

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT KERICHO

ELRC APPEAL NO. E006 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

GEOFFREY KIBET CHERUIYOT.....

.....APPELLANT

VERSUS

**KETEPA REGULATED NON WDT SACCO
SOCIETY LIMITED**

.....RESPONDENT

***(Being an Appeal from the Judgment and Decree of
the Honourable T.M Gesora, Chief Magistrate,
delivered on 16th July 2025 in Kericho MCELRC No.
E044 OF 2023)***

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of Chief Magistrate Honourable T.M Gesora, filed this appeal vide a Memorandum of Appeal dated 12th August 2025, on the following grounds that:

- a) The learned Magistrate erred in law and fact and misdirected himself in holding that the Respondent terminated the Appellant's employment in accordance with sections 43, 44(3) and (4), and section 45 of the***

Employment Act when the evidence on record demonstrated the contrary.

- b) The learned Magistrate erred in law and fact in disregarding the fact that the Claimant was subjected to a sham hearing where the accuser was the prosecutor and the judge in the same cause, and which essentially violated his right to a fair hearing.***
- c) The learned Magistrate erred in law and fact and misdirected himself in relying on and basing his decision on documents and witness statements of the Respondent which had neither been adopted nor produced by any of the Respondent's witnesses.***
- d) The learned Magistrate erred in law and fact and misdirected himself in holding that the Appellant did not discharge the onus placed on him by virtue of section 47(5) of the Employment Act.***
- e) The learned Magistrate erred in law and fact and misdirected himself in shifting the***

onus of demonstrating that there were valid and genuine reasons for termination and that due process was followed to the Claimant against the settled principle that the burden rests with the employer.

2. The Appellant prays that:

a) The appeal herein be allowed.

b) The Honourable Court be pleased to set aside the judgment of the subordinate court delivered on 16th July 2025 and the decree emanating therefrom in its entirety, and substitute it with an order allowing the claim dated 29th September, 2023 in its entirety.

c) That the costs of this appeal be provided for.

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

Appellant's written submissions

4. The Appellant submitted that, as the first appellate court, it is duty-bound to re-evaluate and reconsider the evidence presented in the trial court on both matters of law and fact, and to arrive at independent

conclusions. However, the appellate court must acknowledge that it did not see or hear the witnesses and therefore make due allowance for this limitation. It is not bound by the trial court's findings if it is evident that the trial judge failed to consider material circumstances or probabilities in assessing the evidence, as emphasised in ***Selle v Associated Motor Boat Co. Ltd [1968] 1. E.A 123*** and reaffirmed in ***Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)***.

5. The Appellant submitted that the case stems from being arbitrarily sent on compulsory leave on 14th June 2023 without explanation, followed by a Notice to Show Cause on 1st July 2023 alleging failure to comply with leave, refusal to hand over duties, and incitement. Despite responding on 5th July 2023, he was again sent on compulsory leave on 18th July 2023 under new allegations of gross misconduct, and later summarily dismissed on 14th August 2023 without evidence or a fair hearing. The disciplinary process was marred by shifting accusations, lack of particulars, denial of witnesses, and reliance on

untested documents. The Respondent's Acting CEO acted as accuser, prosecutor, and judge, undermining fairness. No evidence was produced to substantiate claims of incitement or misuse of his computer, and the Appellant was denied the opportunity to cross-examine witnesses or prepare a defence. The trial court confirmed that the allegations remained unproven, the Respondent's documents were inadmissible, and the dismissal was unjustified, amounting to a predetermined sham process designed to remove the Appellant.

6. The Appellant submitted that **sections 45(2) and 43 of the Employment Act** place the burden on the employer to prove that termination of employment was fair, valid, and procedurally just. A dismissal is deemed unfair if the employer fails to establish a valid reason, a fair reason connected to conduct, capacity, compatibility, or operational requirements, and adherence to due process. In ***Mwangi v Family Bank Ltd [2023] KEELRC 2156 (KLR)***, the court emphasized that the employer's belief in the reasons for termination must be genuine, not whimsical or capricious. In the present case, the Appellant argued that the Respondent's accusations of failure to

proceed on leave, refusal to hand over operations, and incitement were vague, unsupported by particulars, and later shifted to “gross misconduct” without explanation. Consequently, the reasons for termination were neither valid nor genuinely believed to exist, and due process was not followed.

