

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**KISUMU**

**APPEAL NO. E100 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**KEDA CERAMICS INTERNATIONAL LIMITED.....**  
**APPELLANT**

**VERSUS**

**JAMES WANDERA OUMA.....RESPONDENT**

**JUDGMENT**

This is an appeal against the Judgment of Hon. K. Cheruiyot, S.P.M delivered on 3<sup>rd</sup> November 2025 in Kisumu MCELRC No. E283 of 2023 **James Wandera V Keda Ceramics International Company Limited** where the court awarded compensation for unlawful termination of the claimant’s employment, salary in *lieu* of notice, underpayment, unpaid salary for April, unpaid public holidays, costs of the suit and interest from date of filing of the suit.

The brief facts of the claimant’s case against the respondent at the trial court was that he was employed by the respondent on 28<sup>th</sup> October 2022 under a one (1) year contract effective 26<sup>th</sup> November 2022 to 25<sup>th</sup> November 2023 but the respondent

terminated the contract on fabricated grounds on 13<sup>th</sup> March 2023 without according the claimant the right to be heard.

The claimant prayed for salary in *lieu* of notice, underpayment, salary for April 2023, 12 months compensation, unpaid public holidays and costs.

The respondent's case was that the claimant was its employee from November 2022 to March 2023 when his employment was terminated, that it had a justification to terminate the claimant's employment and accorded him an opportunity to be heard and prayed for dismissal of the suit with costs.

After considering the respective cases, evidence availed by the parties and submissions by counsel, the learned trial magistrate found that although the employer had a substantive justification to terminate the claimant's employment the procedure was unfair and made the awards adverted to elsewhere in this judgment.

Aggrieved by the decision of the learned trial magistrate, the appellant filed a Memorandum of Appeal dated 18<sup>th</sup> November 2025 praying that the appeal be allowed and the trial court's decision be set aside for an order dismissing the claimant's suit.

The learned trial magistrate was faulted on seven (7) grounds, that the court erred in law and fact by:

1. Finding that termination of the claimant's employment was unprocedural and unfair and awarding 6 months' salary.
2. Awarding pay in *lieu* of notice.
3. Awarding underpayment.
4. Awarding public holidays.
5. Awarding unpaid salary on account of misdirection.
6. Misdirecting himself on facts and law and based his findings on wrong and irrelevant considerations.
7. Disregarding the evidenced tendered by the respondent and its submissions.

In the court's view, the seven (7) grounds may be condensed into three or four namely; awards made by the trial court, appreciation and application of the evidence and disregard of evidence and submissions.

### **Appellant's submissions**

On termination of the claimant's employment, counsel submitted that the appellant was in agreement with the learned trial magistrate that there was a valid ground for termination of the claimant's employment consistent with the provisions of section 43 (2) of the Employment Act and urged the court to uphold the finding.

Counsel however, challenged the court's finding that the appellant did not comply with the procedural requirements citing

the fact that the claimant received the Notice to show cause, sought for more time to respond, responded, was invited for a hearing and notified of his rights, attended the hearing and the outcome was communicated.

Counsel submitted that the requirements of section 41 of the Employment Act, were complied with.

Reliance was placed on the sentiments of the court in **Nicholas Muasya Kyula v Framchem Ltd (2012) eKLR** to submit that there were sufficient reasons for the court to set aside the findings of the trial court.

On entitlement to the reliefs sought, counsel submitted that the claimant was paid salary in *lieu* of notice, the claim for underpayment was unsustainable, as was the salary for April, 2023, dismissal from employment was lawful and the prayer for public holidays lacked particulars.

Counsel urged the court to allow the appeal with costs.

### **Respondent's submissions**

As to whether the Respondent extorted money from a customer named Nichols Kaiga, Counsel submitted that he did not and neither defrauded the appellant as the customer paid Kshs.17,000

to Mr. Onesmus Matara, which was transferred to Sunsure Africa Ltd.

As to whether termination of the Respondent's employment was unprocedural, unlawful and unfair reliance was placed on the decision in **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd (2013)** eKLR, on the requirements of section 41 of the Employment Act to submit that based on the evidence on record, the appellant contravened the provisions of section 41 and 43 of the Employment Act and no investigation was conducted as no copy of the report was availed.

Counsel submitted that the Respondent had no job description no previous warning and the disciplinary process was a sham as the committee was partial, the proceedings were one-sided and the Respondent did not sign the minutes which may have been altered.

That the appellant stifled the Respondent's opportunity to be heard and termination of his employment was unfair.

Reliance was placed on **Mary Chemweno Kiptui v. Kenya Pipeline Co. Ltd (2014)** eKLR on the mandatory nature of section 41 of the Employment Act.

On entitlement to the reliefs prayed for, counsel submitted that the Respondent was entitled to salary in *lieu* of notice Kshs.21,067.43 compensation for unlawful termination of employment Kshs.126,404.50, public holidays Kshs.2,808.00 underpayment, salary for April to November 2023 costs and interest.

### **Analysis and determination**

As adverted to elsewhere in this Judgment, the trial court was faulted on matters evidence, disregard of submissions and the awards made.

Being the mainstay of a case, the court will, in the first instance consider the evidence before the trial court as well as the court's appreciation and application of the same.

However, before delving into the grounds of appeal, it is essential to underline the role of the first appellate court which is to consider and re-evaluate the evidence and arrive at its own conclusions bearing in mind that it neither saw nor heard the witnesses testify and make due allowance in that respect as held in **Gitobu Imanyara & 2 Others V Attorney General** [2016] eKLR, **Selle and another V Associated Motor Boat Co. Ltd & others** [1968] EA 123 and **Kenya Ports Authority V Kutson (Kenya) Ltd** [2009] 2 E. A. 212.

The learned trial magistrate was faulted for having failed to consider the respondents evidence and misdirecting himself.

Under paragraphs 7 and 8 of the judgment, the learned trial magistrate captured the respondent's evidence but regrettably made no reference to the appellant's witness or evidence so as to demonstrate why it fell short of its averments that termination of the respondent's employment was substantively and procedurally fair.

This was necessary because the appellant availed documentary evidence of the contract of employment, notice to show cause, respondent's responses, invitation to a disciplinary hearing, minutes of the meeting, including deliberations by the committee, letter of termination of employment and evidence of payment in accord with the letter of termination among other documents.

A perusal of the judgment of the trial court leaves no doubt that the trial court to a large extent disregarded the respondent's evidence and thus erred.

As to whether the court arrived at the correct decision, on termination of the claimant's employment, the court proceeds as follows.

The claimant's written witness statement as well as those of Onesmus Juma failed to capture essential facts including dates of

employment and termination, allegations, notices received, responses, how underpayment arose, if any, unpaid salary, public holidays among other factual issues.

Be that at it may, evidence before the trial court showed that the respondent was employed by the appellant as a receiving and issuing officer at the respondent's Warehouse at Miwani.

By a notice to show cause dated 3<sup>rd</sup> March 2023, the appellant accused the respondent of having given a customer by the name Nicholas Kaiga a false quotation on Grade C tiles on 27<sup>th</sup> February 2023, advised the customer the cost was Kshs.17,000 which was sent to the appellant's supervisor, who was aware of the dealings by the respondent and received the same on 0712793225.

Evidence on record revealed that the appellant company received Kshs.10,878.00 only through a proxy.

The respondent received the notice to show cause on 4<sup>th</sup> March 2023, refused to acknowledge receipt but responded on 6<sup>th</sup> March 2023. He admitted having dealt with the customer but instead of advising the customer to proceed to the Sales Department, and that the customer could only obtain the tiles through a distributor, he consulted his supervisor and the two gave the customer the prices for boxed tiles and payment of Kshs.17,000.00 was made through the supervisor's cell phone number 0712 793225.

