



**Shitemi v Carbacid Limited (Cause E466 of 2024)
[2026] KEELRC 589 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 589 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E466 OF 2024
SC RUTTO, J
FEBRUARY 27, 2026**

BETWEEN

HENRY OGALO SHITEMI CLAIMANT

AND

CARBACID LIMITED RESPONDENT

JUDGMENT

1. The Claimant states that he was employed by the Respondent in May 2006 as a driver/machine operator, responsible for delivering and collecting gas cylinders and other consignments for the Respondent's clients within Nairobi County.
2. He asserts that he served the Respondent diligently, maintained an exemplary record, and consistently performed his duties as required. The Claimant further avers that, owing to his commendable work and clean record, his colleagues elected him as their representative in the workers' union. He contends that this development displeased the Respondent and marked the beginning of a strained relationship.
3. According to the Claimant, as he became more vocal in his union role, the Respondent sought ways to remove him from employment.
4. He states that the Respondent eventually dismissed him on 28th September 2022. In the Claimant's view, this termination was unlawful and wrongful, and he therefore seeks declaratory reliefs together with the following monetary remedies against the Respondent:
 - a. Damages for discrimination at the workplace: Kshs. 1,000,000.00.
 - b. 12 months' salary Compensation for wrongful dismissal: Kshs. 1,040,496.00.
 - c. One month's Pay in lieu of notice Kshs. 86,708.00.



- d. Service pay and/or gratuity (As per the CBA) Kshs. 86,708.00/30 working days * 21 days per year * 16 years =Kshs. 971,129.40.
5. The Claimant further seeks an award of interest and the costs of the suit.
6. The Claim was opposed through the Respondent's Statement of Defence dated 4th September 2024, in which the Respondent asserts that the Claimant was summarily dismissed on 28th September 2022 for gross misconduct and insubordination.
7. The Respondent further contends that the Claimant was not a model employee, noting that he had previously been issued with warning letters before his dismissal.
8. The Respondent maintains that the Claimant's termination was both fair and procedural, and therefore argues that he is not entitled to the reliefs sought. Accordingly, the Respondent prays that the Claimant's suit be dismissed with costs.
9. The matter proceeded for hearing on 4th November 2025, during which both sides called oral evidence.

Claimant's Case

10. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement and the list and bundle of documents filed on his behalf to constitute his evidence in chief.
11. The Claimant testified that the alleged victimisation by the Respondent began on 22nd December 2021, when he received a warning letter accusing him of engaging and misinforming a customer. He stated that he did not understand the basis of the accusation, and when he sought clarification, none of the Respondent's representatives provided a valid explanation for issuing the warning.
12. He further stated that on 9th September 2022, he received another warning letter alleging that he was reading novels during working hours, an accusation he described as practically impossible. The letter also claimed that he habitually attempted to leave work at 3:30 p.m., which he denied.
13. The Claimant explained that it had long been the practice, with the knowledge of his immediate supervisor, that employees who worked through the lunch hour were allowed to leave work earlier to compensate for the extra hours, since it was difficult to document lunchtime overtime for later payment.
14. He asserted that he was not the only employee who would leave early on this basis and that he had followed this practice for many years without any issue being raised by his supervisor.
15. He stated, however, that on 2nd September 2022, when he worked over the lunch hour and thereafter left early in the usual manner, he was sanctioned. On that day, he had deliveries to make to KEMRI-JICA, Super Haulers, and Bolloré Logistics, which required him to work through the lunch period.
16. After completing his final delivery and while returning to the Respondent's premises, he received an urgent call from his son's school informing him that his son was unwell and required immediate medical attention. He hurried back to the factory and sought permission to leave early so he could pick up his son.
17. As he was about to leave, his supervisor questioned why he had not collected cylinders from Kenya Breweries in Ruaraka. The Claimant stated that he had not been given any such instruction, although the supervisor insisted that the directive had been communicated.