7. In ***Osire v Mega Pack (K) Limited [2023] KEELRC 1504 (KLR)***, Nderitu J stated as follows:

“ Section 43(2) of the Act deserves a second look before the court decides on the substance of the dismissal. What the employer is required to have is a genuine belief that the employee has misconducted himself or herself in the alleged manner, even if such belief later on turns out to be untrue. However, the belief must be genuine and not based on malicious, discriminative, speculative, weird, whimsical, and capricious allegations.

What this court understands to be the totality of the genuine belief imperative is that the employer should have some prima facie evidence that the employee has

engaged in misconduct that deserves disciplinary action. For such a belief to exist, the employer ought to have carried out some reasonable investigation and gathered the evidence against the employee. In my opinion, mere suspicion cannot be a ground for taking disciplinary action that may lead to dire consequences, including dismissal, as it happened in this cause.

In as much as the test is partly subjective on the part of the employer, this court holds the view that the belief should be genuine and reasonable founded on prima facie evidence. While it is not the duty of this court to substitute its view for that of the employer, the court has a duty and indeed an obligation to intervene where the position taken by the employer is unreasonable and not founded on reasons that go beyond mere suspicion. If employers were to act against employees on mere suspicion of misconduct, the environment at the workplace would

become chaotic, uncertain, and untenable, hence not conducive for optimum productivity.”

8. From the above-mentioned case, the Appellant submitted that the Respondent had no genuine reason to believe misconduct occurred, as the allegations in the show cause letter shifted from failure to proceed on leave to “gross misconduct” without particulars, evidence, or opportunity for response. The Respondent even altered the grounds for compulsory leave before holding a disciplinary hearing, demonstrating inconsistency and lack of genuine belief. The trial court erred in finding valid and genuine reasons for dismissal when the evidence showed the accusations were vague, unsupported, and later changed to unsustainable grounds.
9. The Appellant submitted that ***section 41 of the Employment Act*** sets out mandatory minimum standards for fair procedure in dismissals, requiring that an employee be notified of the charges in a language they understand, be allowed representation, and have their response genuinely considered. Courts have consistently emphasized that fair hearings must

include sufficient opportunity to prepare, a full understanding, **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] KEELRC 920 (KLR)**, and **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] KEELRC 296 (KLR)**. In **Kenfreight (E.A) Limited v Benson K. Nguti [2016] KECA 409 (KLR)** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR)**, it was held that failure to comply with section 41 of the Employment Act renders the process unfair. Similarly, in **Postal Corporation of Kenya v Tanui [2019] KECA 489 (KLR)**, the Court of Appeal stressed that withholding documents forming the basis of charges violates fairness. In the present case, the Appellant was invited to a disciplinary hearing without being furnished with particulars, evidence, or documents, and no witnesses were called for cross-examination. The Respondent's argument that the Appellant did not request documents or witnesses is untenable, as the duty to ensure fairness lies squarely on the employer. The trial court therefore erred in

disregarding these procedural lapses, which rendered the dismissal unfair.

10. In ***Kenya Revenue Authority v Menginya Salim Murgani [2010] KECA 164 (KLR)***, the Court of Appeal held that a fair disciplinary hearing requires more than a perfunctory recitation of charges; the employer must explain the allegations, supply documentary evidence such as audits, call witnesses, and allow the employee to cross-examine and present a defence. The Appellant submitted that his case mirrors this flawed procedure: the notice to show cause was vague and unsupported, evidence was concealed until the hearing, and the lead investigator improperly acted as prosecutor, witness, and judge, violating the rules of natural justice as emphasized in ***Mwangi v Family Bank Ltd [2023] KEELRC 2156 (KLR)*** and ***Co-operative Bank of Kenya Limited v Kennedy Kimaiyo Kiplagat [2021] KECA 918 (KLR)***. Moreover, the Respondent failed to prove valid and fair reasons for dismissal under ***sections 43 and 45 of the Employment Act***, as disciplinary proceedings did not substantively justify the termination. As reaffirmed in ***Odima v***

Maya Freight Ltd [2024] KEELRC 1634 (KLR), substantive justification must flow from fair procedure, which was absent here. The trial court, therefore, erred in finding the dismissal valid and procedurally fair.

