflected at page 69 of the Record of Appeal, and that the trial court extensively analyzed her testimony, including the fact that she received and responded to the notice to show cause and attended the disciplinary hearing.

30. In response to allegations made by the Appellant that the trial court did not consider her submissions despite the Respondent not filing submissions, the Respondent submitted that it duly filed submissions dated 26<sup>th</sup> January 2024, as reflected at pages 49 to 58 of the Record of Appeal. It was further submitted that submissions do not constitute evidence but are merely persuasive arguments, and that a court is required to

determine a matter on the basis of pleadings, evidence, and the applicable law. In support of this position, the case of Douglas ***Odhiambo Ape & Another v Telkom Kenya Ltd*** and ***DK Law Advocates v Zhong Gang Building Material Co. Ltd & Another*** was cited.

31. On the allegation that the trial court relied on irrelevant considerations, the Respondent submitted that the finding that the Appellant manipulated the fuel pump for her own gain was a reasonable inference drawn from customer complaints, video surveillance footage, and the disciplinary minutes. It was further submitted that the Appellant admitted, both in her response to the notice to show cause and during cross-examination, that she leaned on the fuel pump, thereby corroborating RW1's testimony that she concealed the pump readings. Citing ***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others [2019] eKLR***, the Respondent submitted that an employer is only required to demonstrate reasonable suspicion, and not criminal liability, to justify dismissal for misconduct.

32. The Respondent submitted that the trial court properly applied the reasonable employer test and that the Appellant failed to demonstrate that the findings were not supported by the evidence on record.
33. It was further submitted that an appellate court should not interfere with findings of fact made by a trial court unless such findings are shown to be perverse or unsupported by evidence, which threshold had not been met in the present case.
34. The Respondent maintained that the trial court correctly applied Sections 41, 43, 45, and 47(5) of the Employment Act and the relevant jurisprudence, and that the Appellant was lawfully dismissed pursuant to Section 44(4)(g) of the Employment Act.
35. In conclusion, the Respondent submitted that the Appellant was not entitled to the remedies sought and urged the Court not to interfere with the judgment delivered on 27<sup>th</sup> February 2024.

## **Determination**

36. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, I find that the issues that fall for this court's determination in the appeal are: -

- i. Whether the trial court erred in finding that the Appellant's termination was substantively justified,
- ii. Whether the trial court erred in law and fact by finding that there was a procedural lapse but nonetheless upholding the Appellant's termination as lawful,
- iii. Whether the Appellant is entitled to the reliefs sought.

*Whether the trial court erred in finding that the Appellant's termination was substantively justified*

37. Section 43 of the Employment Act stipulates that an employer bears the burden of proving the reasons for termination, and where the employer fails to do so, the termination is deemed unfair within the meaning of Section 45 of the Act. The reasons relied upon must be valid, fair, and supported by evidence.

38. The reason for the dismissal of the Appellant from employment was allegations that she aided a customer service attendant to manipulate fuel dispensing by concealing dispenser meter readings and improperly hanging of the pump nozzle. The Respondent further contended that CCTV footage captured the Appellant engaging in the alleged misconduct.
39. It is a fundamental principle of law that an employer seeking to justify summary dismissal must provide cogent evidence of the misconduct alleged. Allegations unsupported by demonstrable evidence cannot form a basis for dismissal.
40. I have reviewed the Record of Appeal at length and noted that the CCTV footage referred to in the proceedings, although filed, was never produced in court because the Appellant's counsel objected to its production without a certificate required for electronic evidence. Nevertheless, the hand written responses to the notice to show by the two pump attendants who were working with the Appellant, that is Titus Kipruto and Faith Koech, clearly confirm that they both failed to return the nozzle of the fuel pump to its resting place which would automatically reset the fuel pump to zero.