18. The Claimant maintained that he would not have refused any instruction had it actually been issued. Given the emergency involving his son, he requested permission to leave, and his supervisor reassigned the task to another employee, after which the Claimant left.
19. According to the Claimant, he was unaware that this incident would later be used against him. He asserts that he was falsely accused of disobeying a superior's order and that this allegation became the primary basis for his dismissal.
20. The Claimant stated that after he responded to the emergency at his son's school, the Respondent seized the opportunity to issue him with a show cause letter alleging insubordination. He promptly responded on 6th September 2022, denying that he had been instructed to collect the cylinders and explaining the emergency he was facing.
21. He was subsequently invited to a disciplinary hearing, which he attended on 15th September 2022. He again denied that he had been assigned the task in question. The Claimant contended that his supervisor failed to produce any evidence showing that the instruction had been communicated.
22. It was his contention that despite the lack of evidence, the Respondent's representatives at the hearing appeared biased against him and seemed to have predetermined the outcome. He described the proceedings as a mere formality to justify a decision that had already been made.
23. He later received an invitation to a second hearing on 20th September 2022, during which the decision to summarily dismiss him was formally communicated.
24. The Claimant stated that this outcome did not surprise him, as he had already anticipated dismissal based on the conduct of the disciplinary committee.
25. He further asserted that the minutes provided to him as a record of the 15th September 2022 hearing did not accurately reflect what had transpired, and he refused to sign them for that reason.
26. The Claimant averred that after his dismissal, and after much consideration, he submitted his appeal to the Respondent on 23rd September 2022.
27. He stated that his appeal hearing was rescheduled three times, and on 28th September 2022, he was informed that the dismissal decision would stand.
28. The Claimant averred that due to his advanced age, he has been unable to secure alternative employment and continues to suffer the consequences of what he considers to be an unfair dismissal.

Respondent's case

29. The Respondent called oral evidence through Faith Amisi, who testified as RW1. She identified herself as the Respondent's Human Resource Officer. Similarly, she adopted her witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
30. RW1 testified that on or about 22nd December 2021, the Claimant was issued with a warning letter for allegedly misinforming or misdirecting one of the Respondent's clients. She stated that the Claimant had given the client (NAS Manager) incorrect information, which caused the client to amend its order for dry ice to the Respondent's detriment. This conduct, she maintained, fell outside the Claimant's job description.
31. She further stated that on or about 6th September 2022, the Claimant was found reading a novel during working hours instead of attending to his duties.



32. RW1 added that the Claimant often attended to customers, particularly Alloys Steel, in a hurried manner when collecting cylinders, causing the customers to feel unappreciated and inconvenienced. She stated that this negatively affected customer relations.
33. She explained that on 30th August 2022, a client issued instructions to the Sales and Services Supervisor for the refill of CO₂ cylinders. The Supervisor then liaised with the Claimant's immediate supervisor, the Depot Team Leader (DTL), to arrange the collection of the cylinders the following day and to provide the details of the assigned driver.
34. According to RW1, the DTL informed the Claimant of the assignment and allocated the route to him, clearly indicating that the task was to be completed by close of business on 2nd September 2022.
35. RW1 stated that on 2nd September 2022, the DTL expressly instructed the Claimant to collect the cylinders from Kenya Breweries Limited (KBL).
36. She further testified that the Sales and Services Supervisor later found the Claimant resting in his vehicle. When asked why he had not collected the cylinders, the Claimant responded that he was unaware of the assignment.
37. The Supervisor then instructed the Claimant to proceed with the collection, but the Claimant declined, stating that he needed to pick up his son, and he left the premises at 3:36 p.m.
38. RW1 stated that at 3:38 p.m., the DTL received an email reporting that the Claimant had declined to collect the cylinders and had left the depot at 3:36 p.m. The task was consequently assigned to another employee, who completed the collection and returned the cylinders to the client the following day, a Saturday.
39. She added that on 31st August 2022, the Claimant's details had already been shared with KBL, and the assignment was expected to be completed by the close of business on Friday. A review of the matter confirmed that the DTL had issued instructions earlier in the week for the Claimant to collect the cylinders on that day.
40. It was further established that the Claimant was reminded of the assignment again on 2nd September 2022.
41. RW1 affirmed that the Claimant's conduct constituted insubordination and delayed the Respondent's fulfilment of its obligations to a longstanding client. As a result, the Respondent issued him with a Notice to Show Cause dated 5th September 2022, requiring him to explain why disciplinary action, including termination, should not be taken against him.
42. The Claimant responded on 6th September 2022, giving various explanations for what the Respondent viewed as insubordination, including an assertion that he needed to pick up his sick child. RW1 noted, however, that the Claimant was unable to substantiate the alleged sickness.
43. RW1 stated that the Claimant's explanations were found unsatisfactory, and by a letter dated 12th September 2022, he was invited to attend a disciplinary hearing scheduled for 15th September 2022.
44. The disciplinary hearing proceeded as scheduled, attended by the Claimant, his witness (John Nganga), and the Respondent's managerial representatives.
45. Following the hearing, the Claimant was invited, via a letter dated 19th September 2022, to attend a meeting on 20th September 2022 to receive the outcome of the disciplinary process.



