

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KAKAMEGA**  
**APPEAL NO. E019 OF 2025**

*(Being an appeal arising from the judgment of Hon. R. M. Ndombi (Senior Resident Magistrate) delivered on 20th July 2023 in Vihiga Chief Magistrates' Court ELRC No.4 of 2021)*

**COUNTY GOVERNMENT OF VIHIGA ..... APPELLANT**

**-VERSUS -**

**ABIGAEL KAZZY KEVOGO ..... RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**JUDGMENT**

**I. INTRODUCTION**

1. In a judgment dated and delivered on 20th July 2023 the lower trial court awarded to the Respondent (the Claimant in the lower court) as follows –

- 1. I declare that the summary dismissal was unfair and therefore unlawful.***
- 2. One-month salary in lieu of notice Kshs.75,740/=***
- 3. Compensation for unfair termination 75,740/= x 12 months = 908,880/=***
- 4. Loss of half income while under interdiction Kshs.38,870 x 12 months – 454,440***

**5. Certificate of service shall issue.**

**6. Costs of the suit and interest at court rates.**

2. Subsequently, a decree was drawn and issued on 14th November 2023.
3. Dissatisfied with the judgment, the Appellant through the County Attorney filed a memorandum of appeal dated 7th August 2025 seeking that the entire judgment of the lower trial court be set aside and asking this court to substitute therefor an order dismissing the claim with costs.
4. The appeal is based on the following grounds –
  - i. *THAT the Learned Magistrate erred in law and in fact by failing to consider the substantive reasons for termination of employment of the Respondent.*
  - ii. *THAT the Learned Magistrate erred in law and fact by failing to consider on the issues raised by the Appellant in their defence and thereby denying the Applicant the right to access to justice guaranteed by Article 49 and 50(1) of the Constitution.*
  - iii. *THAT the Learned Magistrate misdirected herself in law on whether the claim for termination of employment was unfair was proved, which finding is in dispute.*
  - iv. *THAT the Learned Magistrate erred in law and in fact by not addressing or considering that the Public Service Commissioner had delivered its ruling on the same issue and therefore the*

*magistrate court did not have jurisdiction to sit as appellant court to determine the same issue.*

- v. *THAT the Learned Magistrate failed in her analysis to take into account any of the Appellants' Submissions, and Documents and Authorities filed and therefore came to an unjust and biased determination that the Appellant was guilty of unfair termination of the Respondent's Claim.*
  - vi. *THAT the Learned Magistrate erred in law and in fact by shifting the burden of proving unfair termination to the Appellant in view of a clear and an unequivocal apology by the Respondent during the disciplinary hearing.*
  - vii. *The Learned Magistrate erred in law and in fact by failing to note that the Respondent had failed to discharge her legal and evidentiary burden of proof.*
  - viii. *The Learned Magistrate erred in fact and law by holding that the Respondent was unfairly terminated without adequate and sufficient evidence in support of the allegations.*
  - ix. *The Learned Magistrate failed to exercise its discretion judiciously and failed to consider all relevant facts.*
5. The appeal is opposed by the Respondent through Lutta Antoninah & Co. Advocates.
6. By consent recorded on 11th November 2025, the court directed that the appeal be canvassed by way of written submissions. Mr. Mukabi

for the County Attorney for the Appellants filed written submissions dated 1st December 2026 and Mr. Obinchi for the Respondent filed written submissions dated 16th January 2026.

## **II. SUBMISSIONS BY COUNSEL**

7. Counsel for the Appellant submitted on all the grounds of appeal together. It is submitted that the trial court failed to consider the substantive reasons for the dismissal of the Respondent and failed to consider the case for defence in the trial hence denying the Appellant the right to be heard as enshrined in ***Articles 49 & 50 of the Constitution***.
8. It is further submitted that the Respondent was summarily dismissed, fairly and lawfully, as per the letter of dismissal dated 3rd April 2020, on the grounds stated therein. It is submitted that the Respondent was accorded both substantive and procedural fairness before dismissal. It is submitted that the Respondent was issued with a show-cause letter to which she responded, she appeared before the County Public Service Board for a disciplinary hearing and was indeed given an opportunity to defend herself and, she was subsequently dismissed as per the letter of dismissal served upon her.
9. It is submitted that the Respondent admitted to have been negligent in performance of her duty for sharing her password to the payroll system with other individuals.