41. In his reply to show cause letter Titus wrote: *“I found myself catching the nozzle severally at which I was no intention of frauding the pump. Imagine akili yangu haikuwa hapo nikishika pump sikumbuki ata nikishika hapo. Pliz forgive me....”*. (sic)
42. In her reply to show cause letter Faith Koech wrote: *“After serving the motor bike I took back the nozzle and relaxed waiting for the motor bike to leave, so that I go back to the pump where I was assigned on that day.  
I was not having any intention of stealing from the customer.”*
43. The Appellant on her part wrote *“according to CCTV footage at annex Station camera it showed me standing and one of my hands touching machine which I had only supported myself with I had no intention of aiding to conceal the improper hanging of display pump nozzle as indicated in the letter. ... on the said date a crown company Nissan came and parked ... our LPG rack for almost 10 minutes and he proceeded to come where I was and he asked for till number and without ... my hands where touching the pump body as I continue taking with the Nissan driver.”* (sic)

44. From the foregoing it is difficult to understand why the Appellant was standing at the pump all that while and blocking the pump readings while the two pump attendants were holding nozzles of the pumps without returning them to their resting place to reset the pump to zero, when all the of them were acting in contravention of the Respondents instructions on handling of pumps and customers. The actions of all the three could not be a coincident. Nor are their explanations in their responses to the notices to show cause convincing.

45. I find no reason to disagree with the conclusion reached by the Respondent that the acts of the Appellant and her two colleagues were deliberate and intended for conceal irregular activities at the fuel pumps from being captured in the CCTV.

*Whether the trial court erred in law and fact by finding that there was a procedural lapse but nonetheless upholding the Appellant's termination as lawful*

46. Section 41 of the Employment Act prescribes mandatory procedures that an employer must comply with before terminating the employment of an employee on grounds of

misconduct. The law requires that an employee be informed of the reasons for the contemplated termination in a language that they understand, and that the employee be given an opportunity to respond and be heard.

47. In the instant case, the record indicates that the Appellant received a show cause letter dated 7<sup>th</sup> April 2021, inviting her to attend a disciplinary hearing scheduled for 8<sup>th</sup> April 2021. The Appellant testified that no disciplinary hearing took place on that date and that she was instead instructed to go home and await further notice. Under cross examination the Appellant admitted that she was called for a disciplinary hearing and was in attendance alongside Titus Kipruto. As recorded in the proceedings, the Appellant specifically stated *“I have no issue with the process of sacking me”*.
48. The minutes of the disciplinary hearing, appearing at page 38 of the record of appeal, indicate that a hearing was conducted on 9<sup>th</sup> April 2021.
49. The trial court acknowledged that the procedural requirements were not strictly followed. The court observed:

*“In the matter before me, I am of the considered opinion that in as much as the procedure might have not been followed to the letter, the Respondent gave the Claimant an opportunity to be heard. The court is convinced that the Claimant operated the pump in a manner to suggest that she was manipulating the fuel pumps for her own gain. ... I am convinced that the Respondent had a substantive justification to bring to an end the Claimant’s employment.”*

50. I agree with the conclusion of the trial court and confirm the same. I find no error in the finding of the court.

*Whether the Appellant is entitled to the reliefs sought*

51. The Appellant having not been unfairly and unlawfully terminated from employment, I now consider if she is entitled to any of the prayers sought in her claim. In her Statement of Claim, the Appellant prayed for several remedies which I will address in separate heads.

*i. A declaration that the claimant’s services were unprocedurally, unlawfully and unfairly terminated*

In light of the findings of this Court that the Respondent largely complied with the substantive and procedural requirements of the Employment Act, 2007, the Appellant is not entitled to a declaration that the termination of her employment was unlawful. This prayer is dismissed.

ii. *Terminal benefits*

a. *Salary for the remaining period of the contract*

Generally, an employee is not entitled to salary for the unexpired portion of a fixed-term contract, unless there is a specific contractual provision or the dismissal amounts to a breach of contract attracting damages. This prayer is therefore declined

b. *Compensation for Unfair Termination*

The Appellant's dismissal having not been found to be unfair, she is not entitled to compensation.

c. *Severance pay*

The Appellant was summarily dismissed for gross misconduct and not terminated on account of redundancy. This claim is therefore not merited and is declined.

*d. Unpaid leave*

The Appellant did not lead evidence to establish any accrued leave. This prayer is declined

*e. Certificate of service*

Pursuant to section 51 of the Employment Act, the Appellant is entitled to a Certificate of service.

*f. One month's salary in lieu of notice*

The Appellant having not been unfairly and unprocedurally summarily dismissed from employment, she is not entitled to this prayer.

52. In conclusion, the judgment of the Trial Court dismissing the Appellant's suit is upheld. The appeal is accordingly dismissed. The Appellant is however entitled to a certificate of service in terms of section 51 of the Employment Act if the same has not yet been issued to her by the Respondent.
53. Each party shall bear its costs of the Appeal.
54. Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY  
THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**M. ONYANGO  
JUDGE**