



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E065 OF 2025

UNITED MILLERS LTD.....**APPELLANT**

VERSUS

EDDY AMOLLO ANGAWA.....**RESPONDENT**

(Being an appeal from the judgment and decree of Hon. V. Adhiambo SRM in Kisumu CMELRC NO. E211 OF 2024 delivered on 22nd July 2025)

JUDGMENT

1. This appeal arises from the Judgment of Hon. V. Adhiambo SRM delivered on 22nd July 2025 in **Kisumu CMELRC No. E211 of 2025, Eddy Amollo Ang'awa v United Millers Ltd.** Aggrieved by that decision, the Appellant lodged a

Memorandum of Appeal dated 6th August 2025, setting out the following grounds:

- (1) *That the Learned Magistrate erred in law and fact by failing to appreciate the import of section 44 of the Employment Act and by awarding the Claimant salary in lieu of notice in the sum of Kshs. 46,950/- when in fact the Claimant was summarily dismissed from employment.*
- (2) *That the Learned Magistrate erred in law and fact by failing to consider that the Claimant failed to prove that he was denied a shop floor representative or a fellow employee to accompany during the preliminary hearing.*
- (3) *That the Learned Magistrate erred in law and fact by awarding the Claimant unpaid leave days in the sum of Kshs. 46,950/-, which had in fact been paid by the Appellant as part of the Claimant's full and final dues.*
- (4) *That the decision of the Learned Magistrate is against the weight of the evidence.*

2. On the strength of these grounds, the Appellant urges this Court to allow the appeal, set aside the judgment of the Trial Court, and substitute it with an order dismissing the claim. The Appellant also seeks costs of the appeal.

3. The appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant begins by emphasizing the duty of a first appellate court to reconsider, re-analyse, and re-evaluate the evidence on record, and to arrive at its own independent conclusion, bearing in mind that it did not have the benefit of seeing or hearing the witnesses. It relies on the cases of **Selle v Associated Motor Boat Ltd (1968) EA 123** and **Peter v Sunday Post Ltd [1958] EA 424**. In view of the foregoing, the Appellant submits that this Court is entitled to interfere with the findings of the trial court where; there is a misapplication of the law, conclusions based on unsupported evidence, or an injudicious exercise of discretion.

5. In support of the appeal, the Appellant identifies the issues for determination as: whether the Respondent was lawfully and procedurally summarily dismissed; whether the award of salary in lieu of notice was lawful; whether the award for alleged unpaid leave was supported by evidence; and whether the judgment as a whole was against the weight of evidence and the law.

6. On the lawfulness and procedural propriety of the dismissal, the Appellant submits that the Respondent was lawfully summarily dismissed for gross misconduct. Concerning procedural fairness, the Appellant contends that it complied with the requirements of section 41 of the Employment Act. It submits that the Respondent was issued with a notice to show cause, responded in writing, attended a disciplinary hearing, and was informed of his right of appeal, which he did not pursue. Further, the Appellant asserts that it satisfied the minimum standards of procedural fairness set out in

Postal Corporation of Kenya v Andrew K. Tanui [2019]

eKLR, in the following terms:

- a. Explanation of the grounds of termination in a language understood by the employee;

- b. Explanation of the reasons for contemplated termination;
- c. Explanation of the right to be accompanied by a fellow employee or union representative; and
- d. Consideration of the employee's representations.

7. The Appellant further submits that the Respondent elected to attend the disciplinary hearing unaccompanied, despite being informed of his right to be accompanied. It therefore contends that the Respondent cannot allege procedural unfairness after voluntarily waiving that right. Moreover, the Appellant argues that the Trial Magistrate misinterpreted the term "company" in the disciplinary minutes to refer to a corporate entity, rather than to the act of being accompanied by another person, thereby arriving at an erroneous conclusion.

8. In any way, the Appellant submits that the Respondent neither pleaded nor proved that he requested representation and was denied. It contends that the Respondent therefore failed to discharge the burden of proof under section 47(5) of

the Employment Act, read together with sections 107, 109, and 112 of the Evidence Act. It references **Postal Corporation of Kenya v Andrew K. Tanui** (*supra*) for the proposition that the right to representation under section 41 crystallizes upon request, and that where an employee elects to proceed unaccompanied, the employer cannot be faulted. The Appellant therefore maintains that the finding of procedural unfairness is unsupported by the evidence and is based on a misapprehension of the record.

9. On substantive justification, the Appellant submits that the Respondent had received several warning letters, and that the evidence demonstrated negligence and recklessness in the performance of his duties. It asserts that section 44(1) and (4) of the Employment Act permits summary dismissal in such circumstances, and that the dismissal was therefore justified.

10. Regarding the award of salary in lieu of notice, the Appellant submits that the trial court erred in law in granting the same after upholding summary dismissal. It contends that once summary dismissal is established under section 44

of the Employment Act, the issue of notice pay does not arise. In support of this position, the Appellant cites **Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR** and **CFC Stanbic Bank Ltd v Danson Mwashako Mwakuwona [2015] eKLR**, in which the Court of Appeal held that notice pay is incompatible with lawful summary dismissal, and that a court cannot uphold a dismissal while simultaneously awarding notice pay.