46. At that meeting, the Claimant was informed that he had breached the terms of his employment through acts of insubordination and that the Respondent had resolved to summarily dismiss him. This was formally communicated through a letter dated 20th September 2022, which also informed him of his right to appeal the decision on or before 23rd September 2023.
47. The Claimant lodged his appeal via a letter dated 23rd September 2023, and the Respondent then issued a letter dated 26th September 2022 indicating that the appeal hearing would take place on 27th September 2022.
48. The appeal hearing proceeded as scheduled, attended by the Claimant, a representative from the Kenya Chemical Workers Union, one Mr. Gwako, and the Respondent's managerial representatives.
49. RW1 stated that all grounds raised in the appeal were considered but were ultimately found to lack merit.
50. By a letter dated 28th September 2022, the Respondent informed the Claimant that the decision to summarily dismiss him had been upheld.
51. RW1 averred that the Claimant's employment was thereafter terminated with immediate effect, his terminal dues were computed, and a cheque was issued in his favour.

Submissions

52. The Claimant argued that the Respondent failed to show how the alleged instruction was communicated to him. He contended that the instruction remained an unproven allegation.
53. Citing the case of Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR and Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR, the Claimant submitted that the Respondent's case lacked evidential support. He contended that no credible trail of the instruction was presented, whether via route sheet, written assignment, delivery plan, email, or any contemporaneous record he acknowledged that could establish, on a balance of probabilities, that a lawful instruction was issued and disobeyed.
54. To this end, the Claimant urged the Court to hold that a disciplinary process conducted on a foregone conclusion, without evidential foundation and supported only by disputed minutes, fails the fairness standard under Section 41 of the [Employment Act](#) and Article 41 of [the Constitution](#).
55. The Court was also urged to find that the Respondent did not meet the statutory burden under Section 43 of the [Employment Act](#) to prove, by credible evidence, that a clear lawful instruction was issued and disobeyed.
56. The Claimant further contended that, even if an instruction existed, the dismissal remained unjustified due to the emergency context, the reasonable explanation provided, his long service, proportionality, and the element of his victimisation.
57. On the other hand, the Respondent submitted that the Claimant's disobedience of a lawful command and absence from the workplace during working hours was established on the balance of probabilities. On this core, reliance was placed on Anthony Korir v Imarisha Sacco Society Limited [2020] eKLR.
58. The Respondent maintained that since the causes of termination, specifically absence without permission and failure to obey a lawful command, were proven, the dismissal was justified.



59. Regarding procedural fairness, the Respondent referred to the case of *Mutuma v China Railway 21st Bureau Group (Kenya) Company Limited* [2025] KEELRC 726 (KLR), and argued that there was substantial compliance in ensuring procedural fairness to the Claimant.

Analysis and determination

60. After reviewing the parties' pleadings, the evidence on record, and the opposing submissions, the Court identifies the following issues for determination:
- i. Whether the Respondent has proved that there was a fair and valid reason to terminate the employment of the Claimant;
 - ii. Whether the Claimant was accorded procedural fairness prior to being terminated from employment;
 - iii. Is the Claimant entitled to the reliefs sought?

Fair and valid reason?

61. The termination of the Claimant's employment, as can be discerned from the letter of summary dismissal, was on the grounds of insubordination, specifically refusal to obey a lawful instruction within the scope of his duties. In this regard, it was alleged that on 30th August 2022, the Claimant was instructed to collect empty CO2 cylinders from Kenya Breweries Limited, his name having been communicated to the Respondent's client as the designated agent for this task.
62. It was alleged that the Claimant had failed to collect the cylinders and, when he was reminded later the same day, he still declined to carry out the assignment. Instead, he left his workstation early and went home, resulting in the Respondent's failure to fulfill its obligation to the client.
63. In response to the Notice to Show Cause, the Claimant stated that he had no prior information regarding the collection of the gas cylinders. He further explained that he had been called from his son's school to attend to him as he was unwell. Upon notifying his supervisor of the same, he was permitted to leave, and a colleague was assigned to collect the cylinders.
64. Pursuant to Section 43(1) of the *Employment Act*, the Respondent bears the burden of proving the reasons for termination. Failure to do so renders the termination unfair. Further, under Section 45(2) (a) and (b) of the *Employment Act*, an employer must demonstrate that the reasons for termination are valid, fair, and related to the employee's conduct, capacity, or compatibility, or based on its operational requirements.
65. Therefore, the central question for determination is whether the reason advanced for terminating the Claimant's employment was valid and fair within the meaning of Section 45(2)(a) and (b) of the *Employment Act*.
66. As outlined above, the Claimant was dismissed on the grounds of insubordination for allegedly failing to follow his supervisor's instruction to collect empty CO2 cylinders from the Respondent's client, Kenya Breweries Limited.
67. Insubordination is a ground for summary dismissal under Section 44(4) (e) of the *Employment Act*, which is couched as follows:

[44](4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.....



