

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
ELRC CAUSE E018 OF 2025
SAMSON OKOTH
GOR.....CLAIMANT

VS

DOSHI & COMPANY (HARDWARE) LIMITED..... RESPONDENT

JUDGMENT

Background

1. By the Memorandum of Claim dated 24th February 2025, the Claimant sued the Respondent and sought the following reliefs against it;

A. A declaration that the termination of the Claimant's employment by the Respondent on 6/9/2024 lacks equity, was un procedural, and unfair.

B. The Respondent be compelled to pay the claimant as follows: -

i) One month's salary in lieu of Notice = KShs. 80,346.00 ii) Severance pay @ 15 days per year for each completed year of service (6 years) = KShs. 241,038.00

iii) Maximum compensation for unfair termination based on gross wage = Kshs. 964,152.00 Total = Kshs. 1,285,536 iv) Costs and interest of the suit from the date of filing till payment in full. v) Any other order as the court may deem fit to meet the ends of justice.

2. The Respondent contested the Claimant's claim with a Response to the Memorandum of Claim dated 29th April 2025. The Respondent confirmed that at all material times the Claimant was its employee. However, it denied the Claimant's cause of action and entitlement to the reliefs sought.

3. At the hearing of this suit, the parties adopted their respective witness statements filed herein as part of their evidence in chief and produced the documents filed under their respective lists of documents as their documentary evidence.

Claimant's case

4. The Claimant stated that he was employed by the Respondent on 2nd December 2017 as a Declaration Clerk, earning a monthly salary of Kshs. 80,346. He served

diligently without any disciplinary issues. His employment was confirmed in June 2018 due to his good performance.

5. On 24th August 2024, he received a show-cause letter alleging misconduct on his part. The letter required him to make a response thereto within three days of the date thereof. He replied promptly.
6. On 29th August 2024, the Respondent wrote to him inviting him to a disciplinary hearing scheduled for 2nd September 2024.
7. Subsequently, on 6th September 2024, the Respondent issued him a letter terminating his employment. The reasons given for his dismissal were that he allegedly wasted company time by browsing the internet, used company stationery for personal work, and copied confidential company information using private facilities.
8. The Claimant asserted that the allegations were unfounded and that the dismissal was unjustified.
9. He argued that the disciplinary process was inherently flawed and procedurally unjust. The Respondent failed to provide witnesses or evidence to substantiate the allegations, refused to produce the CCTV footage he had requested, and failed to specify the details of the alleged misconduct, including the time and nature of the events.
10. He contended that in discharging his duties, for instance, lodging entries through SMS, he regularly used the internet. The Respondent's internet was blocked for unofficial use. He never used it for his personal use at any point during his employment.
11. He further testified that if stationary meant things like a calculator, he normally used his phone for calculations, as the Respondent did not provide a calculator despite several requests.
12. He stated that, though the letter inviting him to the disciplinary hearing expressed that he had the right to be accompanied by a colleague, no one was willing to accompany him. His desire to have an external witness accompany him to the hearing was thwarted when the Respondent declined his request for additional time to secure the witness. He was compelled to participate in the hearing because the panel took the firm position that it must proceed.
13. Despite his letter dated 24th August 2024, the Respondent failed to give him in advance the evidence that was to be relied on during the hearing. The Respondent did not call any witnesses during the hearing to support the allegations they had made against him.
14. Cross-examined by Counsel for the Respondent, the Claimant testified that he was stationed at the Respondent's hardware store within the town and had an assigned desk from which he operated. 15. Initially, he had a laptop assigned to him by the Respondent, and the same had an inbuilt calculator. However, on 15th September 2023, he was moved to another desk that had neither a calculator nor a laptop. He worked from this desk till he was terminated.
16. He stated that Mr Maurice Otieno was his immediate supervisor. Further, from his desk, Mr Otieno would not be able to see what he [the Claimant] was doing on the laptop, given the distance between their desks.

17. At separation, he was paid part of his terminal dues. His last pay slip shows that he was paid leave encashment. He was issued a certificate of service.
18. Though he worked for six days in September 2023, he was not paid a salary for those days.

Respondent's case

19. The Respondent called one witness, Mr Joseph Otin, its Human Resources Manager, to testify on its behalf. The witness stated that the Claimant commenced employment with the Respondent on 2nd December 2017 and was confirmed in employment from 1st June 2018.
20. According to the witness, the Claimant had a history of disciplinary issues during his employment. In June 2022, he was reported for shouting at his supervisor when questioned about an assignment, which led to a disciplinary process and a warning letter. On 15th September 2023, he faced disciplinary action again for poor performance after making an error that caused a financial loss to the company, and he received a verbal warning following a meeting to address the matter.
21. The Respondent further states that on 23rd August 2024, the claimant was issued with a show cause letter for persistently wasting company time by engaging in personal work on his personal iPad despite repeated verbal cautions.
22. The matter proceeded to a disciplinary hearing on 2nd September 2024, which the Claimant attended. After considering the evidence, the Respondent found the Claimant guilty of gross misconduct, specifically for wasting company time by browsing the internet, doing personal work using company stationery, and making copies of confidential company information using private facilities, contrary to company policy.
23. Following the disciplinary process, the Respondent terminated the Claimant's employment on 6th September 2024. At termination, the Claimant was paid all his terminal dues, including one month's salary in lieu of notice, accrued leave days, and salary up to the date of termination. The Claimant was issued a certificate of service on the same day.
24. It is further asserted that the claimant did not appeal the termination decision and proceeded to settle with the company immediately after receiving the termination letter.
25. Cross-examined by Counsel for the Claimant, the witness asserted that the Claimant's employment was terminated on three grounds: wasting the Respondent's time browsing the internet, wasting the company's time doing his own work using the company's resources, and making copies of the company documents using private facilities.
26. Prior to the termination on the stated grounds, he had been given verbal warnings.
27. After receiving the show cause letter, the Claimant requested for CCTV footage and a meeting with the accusers. The witness did not respond to the request.
28. He further testified that during the disciplinary hearing, the Claimant informed him that he had no witnesses. However, he consented to the meeting proceeding nonetheless.

29. From the minutes of the disciplinary meeting, it is clear that the Claimant was informed that he was charged with deliberately disobeying lawful orders. The person who reported this against the Claimant was Maurice Otieno. Mr Otieno was a member of the disciplinary panel.
30. The witness further stated that the Respondent did not, in any of the letters it wrote to the Claimant, state the specific dates when the infractions it complained of were committed by the Claimant.
31. The Respondent did not have any witnesses during the hearing to confirm the accusations against the Claimant. The Respondent did not present any CCTV footage to the court, as its cameras are non-functional.
32. The witness further stated that the Respondent did not inform the Claimant and the court when the alleged copies of the confidential information were made. Further, what they meant by confidential information.
33. Pressed further, he stated that the confidential information referred to meant the documents that the Claimant presented during the disciplinary hearing in support of his defence.
34. The issue of the documents was not raised in the show-cause letter. The Respondent did not inform the Claimant that the documents had become a disciplinary issue, nor did they allow him to defend himself against the accusation. Yet the Respondent made it a ground for terminating the Claimant's employment.

Claimant's submissions

35. The Claimant submits that his termination by the Respondent on 6th September 2024 was unlawful, unprocedural, and unfair, despite the Respondent admitting the existence of an employment relationship from 2nd December 2017 to the date of termination.
36. He argues that although the Respondent cited reasons of misconduct, including wasting company time, doing personal work, and handling confidential information improperly, the process leading to his dismissal did not meet the legal standards for fairness.
37. The Claimant maintains that upon receiving the show cause letter dated 23rd July 2024 (which he received on 24th August 2024), he responded immediately and requested details of the allegations, including the identification of his accusers and CCTV footage, but the Respondent failed to provide these and instead proceeded to hold a disciplinary hearing without addressing his requests.
38. The Claimant argues that this failure denied him a fair opportunity to prepare and present his defence, thereby rendering the disciplinary process defective. In support of this position, reliance is placed on *Willie Kipkoech Langat v County Public Service Board & 2 others* [2022] eKLR and *Kimani v Rosslyn Academy (Cause E 251 of 2022)* [2025] KEELRC 1892 (KLR) (27 June 2025).
39. The Claimant also relies on *Wanyera v Central Isiolo Investment Limited (Appeal E002 of 2023)* [2024] KEELRC 596 (KLR) (8 March 2024), which cited *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR.
40. On the remedies sought, the Claimant contends that he is entitled to notice pay on the basis that he was not issued with prior written notice as required under

section 35(1)(b) of the Employment Act, notwithstanding the Respondent's claim of payment in lieu of notice. He further claims severance pay for six years of service and maximum compensation for unfair termination under section 49(1)(c), arguing that the dismissal violated sections 41, 43, 45 and 46 of the Employment Act.