11. The Appellant submitted that once a court finds termination of employment to be wrongful or unfair, the next step is determining the appropriate remedy under **sections 49 and 50 of the Employment Act**. These provisions empower the court to award compensation aimed at making good the employee's loss, not punishing the employer. As emphasized in **Hema Hospital v Wilson Makongo Marwa [2015] KECA 190 (KLR)**, where the Court of Appeal cited a South African case of **Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G Dun & Others, Appeal Case No JA 65/205**, which held as follows:

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that

loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."

12. ***Section 49(4) of the Employment Act*** outlines 13 guiding considerations, including the employee's wishes, length of service, expectation of continued employment, opportunities for comparable work, and mitigation of loss. In this case, the Appellant seeks: one month's salary in *lieu* of notice amounting to Kshs.39,398/= under ***sections 36 and 40(1)(f) of the Employment Act***, twelve months' salary as damages for unfair dismissal amounting to Kshs.472,776/= under ***section 49(1)(c) of the Employment Act***, accrued leave pay for 25 days, amounting to Kshs.46,902/=, and punitive damages of Kshs.500,000/= for the Respondent's oppressive and arbitrary conduct. The claim for punitive damages is supported by ***Bank of Baroda (Kenya) Ltd v Timwood Products Ltd, Civil Appeal No. 132 of 2001***, which allows such awards where

actions are oppressive or calculated to benefit the employer at the employee's expense.

13. The Appellant submitted that costs should follow the event, and seeks costs of both the trial and appeal. The cumulative evidence demonstrates that the Respondent's conduct was unlawful, oppressive, and procedurally flawed, warranting the remedies prayed.

Respondent's written submission

14. The Respondent submitted that the Appellant's termination was lawful and procedurally fair under **sections 43, 44(4), and 45 of the Employment Act**. The Respondent also submitted that the Appellant was notified of the reasons for the abuse of the company code of conduct, misuse of proprietary rights, and insubordination, and was afforded a hearing in line with its disciplinary policy and code of conduct. The Respondent maintains that the trial magistrate's judgment was sound, properly reflecting the Appellant's conduct and demeanour, and that the appeal raises no plausible grounds.

15. The Respondent further submitted that the show cause letter of 1st July 2023 clearly set out the allegations, to which the Appellant responded, and

that the dismissal met the fairness threshold under **section 45(2) of the Employment Act**. In support, the Respondent relies on **Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386 (KLR)**, where the court reiterated that **section 45(2) of the Employment Act** provides that termination of employment is unfair if the employer fails to prove that the reason for termination is valid, fair, and related to the employee's conduct, capacity, compatibility, or operational requirements, and that the termination was carried out in accordance with fair procedure. To satisfy the fairness test, termination must meet both substantive fairness, meaning the reasons are valid and genuine, and procedural fairness, meaning the process complies with **section 41 of the Employment Act**, which requires proper notification, explanation of charges, and a fair hearing.

16. The Respondent contended that the Appellant's termination was lawful and fair, effected through a dismissal letter dated 14th August 2023, citing gross misconduct and repeated violations of professionalism and the code of conduct. It argued that the process complied with **sections 45(1) and (2) of the**

Employment Act, which require valid and fair reasons related to conduct, capacity, compatibility, or operational needs, and adherence to fair procedure. The Respondent maintains that both substantive and procedural fairness were satisfied: investigations were undertaken, a show cause letter was issued on 1st July 2023, the Appellant responded, and he appeared before the disciplinary committee prior to dismissal. The Respondent placed reliance on **Josephine M. Ndungu & others v Plan International Inc [2019] KEELRC 663 (KLR)**, the Respondent emphasizes that fair procedure entails affording the employee an opportunity to be heard, with the employer bearing the burden under **sections 43(1), 45(2), and 47(5) of the Employment Act** to justify the termination and prove compliance with fair process.

