

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E305 OF 2025

MAUREEN KERUBO NYANGESI.....APPELLANT

-VERSUS

SIMBA DUTY FREE LIMITED.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. E. Riany (PM)
delivered on 27th August 2025 in Nairobi MCELRC No. E069 of 2024)*

CORAM

Before Lady Justice J.W.Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. E. Riany (PM) delivered on 27th August 2025 in Nairobi MCELRC No. E069 of 2024 between the parties filed a Memorandum of Appeal dated the 29th August 2025 seeking the following orders: -

- a) The judgment and decree of Chief Magistrate Court in Milimani MCELRC/E069/2024 be set aside.
- b) The same be substituted with a Judgement and Decree for a finding for substantial unfairness leading to the dismissal of the Appellant

- c) The said Judgement be further substituted with compensation for substantive and procedural unfairness leading to dismissal for 12 months for Kshs. 420,000.

GROUND OF THE APPEAL

2. The Honourable Magistrate erred both in law and fact in finding that there was substantive fairness leading the dismissal of the Appellant by the respondent
3. The Honourable Magistrate erred both in law and fact in awarding the Appellant 1 month's salary of Kshs. 350,000 for procedural unfairness instead of 12 months' salary compensation for both substantive and procedural unfairness leading to dismissal of the claim.

BACKGROUND TO THE APPEAL

4. The Claimant/Appellant filed a claim against the Respondent vide a statement of claim dated the 17th of January 2024 seeking the following orders: -
 - a) A declaration that the Claimant's termination by the Respondent was unfair, unjust and unlawful.
 - b) One month's salary in lieu of notice of Kshs. 35,000
 - c) Salary for the months of November and December at Kshs. 70,000
 - d) Damages for unfair, unlawful and wrongful termination of the Claimant's employment as provided for in Section 49 totaling Kshs.420,000 being equivalent to 12 months' salary.
 - e) Reinstatement
 - f) Costs of this suit plus interest at court rates.

(pages 3-5 of Appellant's ROA dated 29th August 2025).

14. The Claimant filed her list of witnesses dated 17th January 2024; witness statement of even date; and of documents of even date with the bundle of documents attached (pages 8-21 of ROA).
15. The Respondent entered appearance and filed a response to claim dated 27th June 2024 (pages 48, and 96-99 of ROA). In support of their response, the Respondent also filed a list of witnesses dated 27th June 2024; witness statement of RICHARD OTIENO of even date; and a list of documents of even date with the bundle of documents attached (pages 100-121 of ROA).
16. The Claimant/Appellant's case was heard on the 22nd of June 2025 where the claimant testified in the case, relied on her filed witness statement as her evidence in chief, and produced her documents as exhibits. The Claimant was cross-examined by counsel for the Respondent, Mr. Nyabenge (pages 236-237 of ROA dated 21st October 2025).
17. The Respondent's case was heard the same day with RICHARD OTIENO testifying on behalf of the Respondent as RW1. He relied on his filed witness statement as his evidence in chief, and produced the Respondent's documents as exhibits. The witness was cross-examined by counsel for the Claimant, Mr. Ojienda (pages 237-238 of ROA dated 21st October 2025).
18. The court gave directions on filing of written submissions after the hearing, and both parties complied.

19. The Trial Magistrate Court delivered its judgment on the 27st of August 2025, partially allowing the Claimant/Appellant's claim to the extent of one month's salary in lieu of notice; one month's salary as compensation for procedural unfairness, plus costs and interest at court rates (judgment at pages 228-230 of ROA dated 29th August 2025).

DETERMINATION

20. The appeal was canvassed through written submissions. Both parties filed.

Issues for determination

21. In her submissions dated 27th November 2025, the Appellant identified one issue for determination, namely, whether the appeal has merit.

22. The Respondent submitted generally on the appeal in their submissions dated 15th December 2025.

DETERMINATION

23. The court adopted the 2 grounds of appeal as the issues for determination in the appeal, namely-

- a) Whether the Honourable Magistrate erred both in law and fact in finding that there was substantive fairness leading the dismissal of the Appellant by the respondent

- b) Whether the Honourable Magistrate erred both in law and fact in awarding the Appellant 1 month's salary of Kshs. 350,000 for procedural unfairness instead of 12 months' salary compensation for both substantive and procedural unfairness leading to dismissal of the claim.