10. It is further submitted that after the dismissal the Respondent appealed to the Public Service Commission and the appeal was dismissed. It is submitted that despite the fact that this was brought to the attention of the trial court that court went ahead to determine the matter without jurisdiction. It is submitted that as at the time of the trial the matter was ***Res judicata*** the same having been dealt with by a competent body, the Public Service Commission.
11. It is further submitted that, in any event, the Respondent admitted to the charges and pleaded guilty to the gross misconduct in a letter dated 5th December 2018.
12. On the other hand, counsel for the Respondent identified the following issues for determination –
- i. Whether the Respondent's termination was procedurally unfair?*
  - ii. Whether the Respondent's termination was substantially unfair?*
  - iii. Whether the Appellant has demonstrated any error warranting interference with the trial court's judgment?*
  - iv. Whether the awards made by the trial court were justified?*
13. On the first issue, it is submitted that the dismissal of the Respondent was un-procedural in that the letter inviting her to the purported disciplinary hearing did not inform that she is the one who was under investigation and scrutiny. It is submitted that the letter implied that the Respondent was to assist the Public Service Board in determining a disciplinary action against another employee, not herself, and

hence the same was misleading and deceptive. It is further submitted that the Respondent was not supplied with the details of the particular charges and allegations or evidence against her and was only given three days to prepare.

14. It is further submitted that the grounds for her dismissal were different from those stated in the show-cause letter. Counsel cited *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, *David Gichana Omuya V Mombasa Maize Millers Limited (2014) eKLR* & *Kenfreight (EA) Limited V Benson Nguti (2016) eKLR* in support of the argument that lack of procedural fairness rendered the subsequent dismissal wrongful, unfair and, unlawful. It is submitted that the Appellant violated **Section 41 of the Employment Act**.
15. On the second issue, it is submitted that the Appellant's witness admitted during the trial that no audit had been carried out and hence there was no proof that indeed the payroll had been invaded and or manipulated as alleged and claimed by the Appellant. It is submitted that in this regard the Appellant failed to satisfy **Sections 43(1) & 45(2) of the Employment Act**. Further, counsel cited *Pius Machafu Isindu V Lavington Security Guards Limited (2017) eKLR* in support of the argument that dismissal based on unestablished and unproved reason is wrongful, unfair and, unlawful.
16. It is further submitted that the Respondent did not at any time admit any wrong-doing and did not apologize. It is submitted that it is the

Respondent who raised alarm on the manipulation of the payroll. It is further submitted that no criminal charges were ever preferred against the Respondent.

17. On the third issue, it is submitted that the Appellant has failed to demonstrate a case warranting this court to interfere with the judgment of the trial court. Citing ***British Leyland UK Ltd V Swift (1981) AELR 91*** it is submitted that the Appellant acted unreasonably in dismissing the Respondent after she had served for over 30yrs with a clean record.
18. It is further submitted that this court (ELRC) as created under ***Article 162(2)(a) of the Constitution*** has original jurisdiction in all matters relating to employment and labour relations. It is thus submitted that the decision by the Public Service Commission did not oust the jurisdiction of the trial court to hear and determine the same subject matter. It is submitted that the Appellant admitted the jurisdiction of the trial court in its filed response to the claim. It is submitted that the trial court considered the matter before it on merits and arrived at the right finding and conclusion.
19. On the fourth issue, it is submitted that the awards made by the trial court were right, correct and, lawful based on ***Section 49(1)(c) of the Employment Act***. In defence of the award for compensation equivalent to 12 months' gross salary, counsel cited ***Ol Pajet Ranching Limited V David Wanjau Muhoro (2017) eKLR & Alfred***

***Muthomi & 2 Others V National Bank of Kenya Limited (2018)***  
***eKLR.***

20. For all the foregoing, the court is urged to dismiss the appeal with costs.

**III. ISSUES FOR DETERMINATION**

21. The factual background of this matter has been set out by the parties and their respective counsel as per the summaries in the preceding parts of this judgment. Briefly, at all material times, the Respondent was an employee of the Appellant in the position of Payroll Manager from 2018, until dismissal, at a monthly gross salary of Kshs75,740/=. Prior to 2018, the Respondent had held various positions having been absorbed by the Appellant from the National Government at the advent of devolution.

22. In the memorandum of claim filed in the lower court – pgs. 7-40 of the record of appeal - the Respondent pleaded that in May 2018 the payroll system was compromised by persons within the Department and she reported the matter to the Appellant for investigation to be carried out. It was pleaded that the matter was investigated by the Directorate of Criminal Investigations (DCI) and she was absolved from the illegal activities that manipulated the payroll to include ghost employees and other unlawful changes. The Respondent was subsequently interdicted and dismissed as alluded to in an earlier part of this judgment.

23. In the response to the claim in the lower court – pgs. 106-112 of the record of appeal – it was pleaded that the dismissal of the Respondent was fair and lawful. It was pleaded that it is the Respondent who caused or contributed to the manipulation of the payroll by sharing her password with other employees in her Department and then absenting herself from work without permission thereby allowing the said persons to access the payroll system. It was pleaded that the Respondent was careless and negligent in her duties in that by the time she reported the invasion and manipulation of the payroll system, damage had already been done with salaries paid to ghost workers and unlawful increments and other unlawful payouts made.
24. From the evidence placed before the trial court, the Appellants availed documents to the effect that after her dismissal the Respondent appealed to the Public Service Commission (the Commission) and the said appeal was dismissed in March 2021. This fact is not disputed by the Respondent.
25. It is therefore a fact that as at the time of filing the claim in the lower court in April 2021, the Respondent had lost her appeal with the Commission.
26. In my considered view, the issues for determination by this court are the following –

**(i) Did the lower trial court have the jurisdiction to hear and determine the claim filed by the Respondent?**

**(ii) If the answer to (i) above is in the affirmative, was the Respondent fairly and lawfully terminated and did the lower trial court arrive at the right finding and holding in that regard?**

**(iii) Did the lower trial court err in the awards that it granted to the Respondent?**

**(iv) What orders should this court make in disposal of this appeal?**

27. Jurisdiction is everything to a court – *Owners of Motor Vessel ‘Lilian S’ V Caltex Oil (K) Limited (1989) KLR* – and a court that proceeds without jurisdiction does so in vain. Any actions, orders, decrees, and indeed the entire proceedings without jurisdiction amount to nothing, they are all nullities.

28. As it is noted above, the fact that the Respondent had appealed her dismissal with the Commission and that the appeal had been denied were brought to the attention of the trial court by the Appellants in the bundle of their documents filed. However, neither of the parties pursued any arguments on the effect of the proceedings with the Commission to the claim filed in the lower court. Likewise, the trial court did not address itself to that very vital element of the cause before it. The lower trial court ought to have addressed itself to that issue in determining whether it had jurisdiction over the subject matter.

29. In the circumstances, this court must address that issue and determine if indeed the trial court had jurisdiction over the subject matter, in view of the proceedings that had been conducted and concluded with the Commission over the same subject matter – the lawfulness or otherwise of the dismissal of the Respondent. The determination of this very issue shall dictate whether indeed this court needs to examine the other issues arising from this appeal as enlisted above.
30. Jurisdiction of any court or a tribunal emanates from the Constitution, a statute or, both – see *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & Another (2012) eKLR*.
31. Interestingly, the issue of jurisdiction of the lower trial court over the subject matter was again raised by the Appellants in ground 3 in the memorandum of appeal as reproduced elsewhere above in this judgment.
32. In the submissions in support of the lack of jurisdiction of the lower trial court, counsel for the Appellants submitted that **Section 85 of the Public Service Commission Act** gives the Commission powers to hear and determine appeals arising from dismissal by a county public service board. It is submitted that after the dismissal of her appeal by the Commission, the Respondent could not file the claim with the lower trial court and should have approached this court (ELRC) in

that the Commission had heard and determined the matter dismissing the appeal. It was submitted that upon the Commission pronouncing itself on the matter and dismissing the appeal, the subject became ***Res judicata*** and the trial lower court ought to have found and held as such.