The respondent feigned ignorance of what transpired thereafter, which was untrue because he even advised the customer how he would receive the waybill, that it was signed and had seen the customer's order in the system later.

During the hearing, the respondent admitted that he was aware of how a customer purchased tiles from the appellant, that once the online application for purchase was printed, the customer would proceed to finance to pay and in the case of boxes of tiles, customers were directed to Kibos at the Logistics Office for advise on price and purchase and clearly the procedure had not been followed in this case. According to the respondent, the customer kept on asking on the price and the respondent gave him on a piece of paper including his cell phone number.

The respondent admitted that he was unaware of how boxed tiles were paid for since it happened at Kibos.

The respondent admitted that he gave the supervisor's number for purposes of payment because the customer required an alternative number as he allegedly did not trust the distributor.

The respondent admitted having given the customer incorrect prices for box tiles. That he wanted to assist the customer yet he did not even know the distributor whose prices he had given.

The respondent admitted that he had no evidence of the customer having requested for the supervisor's cell phone number and he could not explain why the customer sent him the number plate of his motor vehicle on WhatsApp or why the customer was asking for a receipt.

Similarly, the respondent admitted having acted beyond his responsibilities as an issuing officer and only distributors collected goods from the appellant's warehouse.

Finally, the respondent's witness, one Mr. Evans admitted at the hearing that a mistake had been committed in the manner the transaction was conducted by the respondent and he was a scapegoat in a fraudulent transaction yet the respondent knew more than he was willing to disclose at the hearing.

The disciplinary committee was satisfied that the respondent knowingly participated in unlawfully obtaining money from a customer on the pretext of selling tiles on behalf of the company thus tarnishing its image.

The letter of termination dated 13<sup>th</sup> March 2023 identified the reason for dismissal of the respondent as acting in excess of his responsibilities by engaging in a sale of tiles to a customer as

opposed to directing the customer to the appellant's Sales Department as procedure dictated.

The trial court relied on the evidence of the customer Mr. Nicholas Kaiga to find that the respondent neither extorted him nor defrauded the appellant but breached the appellant's procedures and the termination of employment was valid.

Although the trial court found that the customer intended and obtained box tiles from Sun sure Africa, it is questionable how the distributor paid the amount due to the appellant, Kshs.10,878.00 paid on 1<sup>st</sup> March 2023 yet the customer had sent Kshs.17,000.00 to cell phone number 0712793225.

And finally, if the respondent had advised the customer as plainly as the customer's Affidavit postulated, why would he bypass the seller and send the cash to an unknown employee of the appellant to pay for him?

From the evidence on record, the court is in agreement with the findings of the trial court that the appellant had a valid and fair ground to terminate the respondent's employment in accord with the provisions of the Section 43 and 45(2) and 49(5) of the Employment Act. Put in alternative terms, the appellant has evidentiary established that it had a substantive justification to

terminate the respondent's employment. See **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR.

However, as held in **Niama Khamis V Oxford University Press (EA) Ltd** [2017] eKLR a termination of employment may be substantively and /or procedurally unfair.

On procedural fairness, it is trite law that the provisions of Section 45(2)(c) of the Employment Act are unambiguous that the termination of employment must be conducted in accordance with a fair procedure and the provisions of Section 41 of the Act prescribe the elements of procedural fairness as highlighted in **Postal Corporation of Kenya V Andrew K. Tanui** [2019] eKLR.

In **Pius Machafu Isindu V Lavington Security Guards Ltd** [2017] eKLR, the Court of Appeal held that the process prescribed under Section 41 of the Employment Act was mandatory for a termination of employment to pass muster.

The learned trial magistrate found that termination of the respondent's employment by the appellant was procedurally unfair on account that the respondent was not accorded an opportunity to be heard and defend himself.

Documentary evidence revealed that the respondent received the notice to show cause on 4<sup>th</sup> March 2023 by which date a response was required. The letter was dated 3<sup>rd</sup> March 2023.

The one (1) day notice accorded to the respondent was unreasonable and unfair and by an undated letter, the respondent sought 5 days to be in the right frame of mind.

The appellant accorded the respondent one (1) day (Sunday) 5<sup>th</sup> March 2023, to avail his response by Monday 6<sup>th</sup> March 2023.

The respondent responded on 6<sup>th</sup> March 2023. The court is not persuaded that the appellant accorded the respondent sufficient time to respond to the notice to show cause even after a formal request for extension of time.

Puzzlingly, the respondent invited the respondent for a hearing scheduled for 7<sup>th</sup> March 2023 vide letter dated 6<sup>th</sup> March 2023, a notice of less than 24 hours bearing in mind that the hearing was scheduled to commence at 9:00am but commenced at 9:24am.

The respondent received the notice on even date and attended the hearing on the following day or 13<sup>th</sup> March 2023 when all persons present signed the attendance register and the minutes.

Strangely, neither the respondent's written witness statement nor the respondents indicated the date of the hearing or any variation in the date of hearing or extension of time.

M/s Violet Boga, the appellant's Human Resource Manager confirmed on cross-examination that the respondent's employment was terminated in March 2023, no date of the hearing was provided.

However, the letter of termination of employment was explicit on the date of hearing, 7<sup>th</sup> March 2023. Thus, the respondent was accorded less than 24 hours to prepare for the hearing, seek advice, obtain the necessary evidence and witnesses, if any, and procure a colleague to accompany him to the hearing.

Strangely, the appellant provided no reasons as to why it accorded the respondent barely 24 hours to respond to the notice to show cause and appear for the disciplinary hearing.

These notices were extremely short.

It is trite law that whether the employee has been accorded sufficient time is a question of fact dependent on the circumstances of each case.

In **Nebert Mandala Ombajo V Institute of Certified Public Accountants of Kenya (ICPAK)** [2022] KECA 1360 (KLR) the Court of Appeal held as follows:

*“While the Section (41) provides for notification and hearing before termination, it does not provide for a specific period that the employee should have before responding to the allegations made against him, or the period that the employee should have before the disciplinary hearing. Our understanding is that such period must be reasonable as to give the employee the opportunity to cross-check and get all information pertaining to the allegations made against him, and to prepare for the hearing by getting all necessary advice and assistance...”*

*The appellant has relied on the **Patrick Abuya case (supra)**, where Radido, J held that procedural fairness requires not only an advance and reasonable notice of the steps to be taken, but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood...”*

*While we agree with the learned Judge that determination of whether an employee has been afforded sufficient or adequate time to respond to allegations in the course of disciplinary proceedings should be made on a case-by-case basis, taking into account the unique circumstances of the case, we do not see any justification for the clear departure by the learned Judge from his decision in the **Patrick Abuya case...**”*

Similarly, the Court of Appeal commented on the urgency with which the employer had conducted the disciplinary process in the **Nebert Mandala Ombajo case** (supra) as follows:

*“The fact that the appellant nonetheless, did his best to respond to the allegation made against him and attended the disciplinary proceedings on the due date, did not ameliorate the prejudice that was caused to him by the inadequate notice. It was oppressive, unfair and unjust, for the respondent to serve the appellant with a letter for a disciplinary hearing that was to take place next meeting. Such haste reduced the disciplinary hearing to a mere formality to achieve that which the respondent had already pre-determined. There was no procedural justice and this vitiated the whole disciplinary process...”*

These sentiments apply on all fours to the circumstances of the instant case where the appellant accorded the respondent one (1) day notice to respond to the allegations and a similar number of days to attend the disciplinary hearing and relatedly, **RWI** admitted on cross-examination that the appellant had an audit report which it did not avail to the respondent to facilitate preparation for the hearing.

Under the provisions of Section 45(4) and (5) of the Employment Act, a termination of employment is unfair if it is found that in all the circumstances of the case the employer did not act in accordance with justice and equity and in making such

determination the court is enjoined to consider the procedure adopted by the employer in reaching the decision, its communication to the employee, handling of the appeal, if any, compliance with the provisions of the law including issuance of a certificate of service among others.

On non-avaiement of the investigation report to the respondent, the Court of Appeal decisions in **Postal Corporation of Kenya V Andrew K. Tanui** [2019] eKLR, **OI Pejeta Ranching Co. Ltd V David Wanjau Muhoro** [2018] eKLR and **Regent Management Ltd V Wilberforce Ojiambo Oundo** [2017] eKLR and **Unilever Kenya Ltd V Beth Nyawira Gathoni** [2024] KECA 1944 (KLR) are instructive.

From the foregoing, it is discernible that the trial court did not err in finding that termination of the respondent's employment was procedurally unfair.

However, having found that the appellant had valid grounds to terminate the respondent's employment and considering that the respondent had served for less than one year, did not appeal the termination of employment or express his wish to remain in the appellant's employment and substantially contributed to the separation, the six (6) months gross salary awarded as compensation cannot stand and is adjusted to three (3) months consistent with the principles in **United India Insurance Co. Ltd**

**& 2 Others V East African underwriters (K) Ltd** [1985] EA 898 as well as **Mbogo & another V Shah** [1968] EA 93, on the circumstances in which an appellate court may interfere with the exercise of discretion by the trial court, Kshs.72,121.92.

On underpayment, it is unclear to the court how the trial court arrived at the conclusion that the respondent was underpaid by Kshs.19,869 and for how many months bearing in mind that the respondent was an employee for about 31/2 months only and his salary had by then reached Kshs.20,000 per month.

The respondent was more of a store keeper whose salary under the Regulation of Wages (General) (Amendment) Order 2018 effective May 2018 was Kshs.20,904.90 + 15% house allowance Kshs.3,135.74, total Kshs.24,040.64.

Assuming the respondent's salary rose in January 2023 the underpayment for December was Kshs.7,940.64 and January, February and March Kshs.9,081.28 Total underpayment Kshs.17,021.92.

On public holidays, neither the respondent's written witness statement dated 20<sup>th</sup> November 2023 nor the oral evidence adduced in court adverted to work during any public holiday or avail evidence of having been at the work place.

The claim was unmerited.

It is unclear to the court how the court arrived at the four (4) days for which it made an award of Kshs.2,800.00. The claim was patently unmerited for want of particulars.

As regards salary in *lieu* of notice, the sum of Kshs.20,000.00 was paid and having found that the appellant had a valid reason to terminate the respondent's employment notice pay was unmerited.

On the alleged unpaid salary for April 2023 or March 2023 none is payable because neither the witness statement nor the oral evidence adduced in court adverted to any unpaid salary.

Similarly, the letter of termination of employment was clear that salary payable was up to the date of termination of employment and he did not work for the entire month.

The award was unmerited.

In the court's view, a case for interference with the exercise of discretion by the trial court has been made and consequently the decision is interfered with as follows.

1. *The six (6) months' salary compensation is adjusted to three (3) months **Kshs.72,121.92.***
2. *The award of salary in lieu of notice is set aside.*
3. *Underpayment is adjusted to **Kshs.17,021.92.***
4. *Unpaid salary for March or April 2023 is set aside.*
5. *The award of unpaid public holiday is set aside.*

*6. Other Orders of the trial are upheld save that interest shall run from the date of judgment of the trial court.*

ORIGINAL

Owing to the partial success of the appeal, parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI  
ON THIS 15<sup>TH</sup> DAY OF APRIL 2026.**

**DR. JACOB GAKERI**  
**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI  
JUDGE**

ORIGINAL