Whether the Honourable Magistrate erred both in law and fact in finding that there was substantive fairness leading the dismissal of the Appellant by the respondent

Appellant's submissions

24. The learned magistrate at page 2 of the judgment in MCELRC/E069/2024 held that the appellant was in breach of a contractual provision, thus constituting gross misconduct under section 44 of the Employment Act (see page 229 of the record of appeal). We submit that the appellant was only cross examined on the CCTV footage. There was no CCTV footage played in court showing that the claimant indeed took the money. We submit that the learned magistrate erred in law and in fact in holding that the respondent termination of the appellant had substantive justification. Substantive justification is a central pillar for lawful termination. For termination to be valid, the reasons for termination ought to arise from the charges levelled against the employee. There must be a direct link between the charges communicated and the reasons relied upon for dismissal. The respondents alleged show cause notice subject is on discrepancies in stock take. The contents state 'you were noted to avoid scanning of company merchandise meant for sale. As such this anomaly has brought about some discrepancies noted during random stakes done in the months of September 2023 and October 2023.' (see page 63 of the record of appeal). The respondent then requested the appellant to have a one on one meeting on 6th November 2023. On 6th November 2023 the appellant was

asked matters relating to managing sales, process of sales and the bill clearance process (see page 65 to 66 of the record of appeal). There were no questions asked with regard to the alleged stock discrepancies or the alleged CCTV footage. On 1st December 2023 the respondent summarily dismissed the appellant. The grounds for dismissal were as follows: You failed to follow the laid down procedures by the company and customs as regards to purchases at the shop contrary to the numerous advices given against the same. You were as well informed numerous times that it was not acceptable under the customs regulations. This is as well alluded to being aware of in the presence of the Retail operations manager during the hearing on stock discrepancies on 6th November 2023'. You viewed an incident on the companies CCTV footage alluding to malpractice on the cash handling. This was blasted by the fact that the cash was not being put in the POS tray and ended up in your notebook. (See page 61 of the record of appeal. A reading of the alleged show cause notice, minutes of the sham hearing and termination letter all indicate that the reasons for the appellant termination were different from the alleged charges preferred against her. The alleged charges brought against the appellant were on stock discrepancies but summarily dismissed on grounds of taking money from the cash box (See page 61 and 63 of the record of appeal). There was no clear link between the alleged misconduct and the reason used to terminate. We submit that the respondent's termination of the Claimant was devoid of substantive justification.

Respondent's submissions

25. The Appellant's claim that there was no substantive justification is untenable. The

Respondent's case, as presented before the trial court, was premised on gross misconduct as

defined under Section 44 of the Employment Act. The misconduct related to failure to follow laid-down procedures in sales, cash handling, and compliance with customs regulations, which directly jeopardized the Respondent's operations and integrity which led to payments of hefty fines. Contrary to the Appellant's assertions, the charges were consistent and interrelated. The initial show-cause notice (page 63 of the Record) addressed stock discrepancies arising from avoidance of scanning merchandise. The subsequent disciplinary hearing on 6th November 2023 expanded into the process of sales and bill clearance, a natural and logical inquiry into the root cause of the stock anomalies. The termination letter (page 61) explicitly linked the Appellant's actions to breach of company procedures and customs regulations, which was a direct consequence of the investigative process. Crucially, the Appellant's attempt to downplay the CCTV evidence is misleading. The Respondent pleads and confirms that the CCTV footage, which vividly captured the Appellant's improper cash handling (specifically, failing to place cash in the POS tray and instead placing it in her notebook), was part of the pleadings. The footage was physically delivered to the Court on flash disks during pre-trial conferences and was formally produced as evidence during the hearing. The trial magistrate therefore had the full benefit of this incontrovertible visual evidence, which substantiated the allegation of malpractice. The Learned Magistrate, at page 2 of the Judgment, correctly found that the Appellant's actions amounted to a breach of contract constituting gross misconduct. The Appellant was accorded a fair opportunity to respond to the allegations, including being shown the CCTV footage. The termination was therefore based on proven misconduct, satisfying the requirement of substantive justification under Section 43 of the Employment Act

Decision

26. The trial held that the conduct of the Appellant, leading to dismissal, amounted to gross misconduct, thus, there was substantial fairness. The court held there was no procedural fairness and awarded notice pay. The Appellant is aggrieved with the finding of substantial fairness.

27. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”* Substantial fairness relates to reasons of termination. The reasons for termination are fair if in respect of the conduct, capability, and capacity or operational requirements of the employer (section 45(2) of the Employment Act).

28. The prove of the fairness of reason of dismissal is according to section 43 of the Employment Act to wit- ‘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 within the meaning of section 45.(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.”

29. The trial court found there was substantial fairness as the reason for termination was based on gross misconduct. The appellant in her statement of claim stated her services were terminated on the basis of unsubstantiated allegations of gross misconduct in her line of duty (paragraph 5 of the claim).The Appellant produced before the trial court a letter of summary dismissal dated 1st December 2023 on basis of gross misconduct as follows:-

(page 37 of ROA)

The court finds the said reasons disclosed offensive under section 44(4) (g) of the Employment Act of which the employee was entitled, if true, to summarily dismiss the employee subject to compliance with section 41 (2) of the Employment Act to wit:- ‘*RE: SUMMARY DISMISSAL.*

The above Subject refers.

It is with regret that we must inform you that we are terminating your services as a Cashier at Simba Duty Free Ltd, effective the date hereof.

This is based on the following facts:

You failed to follow the laid down procedures by the company and customs as regards purchases at the shops contrary to numerous advices given against the same. You as well were informed numerous times that this was not acceptable under customs regulations. This as well you alluded to being aware of in the presence of the Retail operations manager and Operations Manager during the hearing on stock discrepancies on the 6th of November 2023.

You viewed an incident on the companies CCTV footage alluding to malpractice on cash handling. This was bolstered by the fact that the cash was not being put into the POS tray and ended up in your notebook.

You are further reminded that the aforesaid act constitutes gross misconduct and to justify summary dismissal of an employee for lawful cause; also note there was a breach of the following clauses as specified in Clause 16.4 and 16.9 on your offer of employment dated the 27 March 2023.

i. "Should you commit an error resulting in colossal material losses to the employer" "Should you commit or on reasonable & sufficient ground is suspected of having committed, a criminal offence against or to the substantial detriment of the company or its property" The trial court found the gross misconduct was proved on a balance of probabilities. During the hearing, the appellant adopted her witness statement. At cross-examination, the appellant stated she had been employed for a period of 8 ½ months. She confirmed receipt of the above dismissal letter. She confirmed having been shown the CCTV footage showing she took cash and placed it in a notebook. The appellant said that what she placed in the notebook was a tip

by the customer. She told the court she had received a notice to show cause and responded. On re-examination, the Appellant told the court the cash she placed in the notebook was her tip, and it was not an offence to receive a tip.

30. The Respondent's witness told the court that the Appellant was dismissed for failing to follow the procedure and was issued with a Notice to show cause, which she responded to.
31. I find the accusation of placing money in a notice book by the Appellant, who was employed as a cashier, was not in dispute as the appellant admitted to having viewed the CCTV footage to that effect. The dispute is whether this was gross misconduct, as held by the trial court.
32. The trial court relied on the breach of the employment contract. The contract provided for grounds of summary dismissal including offence under 44 (4) (g) under clause 16.9 (page 15 of ROA).The Appellant signed the Employees Code of Conduct and Obligation on 28th March 2023 dated on same date of employment. (see page 20 of ROA).Clause S of the code prohibited solicitation or acceptance of any gift as follows:-*'S) You shall not solicit or accept, directly or indirectly any gift, favor, entertainment, loan, commission or any other item of monetary value or promise directly related or connected with your employment with the Company. You must notify the Company at earliest opportunity of such any gift, favor, entertainment, loan, commission or any other item of monetary value or promise consideration or present received from or offered by any person or company other than the Company and remit the same to the Company. In the event of suppression of any such information, the Company shall be entitled to take such other action at any time as it may deem fit.'* The code of conduct was part of the contract of employment. The court then

concluded it was misconduct for the appellant to have accepted the tip and placed the same in the notebook, which was hidden from the employer, contrary to clause S of the code of conduct for employees. The dismissal was justified by the appellant's misconduct. The trial court's decision that there was substantive fairness is upheld.

Whether the learned magistrate erred in law and in fact in awarding the appellant 1 month salary of Ksh 35,000 for procedural unfairness instead of 12 months compensation for both substantive and procedural unfairness leading to the dismissal of the appellant.