33. On this issue, counsel for the Respondent submitted that ***Article 162(2)(a) of the Constitution*** grants this court (ELRC) powers to hear and determine all employment and labour relations matters. It is submitted that the Commission dismissed the appeal by the Respondent without giving reasons. It is thus submitted that the Respondent had the right to approach the lower trial court for the remedy of violations of her constitutional and statutory rights.
34. In the unfolding scenario, the court has to determine what remedy was available to the Respondent after her appeal to the Commission was dismissed and, whether indeed the trial court had jurisdiction over the same subject matter.
35. It is the finding and holding of this court that the lower trial court had no jurisdiction over the subject matter after the same had been considered and determined by the Commission. The remedy available to the Respondent was to approach this court (ELRC) seeking setting aside of the decision of the Commission and urging the court to determine the matter afresh on its merits. This is so because ***Section 85 of the Public Service Commission Act*** is clear

that the Commission functions as a quasi-judicial tribunal on the matters listed therein.

36. Further, **Section 88** provides for review of the decision by the Commission while **Section 89(1)** provides that a person affected by the decision of the Commission may approach the Employment and Labour Relations Court created under **Article 162(2)(a) of the Constitution**.
37. In my considered view, **Article 162(2)(a)** is not about Magistrates' Courts but the ELRC properly constituted and presided over by a judge of that court. The jurisdiction of the ELRC is delineated under **Section 12 of the Employment and Labour Relations Court Act**. Specifically, **Section 12(5)** of the Act is in the following terms –
- The Court shall have jurisdiction to hear and determine appeals arising from -***
- (a) decisions of the Registrar of Trade Unions; and***
  - (b) decisions of any other local tribunal or commission as may be prescribed under any written law.***
38. For all intents and purposes, in the context set out above, the Commission operates as a quasi-judicial tribunal in executing that quasi-judicial function. In that regard, the decision from the Commission may only be challenged before the ELRC and not in a magistrates' court whose jurisdiction over employment and labour relations matters is limited. In any event, the trial court in its

judgment did not touch or comment on the decision of the Commission which was brought to its attention as alluded to above.

39. As it now turns out, there are now two decisions over the same subject matter – that of the Commission dismissing the appeal on the dismissal and that of the lower trial court declaring the dismissal unfair and unlawful.
40. Having had her appeal dismissed by a competent body, the Commission, the Respondent ought to have approached this court (ELRC) to set aside that decision and to have the matter considered afresh for determination on merits. Better still, the Respondent ought to have challenged the decision of the Commission with ELRC and thereafter file the claim in a magistrates' court upon vacation of the decision of the Commission, if she desired to follow that route. It is a mockery of justice to have two different and distinct decisions over the same subject matter.
41. The court agrees with the submissions by counsel for the Appellants that upon the Commission rendering its decision dismissing the appeal, the matter became *Res judicata* unless and until that decision was challenged and or set aside by a competent court. It was wrong for the trial court to ignore that fact and proceed as if it the decision of the Commission was of no legal consequence.
42. The court finds and holds that as at the time the Respondent filed her claim in the lower court, a decision had already been made and

communicated by the Commission and as such the subject matter was ***Res judicata***. The trial court ought to have dealt with that issue as a preliminary point and make the conclusion that it had no jurisdiction over the subject matter as long as the decision of the Commission remained unchallenged.

43. Further, ***Regulation 8 of the Public Service Commission (County Government Public Service Appeals Procedures) Regulations*** allows the Commission to hear and determine appeals on dismissal by county public service boards. Furthermore, ***Regulations 21 & 22*** of those regulations provides for review of the decision of the Commission by the Commission. Based on the evidence availed in the trial and submissions by counsel for both parties, the court notes that the Respondent did not exhaust this avenue before approaching the trial court.

44. Consequently, this court finds and holds that the proceedings before the trial court were without jurisdiction and the same, alongside the resultant judgment and decree, shall be and are hereby set aside and declared null and void.

45. With the above holding, there is no need for the court to consider the other issues listed above as doing so shall amount to a mere academic exercise.

46. Consequently, the appeal succeeds and the court shall thus issue orders as hereunder.

**VI. ORDERS**

- (i) The entire proceedings in the lower trial court alongside the judgment and the decree are hereby set aside and declared null and void for lack of jurisdiction.*
- (ii) Each party shall meet own costs in the lower court and for this appeal.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
KAKAMEGA THIS 30TH DAY OF APRIL 2026.**

.....  
**DAVID NDERITU**  
**JUDGE**