41. In support of the claim for compensation, reliance is placed on *Mwaniki v Tihan Limited* (Cause E. 403 of 2020) [2025] KEELRC 1208 (KLR) (30 April 2025), which cited *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR and *D.K. Marete v Teachers Service Commission* (Cause No. 379 of 2009).

Respondent's submissions

42. The Respondent affirms that, although it acknowledges the existence of an employment relationship with the Claimant, the termination of his employment on 6th September 2024 was conducted lawfully, with procedural fairness and substantive justification. The requirements stipulated under the Employment Act 2007, specifically sections 41, 43, 44, and 45, were duly satisfied.
43. It is argued that the Claimant, who served as a Declaration Clerk, was subjected to a disciplinary process following the receipt of a show cause letter. He responded to the letter and thereafter attended a disciplinary hearing on 2nd September 2024, prior to the termination of his employment.
44. The Respondent contends that the Claimant's own evidence supports the fairness of the process, as he admitted to receiving and responding to the show cause letter and to participating in the disciplinary hearing without objection.
45. It is further contended that, although the Claimant was supplied with sufficient work tools, including a company computer and calculator, he consistently utilised his personal tablet during working hours for activities unrelated to work, such as browsing, despite multiple verbal warnings from his supervisor and a director. The conduct constituted gross misconduct under section 44(4)(c) and (g) of the Employment Act, which justifiably attracted the termination of his employment.
46. On the issue of procedural fairness, the Respondent submitted that the procedural fairness requirements under section 41 of the Act, including notice of the allegations, an opportunity to respond, and a hearing before a decision was made, were adhered to. In support of this position, reliance was placed on *Postal Corporation of Kenya v Andrew Tanui* [2019] eKLR.
47. The Respondent further submitted that the sanction of dismissal was proportionate, as the Claimant had been subjected to progressive discipline, including prior warnings, but failed to correct his conduct.
48. Regarding the reliefs sought, the Respondent contests that the Claimant is not entitled to any of the remedies sought. It is argued that notice pay is not payable as the Claimant was already compensated with one month's salary in lieu of notice, severance pay is not applicable since the termination was not due to redundancy under section 40 of the Act, and compensation for unfair termination is unwarranted as the dismissal was both substantively justified and procedurally proper.

49. The Respondent maintains that the only entitlement is a certificate of service under section 51 of the Employment Act, which it is prepared to issue, and requests that the court dismiss the suit with costs.

Analysis and determination

50. The issues to be determined are whether the Claimant's termination was unlawful and unfair, and whether the Claimant is entitled to the remedies sought.

Whether the Claimant's termination was unlawful and unfair

51. For termination of an employee's employment to be considered fair, it must be demonstrated that the process leading to the decision to terminate the employee's employment was procedurally fair, and the decision to terminate was substantively justified.

52. Section 41 of the Employment Act addresses procedural fairness. It sets out a mandatory procedure that any employer contemplating terminating an employee's employment must follow. Failure to adhere to this procedure renders the termination unfair. The procedure comprises three elements: the notification/information element, the hearing element, and the consideration element.

53. The Court of Appeal in *Postal Corporation of Kenya v Andrew Tanui* [2019] eKLR observed;

"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 the grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee."

54. It is important to note that when assessing the procedural fairness of the termination of an employee's employment, the stipulations of Section 41 of the Act must not be read in isolation from other statutory and/or constitutional provisions that address procedural fairness, especially given that employment rights were apparently incorporated into the Constitution of Kenya 2010. Further, the tenets of natural justice, as well as internal policies and practices aligned with the statutory and constitutional stipulations on procedural fairness, must be considered.

55. In the case of the *Chief Registrar of the Judiciary & 2 others v LMN* [2025] KESC 53[KLR], the Supreme Court stated;

"We begin this judgment by declaring that the fairness of any disciplinary process is today a constitutional imperative, irrespective of the status of the officer involved. The process must uphold all the tenets of fair administrative action under Article 47 and the right to a fair hearing under Article 50 of the Constitution. In addition to these constitutional safeguards, by the provisions of the Judicial Service Act and the Fair Administrative Action, the disciplinary bodies, including the Judicial Service Commission, are bound to ensure that any disciplinary

action against a judge, judicial officer and staff must strictly comply with both constitutional and statutory requirements.”

56. It is not disputed that the Claimant was issued with a show cause letter, responded to it, and attended a disciplinary hearing before his termination on 6th September 2024. However, the key issue is whether the process was fair and adhered to both the statutory and constitutional imperatives.

57. The information requirement of the process contemplated under Section 41 of the Employment

Act, the right to a fair administrative action under Article 47, and the right to a fair hearing under Article 50 of the Constitution of Kenya, 2010, require that the accusations against the employee to be subjected to a disciplinary process be set out with sufficient detail and clarity in the document informing the employee of the employer's contemplation of acting against the employee. Generalised accusations cannot be afforded. Entertaining generalised and ambiguous accusations would render the hearing requirement nonsense and constitute an affront to the constitutional procedural fairness imperative.

58. It is not in dispute that the Respondent issued the Claimant a notice to show cause dated 23rd July, 2024. He contended that the notice was deficient in specificity and detail, thereby preventing adequate preparation for his defence and for representation against the intended disciplinary action.

59. The letter read in part;

“It has been reported that on 22nd August, 2024, you were asked to work on a file cover reference as part of opening new files since the other staff were very busy. You refused to do the work, you knowingly failed, or refused to obey a lawful and proper command which was within the scope of your duty to obey. This is insubordination of company policy, and those placed in authority over you by the employer.

Secondly, you have on several occasions been verbally warned to stop wasting company time browsing your iPad and doing personal work during company working hours. You have instead developed a callous attitude and continued disobeying the rules on time wasting and conducting personal activities during official working hours. Your behaviour is insubordination to those placed in authority over you.

The above act of gross misconduct is a violation of the workplace rules and procedures as stipulated in your employment contract and the employment laws of Kenya.

60. I have carefully considered the contents of this show cause letter and hesitate not to conclude that it was so deficient in detail and specificity as to reasonably enable the affected employee to adequately prepare and defend himself against the accusations against him. In fact, in his response letter dated 24th August 2024, the Claimant did not miss the opportunity to express his dissatisfaction with the deficiency. In my view, a reasonable employee, cognizant of the imperative of procedural fairness, would remedy the deficiency by issuing a

further letter with more detailed particulars. Inexplicably, the Respondent did not.

61. Inarguably, procedural fairness requires that the affected employee be provided with details of the accusers before the disciplinary hearing, unless an exceptional circumstance applies, which must be clearly communicated to the employee. Further, the employee should be afforded the opportunity to cross-examine the accusers during the hearing. The employee should also be afforded the documents or other material that the employer intends to use in support of the charges against the employee, and this becomes even more imperative when the employee has requested the same. See *Shollei vs Judicial Service Commission & 3 others* [2022] KESC5[KLR].
62. Despite requests for further details, including the identities of his accusers and CCTV footage, which the Respondent's witness admitted in his evidence under cross-examination, the Claimant was not provided with the details or CCTV footage.
63. In *Kimani v Rosslyn Academy (Cause E 251 of 2022)* [2025] KEELRC 1892 (KLR) (27 June 2025), the court emphasised that an employee is entitled to know and face his accusers, to cross-examine them where necessary, and to be supplied with the evidentiary material relied upon by the employer.

The Court observed that,

"It must be appreciated that a disciplinary process is not a mere formality for purposes of ticking boxes. It ought to embody the elements of a fair hearing, such as the right to cross-examine where applicable and the right to access information, materials, and evidence to be relied upon by the employer in arriving at its decision. As highlighted herein, these elements were lacking in the process applied by the Respondent in terminating the Claimant's employment."

64. By reason of the foregoing premises, I come to the inevitable conclusion that the termination of the Claimant's employment was procedurally unfair.
65. I now turn to consider whether the termination was substantively fair. Section 43 of the Employment Act places a duty on the employer in a dispute regarding the termination of an employee's employment to prove the reason for the termination. A further legal burden is placed on the employer under section 45 to prove that the reason was valid and fair.
66. The question at this juncture is whether a reasonable employer would terminate an employee's employment on the basis of the grounds set out in the show cause letter and the termination letter relevant to this matter.
67. This Court notes that one of the grounds, the basis on which the Respondent terminated the Claimant's employment, can be discerned from the termination letter dated 6th September 2024, is that he made copies of the company's confidential information using private facilities contrary to company policy. In his evidence, including that under cross-examination, the Respondent's witness appeared to this Court unsure of what the information was, when copies thereof were made, and from which private facility.
68. Furthermore, in his evidence during cross-examination, the witness admitted that the ground was not among those set out in the show cause letter, to which the Claimant was invited to respond. The issue arose only during the disciplinary

hearing. In my view, it is improper for an employer to raise matters during the disciplinary hearing that the employee was not informed of in the correspondence before the hearing. To allow such would undermine employees' right to a fair hearing, as it deprives them of adequate preparation to defend themselves against the accusations.

Such deprives the employer's decision of legitimacy.

69. Additionally, the foregoing premises lead this court to conclude that the Respondent did not act in equity and justice.
70. The termination letter expresses that the Respondent's decision was anchored on sufficient evidence that was presented before the panel. With great respect, from the minutes placed before this Court, I see no such evidence.
71. Given the accusations against the Claimant, made in the generalised manner mentioned above, and in addition, the Claimant's response, which required the accusers to be present and CCTV footage to be furnished, no reasonable employer would conclude that the accusations against the Claimant were proved and sanction him.
72. A careful review of the minutes of the disciplinary hearing reveals a critical ambiguity. Was the Claimant found culpable of one infraction, namely knowingly failing or refusing to obey a lawful and proper command within the scope of his duty to obey, or of all the grounds set out in the termination letter? A termination letter can only be legitimate if it aligns with the show cause letter, any communication preceding the disciplinary hearing, speaking to the grounds for the employer's intention, and the minutes of the disciplinary hearing. The termination letter relevant to this matter did not.
73. By reason of the foregoing premises, I come to the inevitable conclusion that the Respondent failed to discharge its legal burden under Sections 43, 45, and 47[5] of the Employment Act, and that, as such, the termination of the Claimant's employment was substantively unfair.
74. I now turn to consider whether the Claimant is entitled to the reliefs sought.
One month's salary in lieu of Notice = Kshs. 80,346.00
75. Undoubtedly, the Claimant is not entitled to this relief. In his cross-examination, the Claimant admitted that, among the separation dues he received, were notice pay and compensation for earned but untaken leave days. In fact, the last pay slip is a testament to these payments.
Severance pay @ 15 days per year for each completed year of service (6 years) = Kshs. 241,038.00
76. Severance, a benefit under Section 40 of the Employment Act, is a remedy available only in redundancy situations. It should not be confused with service pay under Section 35 of the Act. The termination in the present case was not due to redundancy. The remedy cannot be availed to the Claimant.
Maximum compensation for unfair termination based on gross wage = Kshs. 964,152.00
77. Section 49[1][c] of the Employment Act confers on courts the authority to award compensatory relief to an employee who has successfully challenged their employer's decision to unfairly terminate their employment or summarily dismiss them. However, the exercise of this authority is discretionary and depends on the circumstances of each case.

78. I have carefully considered the circumstances surrounding the termination of the Claimant's employment, including that it was devoid of procedural fairness and substantive justification, the length of his service to the Respondent, and that the Claimant did not, in any proven way, contribute to the termination, and hold that he is entitled to compensatory relief to the extent of six months' gross salary.
79. In the upshot, judgment is hereby entered for the Claimant in the following terms;
- a) Compensation pursuant to the provisions of section 49[1][c] of the Employment Act,.....KShs. 482,076.
 - b) Costs of the suit.
 - c) Interest at court rates on the amount awarded from the date of this judgment till full payment.

Read Signed and Delivered this 23rd Day of April 2026.

**OCHARO KEBIRA
JUDGE**