33. The appellant submitted that the termination of the appellant's employment was both procedurally flawed and devoid of substantive justification. That the learned magistrate erred in law and in fact in awarding the appellant one month salary of Ksh 35,000 for unprocedural fairness. Section 49(1)(c) of the Employment Act provides that where the Court finds that a termination of an employment contract or summary dismissal is unjustified, then it may award compensation not exceeding twelve months' gross monthly salary of the employee as at the time of dismissal. Section 49(4) of the Employment Act sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. We submit that the learned magistrate award for procedural unfairness was inordinately low. In the case of *Loice Otieno v Kenya Commercial Bank (2013) eKLR*, the court awarded the claimant 6 months compensation where only the procedure for termination was unfair. While the award for unfair and unlawful termination is discretionary, such discretion should be exercised judicially. Courts have repeatedly emphasized that compensation should be both adequate and proportional so as to give effect statutory intent and the seriousness of unfair dismissal. We further submit that the trial court ought to have considered factors such as the

claimants employment being open ended and the hardships that may have been posed to the claimant as a result of the unlawful termination. We rely on the case of Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR, where the court considered the fact that the claimant had worked for the respondent for 2 years and still had 2 more years to work for the respondent before he was unfair terminated. The court awarded the claimant 12 months compensation for unfair termination. Considering the duration for which the appellant worked for the respondent, we rely on case of Richard Mwashombo Mwachoki v Five Star Plastic Company [2016] eKLR the court awarded the claimant who had worked for the respondent for 2 years, 10 months compensation following unfair termination of the claimant's employment.

Respondent's submissions

34. Whether the Learned Magistrate erred in awarding only one month's salary as compensation for procedural unfairness - The Appellant misconstrues the nature of the award. The Learned Magistrate, having found the dismissal substantively fair, correctly identified a minor procedural lapse and exercised her discretion under Section 49(1)(c) of the Employment Act to award compensation not exceeding twelve months. The statute does not mandate a maximum award; it sets a ceiling, leaving the actual determination to the Court's discretion based on the circumstances In Okuyumba v Unga Limited (Cause E6506 of 2020) [2025] KEELRC 3108 (KLR) (6 November 2025) the court while faced with a similar issue held and I quote; "In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act. The Supreme Court in Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR noted as follows:- "When giving an award under Section 49 of the Employment Act, a court of law is expected to exercise judicial discretion

on what is fair in the circumstances.” Having found the dismissal substantively fair, and only faulted the procedure adopted on account of the short notice, I deem an award of two months’ salary sufficient” The Learned Magistrate rightly considered the factors under Section 49(4), including: (a) The gravity of the misconduct (gross misconduct involving cash handling) (b) The length of service of the Appellant; (c) The opportunity given to the Appellant to be heard; and (d) The fact that the substantive reason for dismissal was valid. The award of one month’s salary (Kshs. 35,000) for procedural irregularity was not “inordinately low” but was proportionate and judicious. The Appellant’s reliance on cases such as Loice Otieno and Alphonee Mwachanya is distinguishable. In those cases, the procedural unfairness was central or the termination was found to be substantively unfair. Here, the core reason for dismissal stood unchallenged on the evidence. The discretionary power of the trial court in assessing compensation is wide. Appellate courts have consistently held that they will not interfere with the exercise of such discretion unless it is shown to have been exercised arbitrarily, capriciously, or on wrong principles. The Appellant has failed to demonstrate any such error.

35. The court upheld the finding of substantial fairness. There was no cross-appeal on procedural fairness. The court on finding unfairness based on reason or procedure or both is to consider and apply any or remedies under section 49 of the Employment Act. The remedies available, save for reinstatement , are stated in section 49(1) as follows- *‘Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—*

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;*
- (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or*
- (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”*

36. The appellant is aggrieved as she was only awarded Notice pay under 49(1)(1) and no compensation under 49(1)(c). The court upheld substantive fairness. The Supreme Court in Ken freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR explained the applicability of the provisions of Section 49 as hereunder; -“.....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the Employment Act, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....” The exercise of the discretion of the court is not capricious or whimsical and the court should

justify the award (Olpejeta Ranching Limited v David Wanjau Muhoro (2017)e KLR . The court finds that the trial court exercised its judicial discretion and awarded Notice Payment of 1 month's salary for the procedural unfairness. The Supreme Court guided that the judicial officer may award any or all of the remedies under section 49(1) of the Employment Act as long as it justified. In the instant case the court justified the award. The court is guided by the principles applicable in appeal decisions in Mbogo V Shah [1968] EA Page 93 where De Lestang V.P (As He Then Was) Observed At Page 94:- *“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”* The court finds the trial court's exercise of discretion to award 1 month notice pay was justified and hence no basis to fault the Trial Learned Magistrate.

37. The appeal is held to lack merit and is dismissed with costs to the respondent.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ojienda

Respondent- absent