11. On leave pay, the Appellant submits that the Trial Magistrate erred in making the award for unpaid leave. It asserts that all leave dues were duly computed and paid, and points to its documentary evidence, which it asserts was not rebutted. It contends that the Respondent failed to plead, particularize, or prove the alleged outstanding leave days, the period of accrual, any discrepancy in payroll or any statutory breach by the Appellant. In support of this argument, the Appellant relies on the case of **Said Ndege v Steel Makers Limited [2014] eKLR**, where the court held that claims for unpaid leave constitute special damages that must be strictly proved, and **SYT v TA [2019] eKLR**, in

which the court underscored that unproven pleadings remain mere allegations incapable of grounding a lawful award.

12. In conclusion, the Appellant urges the Court to allow the appeal. It submits that the judgment was against the weight of the evidence, as the trial court ignored uncontroverted evidence, misapplied sections 41, 44, and 47(5) of the Employment Act, awarded remedies not provided for in law, and exercised discretion on the basis of sympathy rather than legal principle. Reliance is placed on **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** for the argument that judicial discretion must be exercised within the confines of the law.

Respondent's Submissions

13. On his part, the Respondent identifies the following issues for determination:

- (a) Whether the Learned Magistrate erred in finding that the termination was procedurally unfair;
- (b) Whether the award of salary in lieu of notice was erroneous in law;

- (c) Whether the award for unpaid leave was justified;
and
- (d) Whether the judgment was against the weight of the evidence.

14. On procedural fairness, the Respondent submits that the Trial Court correctly found that he was denied the right to be accompanied at the disciplinary hearing. In support of this position, he relies on the minutes of the disciplinary hearing dated 15th March 2024. He also cites **Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386 (KLR)**, in which the court held that for termination of employment to be fair, it must pass both the substantive and procedural fairness test.

15. On whether the award of salary in lieu of notice was contrary to the law, the Respondent submits that it was not. He asserts that an award of notice pay is a natural consequence of a finding of procedural unfairness, and that the Trial Magistrate was therefore entitled to grant it. Reliance is placed on the case of **Gitonga v Karanja**

Njenga Advocates [2025] KEELRC 2042 (KLR), where the court held that non-compliance with section 41 precludes an employer from invoking section 44 of the Employment Act, thereby justifying an award of notice pay.

16. On unpaid leave, the Respondent submits that the award was proper in light of the Appellant's failure to produce leave records or proof of payment. With respect to whether the judgment was against the weight of the evidence, the Respondent submits that it was not. He contends that the judgment was balanced and based on a proper evaluation of the pleadings, oral evidence, and applicable legal principles. He therefore urges the Court to dismiss the appeal and uphold the judgment of the Trial Court.

Disposition

17. This being a first appeal, this Court as the appellate court is obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before that Court in order to arrive at its own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where the

Court of Appeal outlined the duties of a first appellate court as follows:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

[Emphasis supplied]

18. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have duly evaluated the evidence the parties presented in the Trial Court, and which evidence and documents in support thereof, are before this Court and I have come to the following determination.

19. The law is clear. Even where summary dismissal is contemplated, the employer has to accord the employee the

safeguards as per the law. In termination, when the employer contemplates it, on account of misconduct and the like, there should be a hearing at which the employee is allowed to be accompanied by a union or shop floor representative of her/his choice. In the case before the Learned Magistrate, the driver (Respondent herein) was accused of causing an accident. The documents that were produced indicated the damage to the vehicle was consistent with stones thrown on the windscreen. The driver was accused of carelessness and the vehicle which had dents was ascribed to him though there was no logbook or work ticket to show he had the vehicle at the material times when the damage to the front occurred. In regard to the windscreen, he stated that he was able to apprehend the offending motorcyclist but the other boda boda riders came and rescued the man and took the motorbike as well. This explanation was held not to be plausible by the Appellant yet the Isuzu dealers indicated the damage was consistent with an attack on the vehicle by persons unknown. The Respondent was not permitted to have a person of his choice accompany him to the disciplinary hearing.

20. The Employment Act makes provision at section 41 for the hearing of an employee prior to dismissal and the hearing is required to be held after an explanation is given to the employee in the presence of a witness of his or her choice. The Appellant denied the employee the basic rights under the Employment Act and therefore did not mete out a proper dismissal. Even where there is cause for dismissal, the same must accord with the law as held in the case of **Walter Ogal Anuro v Teachers Service Commission** (*supra*) where Ndolo J. (as she then was) held that there must be procedural fairness and substantive justification. The procedural fairness was lacking rendering the dismissal unfair and unlawful within the meaning of the law. The Learned Magistrate therefore did not fall into any error when she found the Appellant to have been in breach of the law as regards the termination.

21. The appeal is for dismissal as there was basis for the finding by the Learned Magistrate. The sums awarded in quantum are reasonable and no error is the award is

discerned. Appeal dismissed with costs and decision of the Learned Magistrate upheld in all respects.

It is so ordered.

Dated and delivered at Kisumu this 27th day of April

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**