17. The Respondent submitted that the trial court rightly dismissed the claim with costs because the termination was valid, justifiable, and consistent with the Respondent's HR policy. The Respondent relied on **George Musamali v G4S Security Services Kenya Limited [2016] KEELRC 1665 (KLR)**, where the court held that fair termination requires both a valid

reason and adherence to fair procedure, including furnishing charges and affording the employee an opportunity to respond. The Respondent further relied on the case of ***Naima Khamis v Oxford University Press (E.A) Ltd [2017] KECA 480 (KLR)***, which emphasized that under ***section 43(1) of the Employment Act***, the employer must justify the reasons for termination, and under ***section 45(2)(c) of the Employment Act***, termination is unfair if valid reasons are not provided or proper procedure is not followed. It also invokes ***section 47(5) of the Employment Act***, which places the burden of proving unfair termination on the employee and the burden of justifying dismissal on the employer. To reinforce its position, the Respondent relied on ***British Leyland UK Ltd v Swift (1981) I.R.L.R 91***, where Lord Denning articulated the “reasonableness test” for dismissal, and ***Kenfreight EA Ltd v Benson K. Nguti (supra)***, affirming the mandatory requirement of fair hearing under ***section 41 of the Employment Act***.

18. Ultimately, the Respondent submitted that the Appellant’s dismissal for gross misconduct under

section 44 of the Employment Act was lawfully effected, and that the appeal should be dismissed with costs.

Analysis and determination

19. Being the first appeal, the court must re-evaluate the evidence and come to a conclusion since it was not present when the evidence was adduced or see the witnesses as set out in ***Selle Associates V Associated Motor Boat Company Ltd (supra) and Kenya Ports Authority v Kustron (Kenya) Limited [2011] KECA 98 (KLR)***.
20. Having considered the record of appeal, memorandum of appeal, and the rival submissions by both parties, the issue for determination is whether the trial court erred in law and fact in finding the Respondent terminated the Appellant in accordance to ***Section 43, 44 and 45 of the Employment Act 2007***.
21. ***Section 47(5) of the Employment Act*** states as follows:
- “For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair***

termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

22. In ***Walter Ogal Anuro v Teachers Service***

Commission(supra) the court held as follows:

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination, while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

23. In ***Cooperative Bank of Kenya Limited v Yator***

[2021] KECA 95 (KLR), the Court of Appeal held that even though the Respondent was summarily dismissed on grounds of gross misconduct, the Appellant ought to have given the Respondent the opportunity to defend himself, which the Appellant bypassed.

24. In the present appeal, the Appellant lodged a claim against the Respondent, having served in the capacity of Accounts Assistant. The record discloses that the Appellant was issued with a notice to show cause dated 1st July 2023, citing allegations of failure to proceed on leave, refusal to hand over shop operations, and incitement of Nairobi members in relation to the said handover. The Appellant, by his letter dated 5th July 2023, denied the allegations. Subsequently, a disciplinary hearing was convened on 1st August 2023, and a dismissal letter was issued on 14th August 2023. Upon consideration, the Respondent defended the termination as fair, contending that the Appellant had reversed the loan interest for a customer, which necessitated his compulsory leave and the handing over of shop operations.

25. The trial magistrate, having weighed the evidence, held that the termination of the Appellant was procedurally and substantively fair.

26. The court is of the view that while the Respondent had valid grounds to terminate the Appellant, the dismissal process was flawed. Specifically, the

Respondent failed to uphold both substantive justification and procedural fairness as required under its Human Resources Policies and Manual, May 2021. In paragraph 18(v) provides that the employee should be interviewed and be given a chance to air their own knowledge of the indiscipline.