(e)an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

68. The Black's Law Dictionary (10th Edition) defines insubordination as "A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. 2. An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give."
69. In the present case, the Claimant has consistently asserted that he was unaware of any instruction to collect the gas cylinders from the Respondent's client. It is notable that the Respondent did not produce evidence to establish that such instructions were indeed communicated to the Claimant on 30th August 2022. Further to this, the procedure for relaying such instructions to employees within the Respondent's organization was not clearly demonstrated.
70. It is, however, undisputed that the Claimant was subsequently notified of the instructions to collect the gas cylinders by his supervisor, but he failed to do so and left the workplace at approximately 3:30 p.m.
71. Explaining his failure to collect the gas cylinders as instructed, the Claimant stated that he had to leave to attend to his unwell son, and averred that his supervisor granted him permission to leave on that basis. Nonetheless, the Claimant did not provide evidence establishing that indeed, his son was unwell and that he had to leave early to attend to him.
72. Upon being notified by his supervisor that he was required to collect the gas cylinders from the Respondent's client, the Claimant was obliged to comply. In the event he was unable to do so for a valid reason, it was reasonably expected that he would provide evidence to substantiate his inability. Regrettably, the Claimant failed to do so.
73. In view of the above, the Court finds that the Claimant's failure to collect the gas cylinders, without offering a credible explanation, constitutes insubordination.
74. Accordingly, the Court finds that the Respondent has proved on a balance of probabilities that on the basis of the Claimant's conduct, it had a fair and valid reason to commence disciplinary process against him.
75. I must also add that the Claimant's assertion that the disciplinary process resulted from victimisation by the Respondent due to his participation in union activities is not plausible. This is because it is evident that the Respondent has a Collective Bargaining Agreement with the Kenya Chemical Workers Union, indicating recognition of the union for collective bargaining purposes and confirming that it represents a majority of the Respondent's unionisable workforce (50% plus one member). In this regard, there is no evidence before the Court that other unionised employees faced victimisation because of their union membership or participation in union activities.
76. What's more, the record bears that the Claimant had previously received warning letters for other alleged infractions. Had the Respondent been motivated by malice, it would have terminated the Claimant's employment earlier on the basis of those prior allegations.

Procedural fairness?

77. The requirement for a fair procedure is generally provided under Section 45(2)(c) of the [Employment Act](#), while the specific elements of a fair hearing are set out in Section 41(1). Under these provisions, an employer must notify an employee of the intended termination in a language the employee



understands and must provide the employee with an opportunity to respond to the allegations against them in the presence of a union representative or a colleague of their own choice.

78. In the present case, it is undisputed that the Claimant was issued with a Notice to Show Cause and that he responded accordingly. It is also not in dispute that the Claimant attended the disciplinary hearing and made oral representations in response to the allegations, and in so doing, he was accompanied by a fellow employee.
79. In interpreting the significance of Section 41 of the *Employment Act*, the Court of Appeal observed as follows in *Postal Corporation of Kenya v Andrew K. Tanui* “Four elements must thus be discernible for the procedure to pass muster: -
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
80. Applying the foregoing precedent to the present case, the Court is persuaded that the Respondent complied with the minimum requirements of a fair hearing as prescribed under Section 41 of the *Employment Act*.
81. Accordingly, the Court is led to conclude that the Claimant’s termination from employment was conducted in accordance with the procedures set out under Section 41 of the *Employment Act*, and the Respondent cannot be faulted in this regard.

Reliefs?

82. As the Court has found that the termination of the Claimant’s employment was based on a fair and valid reason and conducted in accordance with the procedure set out under Section 41 of the *Employment Act*, the Claim for notice pay and compensatory damages cannot be sustained. Besides, it is apparent that the Claimant’s final dues included salary in lieu of notice.
83. The Claimant also sought Kshs 971,129.40 as service pay/gratuity. During cross-examination, he confirmed that he had received approximately Kshs 2.5 million as pension benefits, which effectively disentitles him to service pay and places him within the exclusions under Section 35(6) of the *Employment Act*.

Orders

84. In the final analysis, the Claimant’s claim is hereby dismissed in its entirety, with an order that each party shall bear its own costs.

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

.....

STELLA RUTTO

JUDGE

In the presence of:



No appearance for the Claimant

Mr. Njuguna for the Respondent

Mohammed Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

