

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**APPEAL NO. E074 OF 2022**

**LEVS TRADING COMPANY LIMITED.....**  
**.....APPELLANT**

**VERSUS**

**MOSES WANYONYI SIBOLO.....**  
**RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Honourable Lesootia Saitabau PM in NAIROBI CMCC No. E1314 of 2021 (Moses Wanyonyi Sibolo Vs Levs Trading Company Limited) dated 19th May 2022)***

**JUDGMENT**

**Introduction**

1. The Respondent sued the Appellant before the Nairobi Chief Magistrate's Court, claiming that he was dismissed without due process and that upon termination, he was not paid his terminal dues nor issued with a certificate of service.
2. In a judgment delivered by Hon. Lesootia Saitabau on 19<sup>th</sup> May, 2022, the Court found in favour of the Respondent and awarded him the prayers in his statement of claim, save for severance pay for reasons explained under the said Judgment.

3. Aggrieved by this outcome, the Appellant lodged a Memorandum of Appeal before this court on 15<sup>th</sup> May, 2022, contending that:-

- i. The Learned Magistrate erred in law and fact in entering Judgment in favour of the Respondent
- ii. The learned Magistrate erred in law and fact in failing to find that the Respondent did not prove his case against the Appellant on a balance of probabilities.
- iii. The Learned Magistrate erred in law and fact in finding that the Respondent was denied a hearing before termination of his employment by the Appellant.
- iv. The learned Magistrate erred in law and fact in awarding the Respondent housing allowance against the weight of evidence.
- v. The Learned Magistrate erred in law and fact in awarding the Respondent 6 months' salary as compensation for unfair termination.
- vi. The learned Magistrate erred in law and fact in failing to appreciate and interpret the applicable provisions of the Employment Act correctly.
- vii. The Learned Magistrate erred in law and fact in failing to correctly appreciate the facts and evidence presented before him and apply the applicable law to them.
- viii. The Learned Magistrate erred in law and fact in failing to decide on all issues presented before the Court

and in making a decision against the weight of evidence adduced.

4. The Appellant, in the circumstances, prays that its appeal be allowed and the decision of the Trial Court set aside.
5. Both parties filed submissions pursuant to leave granted on 22<sup>nd</sup> October, 2025.

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

6. The Appellant submits that Sections 41, 43, and 45(2) of the Employment Act provide the legal framework for termination of employment, and that an employer must follow due procedure and prove there was a valid and fair reason for termination. It is its further submission that Section 41 specifically addresses termination on grounds of misconduct.
7. The Appellant submits that Section 44(4) outlines instances that may amount to gross misconduct justifying summary dismissal, including absence without leave, intoxication during working hours, wilful neglect of duty, careless performance of work, use of abusive language, insubordination, prolonged detention following arrest, and commission or reasonable suspicion of committing a criminal offence against the employer or the employer's property.

8. It submits that in this case, the misconduct is theft of a client's goods by the Respondent. It is its submission that under Section 268(1) of the Penal Code, theft is defined as fraudulently and without claim of right taking or converting property belonging to another.
9. The Appellant submits that as a result of engaging in theft, the Respondent irreparably damaged the employment relationship, rendering it untenable and justifying immediate summary dismissal. The Appellant placed reliance in ***Lihanda Ada Yohana v Kenya Nut Company Limited, Nakuru Cause No. 415 of 2016***, where the Court upheld summary dismissal after the Claimant admitted to stealing milk.
10. It further submits that in the present case, the Respondent admitted involvement in the theft through a written apology dated 22nd May 2021, and it therefore urges the Court to find that the dismissal was lawful and based on gross misconduct.
11. The Appellant submits that Section 47(5) of the Employment Act places the burden on the employee to prove unfair termination, while the employer must justify the grounds for dismissal. It submits that the Respondent alleged that the letters he signed were executed under duress and that the signatures were forged, but he failed to provide evidence to substantiate these claims, rendering them mere allegations. It is its further submission that under Section 107 of the

Evidence Act, the party who alleges must prove the existence of the facts asserted.

12. The Appellant maintains that despite clear evidence and the Respondent's own admission of involvement in the theft, the trial Magistrate erred in law and fact by failing to properly consider this evidence, and that the finding of unfair termination was erroneous.

13. It submits that the evidence on record demonstrates full compliance with all statutory and procedural requirements in effecting the Respondent's summary dismissal. The Appellant asserts that it conducted investigations into the alleged theft, accorded the Respondent a fair hearing prior to termination of his contract, and thereafter computed his terminal dues.

14. The Appellant further states that the Respondent was invited to collect a cheque for his dues, but he declined to accept it. The Appellant maintains that the dismissal was lawful, procedurally fair, and justified.

15. The Appellant submits further that the Respondent failed to prove his case and was therefore not entitled to the reliefs awarded by the trial court. It avers that the award of Kshs 25,150 as one month's salary in lieu of notice is challenged on the basis that the termination resulted from theft, which constitutes gross misconduct.

16. The Appellant further contends that it proved the termination was lawful, fair, and procedurally proper, hence the award of Kshs 150,900 as compensation for unfair termination should not have been granted.
17. Regarding house allowance, the Appellant argues that the trial Magistrate erred in awarding Kshs 213,475. It maintains that the house allowance was already included in the Respondent's consolidated monthly salary, even though it was not separately itemized in the employment contract.
18. The Appellant maintains that the Respondent's dismissal was founded on valid and fair grounds, specifically gross misconduct involving theft and dishonesty. It further submits that the summary dismissal process complied with all statutory and procedural requirements, observing the principles of natural justice and fair labour practices.
19. Finally, the Appellant argues that the Respondent was not entitled to the remedies awarded by the trial court. It therefore prays that the appeal be allowed with costs, and that the judgment and decree in ***Nairobi MCELRC Case No. E1314 of 2021, Moses Wanyonyi Sibolo v Levs Trading Company Limited***, dated 19th May 2022, be set aside.

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

20. It is the Respondents' submission that he discharged his legal burden, while the Appellant failed to prove both the

reason for termination and the fairness of the process as required under Section 43 of the Employment Act. He submits that under that provision, an employer must prove the reasons for termination, and failure to do so renders the termination unfair within the meaning of Section 45.

21. The Respondent further submits that the reasons must be those that the employer genuinely believed to exist at the time of termination.

22. The Respondent argues that the allegation of theft was not supported by corroborative evidence and therefore did not meet the statutory threshold. It is submitted that although theft is a serious offence, no criminal prosecution was initiated against him.

23. It is further submitted that the Appellant relied solely on information and a photographic image allegedly received from Carrefour, without conducting any independent investigation to verify its authenticity, context, or accuracy, and that no CCTV footage was produced, despite its importance in proving allegations of theft within commercial premises.

24. It is the Respondent's submission that no inventory or stock records were tendered to demonstrate any loss attributable to the Respondent. The Respondent contends that the Appellant also failed to call witnesses from Carrefour who could have provided firsthand accounts, thereby denying the Respondent an opportunity to challenge or cross-

examine the source of the allegations. He contends further that no police report or Occurrence Book (OB) entry was presented, which would ordinarily document such incidents.

25. It is the Respondent's submissions that, taken together, these omissions demonstrate a failure to observe procedural fairness. The Respondent maintains that he was dismissed without proper investigation, without sufficient evidence, and without a meaningful opportunity to respond to substantiated allegations. Consequently, the summary dismissal was unjustified and contrary to statutory and common law requirements governing fair disciplinary processes.

26. The Respondent submits that the Appellant failed to comply with the mandatory statutory requirements governing disciplinary proceedings, as the alleged "hearing" was procedurally deficient, as there were no minutes, no written outcome, and no evidence of procedural safeguards. It is his submission that no witness was called to confirm that a disciplinary meeting was actually conducted, and as a result, he was denied the legal protections guaranteed under Section 41 of the Employment Act.

27. The Respondent had reliance on the decision of the Court of Appeal in ***Kenfreight (EA) Ltd v Benson K. Nguti (2016) KECA 409 (KLR)***, where the Court held that compliance with Section 41 is mandatory and that failure to

adhere to its provisions renders a termination procedurally unfair.

28. The Respondent therefore maintains that the trial court properly found that the Appellant failed to prove both the existence of gross misconduct and compliance with fair procedure.

29. It is his submission that the finding that the dismissal was unfair and unlawful was correct and should not be interfered with on appeal.

30. The Respondent submits that he denied authoring the alleged admission letter concerning the theft of the cable and disputed the authenticity of the signature, asserting that it was a forgery. He submits that the trial court properly declined to rely on the contested documents, having found them unproven and unreliable, and that this conclusion was reached after a careful evaluation of the evidence on record and does not reveal any error of law or fact warranting appellate interference.

31. It is the Respondent's submission that under Section 49 of the Employment Act, 2007, the trial court has discretion to award compensation after considering factors such as the employee's length of service, the manner of termination, the employer's compliance with statutory requirements, and the impact of dismissal on the employee. He sought to rely in *Kenfreight (EA) Ltd v Benson K. Nguti*, where the Court of Appeal upheld an award of 12 months' gross salary after

considering similar factors, including long service and the harshness of the dismissal.

32. The Respondent submits that the Appellant has failed to demonstrate that the compensation awarded was excessive or based on wrong principles. It is his submission that it is settled law that an appellate court will not interfere with the exercise of judicial discretion unless it is shown that the trial court acted on wrong principles, considered irrelevant factors, or failed to consider relevant ones, and that no such error has been shown.

33. The Respondent submits that Section 31 of the Employment Act creates a statutory presumption that an employee is entitled to house allowance unless the employer provides housing or expressly includes house allowance in a consolidated salary. He submits further that in this case, the Appellant failed to produce a written contract demonstrating that the Respondent's salary was consolidated or inclusive of house allowance.

34. It is his case that no payslips were produced showing that house allowance was separately paid or expressly incorporated into the salary, and that the payslips on record did not reflect any house allowance component.

35. The Respondent finally submits that the trial court properly evaluated the evidence, correctly applied the law, and judiciously exercised its discretion, taking into account the Respondent's length of service, the abrupt and unfair

dismissal, the Appellant's failure to comply with mandatory procedures, and the economic hardship suffered.

36. The Respondent therefore prays that this Honourable Court dismisses the appeal in its entirety, and uphold the trial court's decision and awards together with interest; and costs of the appeal.

### **Analysis and Determination**

37. I have considered the Memorandum of Appeal, the Record of Appeal, the supplementary record, and the rival submissions. The issues that crystallize for determination are:

- i. Whether the Respondent's dismissal was fair and lawful under Sections 41, 43, and 45 of the Employment Act.
- ii. Whether the awards were properly granted.
- iii. Whether this Court should interfere with the trial court's exercise of discretion.

38. The role of a first appellate court is to re-evaluate, re-assess, and re-analyse the extracts on record and determine whether the conclusions reached by the learned trial Magistrate are to stand or not, and give reasons either way. (See **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**).

39. Further, it is now settled that the only instance an appellate court can interfere with the decision of the trial court is if it is based on no evidence, based on misapprehension of evidence, or the Magistrate obviously acted on the wrong principles in reaching his/her decision. (See ***Ramji Ratna and Company Limited V Wood Products (Kenya Limited)***, Civil Appeal No. 117 of 2001).

**Whether the Respondent's dismissal was fair and lawful under Sections 41, 43, and 45 of the Employment Act.**

40. Section 41 of the Employment Act demands that before termination/dismissal on grounds of misconduct, the employee must be informed of the allegations in a language he understands and be allowed an opportunity to respond in the presence of a fellow employee or shop floor representative. The mandatory nature of Section 41 was emphasized in ***Kenfreight (EA) Ltd v Benson K. Nguti [2016] KECA 409 (KLR)***, where the Court of Appeal held that non-compliance with the procedural safeguards renders termination unfair.

41. On the issue of procedural fairness in the instant case, there were no minutes of the alleged disciplinary hearing, no written outcome, and no witness testimony confirming that a procedurally compliant hearing was conducted. The Appellant's assertion that a hearing took place was unsupported by documentary or oral evidence demonstrating compliance with Section 41.

42. It therefore follows that on re-evaluation of the record, this Court finds that the Appellant failed to demonstrate adherence to the mandatory procedural safeguards espoused under Section 41 of the Employment Act and Article 47 of the Constitution.

43. In the premise, I find and hold that the trial court correctly found the termination procedurally unfair.

44. In regard to the substantive fairness of the termination, Section 43(1) of the Employment Act provides that the employer bears the burden of proving the reason for termination, failing which the termination is deemed unfair within the meaning of Section 45. Section 45(2) further requires that the reasons are valid, fair, and justified. The Court of Appeal in Kenya ***Revenue Authority v Reuwel Waithaka Gitahi & 2 others (2019) KECA 300 (KLR)***, affirmed that an employer must not only prove the reason for termination but also demonstrate that the reason was valid and fair.

45. The Appellant herein alleges theft of a client's property by the Respondent, and placed reliance on an alleged written apology. The Respondent, however, denied authorship of the said letter and further disputed the signature thereon. The trial court, in its now impugned Judgment, found the document unproven and unreliable.

46. It is not disputed that no forensic evidence was tendered to authenticate the signature on the purported admission, and no CCTV footage, inventory records, police report, or witness testimony from the alleged complainant (Carrefour) was produced in evidence.

47. In my view, while criminal prosecution is not a prerequisite for disciplinary action, the employer is under duty to establish a genuine and reasonable belief, and which must be founded on reasonable grounds. The evidentiary gaps identified by the trial court were, in my opinion, not cured on appeal.

48. In the end, this Court finds no basis to fault the trial court's conclusion that substantive justification was not proved to the required standard.

**Whether the awards made were properly granted.**

49. The Appellant has challenged the awards made by the trial court upon finding that the Respondent was unfairly terminated.

50. On the award of notice pay, where summary dismissal is not justified either substantively or procedurally, an employee is entitled to notice pay. Having found that the dismissal was unfair, and which finding has been upheld herein, I find the award of one month's salary in lieu of notice was proper.

51. On the award of compensation for unfair termination, Section 49(1)(c) of the Employment Act grants the court

discretion to award up to twelve months' gross salary as compensation. An appellate court will not, as a general rule, interfere with such discretion unless it is shown that the court acted on wrong principles or misapprehended the evidence. This principle was restated in ***Butt v Khan (1978) KECA 24 (KLR)***, where it was held that appellate interference with discretion is limited to instances where the decision is plainly wrong.

52. The trial court awarded the Respondent six months' salary for the unfair termination. There is, in my view, no demonstration that irrelevant factors were considered or relevant ones were ignored by the trial court in arriving at the said award.

53. I therefore neither find the award to be excessive nor based on wrong principles as to warrant this court's interference, and I let it rest.

54. On house allowance, Section 31 of the Employment Act presumes entitlement to house allowance unless housing is provided or the salary is expressly consolidated. The burden rests on the employer to demonstrate that the house allowance was included in a consolidated salary.

55. The Appellant did not produce a written contract expressly providing for a consolidated salary inclusive of house allowance, nor did the payslips reflect a housing component. The trial court, therefore, correctly applied the statutory presumption. This finding further aligns with the established

jurisprudence that consolidation must be explicit and not implied.

56. In conclusion, I find and hold that the trial court correctly evaluated the evidence placed before it and reached conclusions supported by the record, and I find no basis to interfere with the trial court's exercise of discretion.

57. The appeal is hereby dismissed in its entirety, and the judgment and decree of the trial court are upheld.

58. The Respondent shall have the costs of the appeal.

59. It is so ordered.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Ms. Kemunto for the Appellant

Ms. Maina present for the Respondent

Ms. Esther S - C/A