27. Section 41 of the Employment Act as well provides that the employee should be given an opportunity to defend himself in the presence of his witness being a fellow worker or a shop floor union representative See

Section 41(1) of the Employment Act 2007: -

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

28. The Appellant on 14th June 2023 was asked to proceed on a compulsory leave to cover half of his leave days in accordance to the Respondent's Human Resource Manual. He did not proceed on leave and he did not hand over the shop operations as ordered.
29. On 1st July 2023 he was served with a notice to show cause why he refused to go on leave and to hand over and thirdly why he had incited Nairobi members on the above issue. He responded to the Notice to show cause by 5th July 2023. On 18th July 2023 he was again asked to proceed on compulsory leave to allow investigations into erroneous postings based in Nairobi. Then, on 1st August he participated in a disciplinary hearing as per minutes annexed to the Record of Appeal. On 11th August he was served with a termination letter and the reasons were multiple instances of misconduct.
30. The court finds that the Respondent has not given specific reasons to justify gross misconduct and the reasons are at best generalised and unspecified. That therefore contravenes Section 45(1) a & b of the Employment Act. The said Section provides as hereunder: -

“No employer shall terminate the employment of an employee unfairly.”

31. Numerous case laws now support that a specific proven reason or reasons must be established by an employer to justify summary dismissal of an employee. It is not sufficient for the employer for example to state *“multiple instances of misconduct”* as in the Appellant’s termination letter. In the case of ***NAIMA KHAMIS -VS- OXFORD UNIVERSITY PRESS (E.A) LTD 2017 eKLR*** the Court of Appeal held: -

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2)(c) requires a termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employee

fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

32. This among many other authorities is supported by the often-cited case of ***KENFREIGHT E.A. LTD -VS- BENSON NGUTI (2016) eKLR*** where the Court of Appeal held: -

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to

terminate his contract of service is taken.”

33. The court was not provided with the Respondent's letter inviting the Respondent for disciplinary hearing. It is not clear if he was given clear reasons as to why he was being summoned to the disciplinary hearing to enable him to prepare his response. The court also wonders if he was given sufficient time to prepare his defence. And also, was he informed that he could call a fellow worker to be his witness or a shop floor union representative. These facts are not captured in the minutes produced in court. The Appellant did not own the minutes since he never signed them.

34. These discrepancies raise red lights on the procedural fairness of the process leading to the Appellant's termination. In the already cited case of **WALTER OGAL ANURO -VS- TEACHERS SERVICE COMMISSION (Supra)** the Respondent failed in the twin tests of both substantive justification and procedural fairness.

35. The court has critically considered the Memorandum of Appeal and the respective submissions of the rival parties as well as their case Laws and comes to the

conclusion that the trial magistrate erred in law and facts in holding that the Respondent terminated the Appellant in compliance with **Sections 43 and 44(3) (4) and Section 45 of the Employment Act**. The court finds the Appeal is merited and so is allowed. The lower court judgment is set aside therefore.

36. The court will go further and award the following reliefs to the Appellant:-

- (1) One month salary in lieu of notice- Kshs.39,398/=**
- (2) Three months' compensation for unfair termination amounting to Kshs.118,194/= being the Appellant by his combative behaviour contributed to his termination. He had worked for the respondent for only about 2 years. Three months equivalent of his salary is reasonable compensation.**
- (3) For accrued 25 leave days, the court will decline to award, as it was not proved in terms of documentation, together with punitive damages for the Respondent's oppressive and arbitrary conduct**
- (4) The Respondent to issue the Appellant with a certificate of service in accordance with Section 51 of the Employment Act within the next 30 days.**

37. The Appellant will have the costs of the appeal as well as costs of the lower court proceedings

38. Total award will be Kshs.157,592/= plus interest at court rates at 14% per annum from the date of this judgment until full payment.

Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 15th Day of May, 2026.

ANNA NGIBUINI MWAURE
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 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE