



**Chepkuto v Egerton University Investment Co Ltd (Civil Appeal  
14 of 2019) [2024] KECA 1848 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1848 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 14 OF 2019  
MA WARSAME, FA OCHIENG & SG KAIRU, JJA  
DECEMBER 20, 2024**

**BETWEEN**

**SAMUEL K CHEPKUTO ..... APPELLANT**

**AND**

**EGERTON UNIVERSITY INVESTMENT CO LTD ..... RESPONDENT**

*(An Appeal from the Judgment and Decree of the Employment and Labour Relations Court  
at Nakuru (M. Mbaru, J.) dated 29th November 2018 in ELRC Cause No. 402 of 2016)*

**JUDGMENT**

1. In contemporary society, job loss and unemployment have increasingly become ubiquitous in the labour market, manifesting in forms such as retrenchment, termination, or voluntary resignation. This raises a pivotal legal inquiry: when an individual experiences job loss, does this occur as a matter of choice, or is it a consequence of coercion? Moreover, it necessitates an examination of whether the termination was lawful, unlawful, or wrongful.
2. This appeal arises from the judgment rendered by the Employment and Labour Relations Court at Nakuru, (hereinafter referred to as “ELRC”), in which the appellant’s claim was dismissed. In the matter, the appellant sued the respondent for unfair termination vide a memorandum of claim dated 10<sup>th</sup> October 2016.
3. At the end of the trial, the appellant was awarded Kshs.414,000, being the salary for the two months he had not been paid, leave days for the year 2015/2016, and a certificate of service in accordance with Section 51 of the *Employment Act*. Being dissatisfied with the findings of the Court, the appellant lodged the appeal herein.
4. The brief facts of this case are that the respondent employed the appellant as a farm manager at their Ngongongereri Farm on 30<sup>th</sup> March 2010 on a 3-year contract. After the term of the contract lapsed, the



respondent renewed the appellant's contract on 1<sup>st</sup> April 2014 for a term of 4 years. The appellant's monthly salary under the new contract was Kshs.160,000 and a house allowance of Kshs.30,000. The appellant was to receive a yearly increase in his salary. In July 2015, there was an increase of Kshs.8,000 and another increase in January 2016.

5. The appellant's troubles with the respondent began on 1<sup>st</sup> July 2016 when he received a suspension letter from the managing director informing him that he had been immediately suspended from employment due to unacceptable behavior. As the letter did not contain the details of the unacceptable behavior, the appellant responded to the letter on 4<sup>th</sup> July 2016, seeking clarification on what 'unacceptable behavior' entailed.
6. This prompted the respondent to write a show cause letter dated 6<sup>th</sup> July 2016, detailing the reasons for his suspension as misappropriation of public resources for personal use. Firstly, it was alleged that the appellant had converted the respondent's power saw for personal use and even changed its engine from 272XP to 268. Secondly, the appellant was alleged to have brought his tractor KTCB 107J with a boom sprayer into the respondent's farm for his personal use, which conflicted with his supervisory duties of ploughing and spraying. Lastly, the appellant was alleged to have taken the respondent's safe for personal use.
7. In response to the show cause letter, the appellant in his letter dated 11<sup>th</sup> July 2016, denied personal use of the power saw or changing the engine thereof. He conceded that although the power saw was brought to his farm by the carpenter, it was never used as he did not require it and that the carpenter took it back to the respondent's farm the same day.
8. Kevin Mutai, the respondent's store clerk, in his statement dated 4<sup>th</sup> July 2016 denied issuing the appellant with the power saw for personal use, while Joseph Kang'ethe, the respondent's welder in his statement dated 6<sup>th</sup> July 2016 stated that the power saw was in the custody of the managing director.
9. The appellant conceded that he borrowed the respondent's safe to keep the funds he collected following his brother's death and that he returned the safe on 23<sup>rd</sup> June 2016 when he was asked to do so by the farm secretary. This information was corroborated by the statement of Patrick Renju, the respondent's accounts clerk, in a statement dated 6<sup>th</sup> July 2016.
10. As regards the tractor, the appellant stated that he never used it on the respondent's farm and he only parked it there. He stated that he had removed it immediately he was asked to do so. This information was corroborated by the statements of Joseph Kang'ethe and Joseph Ngacha, the respondent's crops supervisor, who both stated that the appellant used the tractor to plough farms around the Mau forest but never the respondent's farm.
11. Thereafter, by a letter dated 20<sup>th</sup> July 2016, the appellant was invited to appear before the respondent's board of directors on 26<sup>th</sup> July 2016. The letter did not indicate whether or not the appellant was facing a disciplinary hearing, and it did not specify whether the appellant could bring witnesses.
12. It is from the minutes dubbed, 'staff disciplinary meeting on 26<sup>th</sup> July 2016' that it became apparent that the appellant was facing a disciplinary hearing. The witnesses who testified at the hearing were the respondent's witnesses. The appellant presented his defence but he did not call any witnesses. The appellant was also not allowed in the room while the witnesses testified.
13. After the hearing, on 28<sup>th</sup> July 2016, the appellant was issued a summary dismissal letter notifying him that he was dismissed with effect from 27<sup>th</sup> July 2016. The letter stated that following the disciplinary board's findings, the appellant was found guilty of converting a power saw belonging to the respondent



- for personal use, changing the engine, and taking a safe belonging to the respondent for personal use. The allegations of parking his tractor on the respondent's farm were dropped.
14. Following these events, the appellant's case was that his dismissal was unfair because the decision of the respondent was in breach of the rules of natural justice and that he was condemned unheard. He alleged that there were no investigations conducted in respect of the allegations leveled against him. Additionally, despite appealing against his dismissal on 9<sup>th</sup> August 2016, the respondent neither considered his appeal nor responded to it.
  15. The appellant sought a declaration that his dismissal from employment was unfair, unlawful, and wrongful; he therefore asked for 3 months' salary payment in lieu of notice; payment for leave days not taken; house allowance due; unpaid salaries for May and June 2016; compensation for unfair termination; issuance of a certificate of service; payment of his unexpired term contract; gratuity at 31%; and costs of the suit.
  16. In response to the claim, the respondent conceded that they had employed the appellant as a farm manager for a period of 4 years with effect from 1<sup>st</sup> April 2014. The respondent stated that they purchased a portable safe in February 2013 to keep official documents. The safe was kept by Mr. Patrick Renju, the accounts clerk. The appellant borrowed the safe from him with the promise to return it immediately. However, he did not return the safe until after he was asked to return it.
  17. While the managing director was on his routine visit on 26<sup>th</sup> June 2016, he found the safe missing. Upon inquiry, he was told that the appellant had taken the safe. He ordered the appellant to return the safe, and the appellant returned the safe the following day as was confirmed by the accounts clerk.
  18. The respondent stated that they purchased a power saw model No. 272XP for cutting trees within the farm in January 2013. However, in 2015 the appellant took the power saw to his home for personal use. When the power saw developed a mechanical problem later on, the assistant farm manager, Mr. Peter Kingori discovered that it had two model numbers, 272XP and 268.
  19. Additionally, the respondent pointed out that the appellant bought a tractor, a boom sprayer, and a plough in March 2016 which he kept on the farm without prior authorization from the managing director. He removed the tractor once he was asked to do so.
  20. The respondent stated that the appellant was given a show cause letter and was thereafter subjected to a disciplinary hearing before he was summarily dismissed from employment, for gross misconduct. His appeal against the dismissal was heard on 31<sup>st</sup> August 2016, and determined to be without merit. The respondent emphasized that the appellant was accorded due process and that his dismissal was lawful and procedural.
  21. At the hearing, Janet Bii Magatta, the respondent's legal officer and company secretary testified that she was the advisor to the respondent's disciplinary committee and also took minutes of the proceedings. She informed the court that the appellant was suspended to allow for investigations. The investigations were conducted by the security department and confirmed that the appellant took the safe and failed to return it immediately after his brother's burial and that the appellant converted the respondent's power saw for personal use and even changed its model numbers. She told the court that there was no sufficient evidence on the allegation regarding the tractor. However, no report was prepared by the security department detailing its findings.
  22. The witness told the court that the appellant was not allowed to ask the witnesses questions during the disciplinary hearing because he was sent out of the room after he presented his case. She also testified



that the charge on the power saw was dropped in the process of the hearing and that the appellant was only terminated for taking the safe.

23. On cross-examination, she told the court that the managing director suspended the appellant before informing the board, yet he ought to have first notified the board.
24. At the close of the hearing, parties filed their respective written submissions which the learned Judge considered before making the following findings:
  - a. The appellant's response to the show cause and his evidence in court did not challenge the fact of taking the safe to his home. He did not have the approval, consent, or authority of the respondent for the use and keeping of the safe, which constituted the misappropriation of the same.
  - b. The appellant admitted to keeping his tractor within the respondent's premises but did not use it in a manner leading to a conflict of interest.
  - c. Misappropriation and conversion of the employer's property without authority, consent, or prior knowledge of the employer were serious matters against the appellant.
25. While citing the provisions of Section 44(4) of the *Employment Act*, the learned Judge held that the fact that the appellant returned the safe upon demand did not change the fact of misappropriation which was a serious employment offence.
26. Consequently, the learned Judge held that the resulting dismissal from employment was justified and that the appellant was taken through the due process of law as required under Section 41 of the *Employment Act*.
27. Having so determined, the learned Judge found that the claims for notice pay, lost future earnings, compensation, and gratuity were not due in the case of summary dismissal, and the house allowance was payable within the contract and therefore, could not be claimed outside the contract.
28. However, the learned Judge found that the appellant was entitled to his claim for leave days owed for the 30 days brought forward for the year 2015/2016, and the last two months' salary owed; hence the award of Kshs.414,000. The respondent was directed to unconditionally issue the appellant a certificate of service.
29. Being dissatisfied with the judgment of the court, the appellant lodged this appeal via a memorandum of appeal dated 23<sup>rd</sup> February 2019 in which he raised the following grounds:
  - a) The learned Judge erred in shifting the burden of justifying the unlawful termination to the appellant contrary to Section 47(5) of the *Employment Act*.
  - b. The learned Judge erred in holding that the summary dismissal was lawful when the respondent failed to prove their reasons for dismissal as provided for under Sections 43 and 45(4) (b) of the *Employment Act*.
  - c. The learned Judge erred in holding that the appellant was guilty of gross misconduct owing to the misappropriation of the safe despite the uncontroverted evidence that he had oral authority from the managing director to use the safe.
  - d. The learned Judge erred in holding that the summary dismissal was lawful when no evidence was produced to prove that due procedure under Section 41 of the *Employment Act* was followed.



- e. The learned Judge erred in failing to award the appellant Kshs. 414,000, which is the arrears of two months' unpaid salary.
  - f. The learned Judge erred in failing to award the appellant the costs of the suit.”
30. The appellant sought orders that; the appeal be allowed, the judgment and decree of the Hon. Lady Justice M. Mbaru delivered on 29<sup>th</sup> November 2018 be set aside, judgment be entered as per the prayers in the memorandum of appeal, and the costs of this appeal be awarded to the appellant.
  31. When the appeal came up for hearing on 11<sup>th</sup> June 2024, Mr. Aim, learned counsel appeared for the appellant while Mr. Okeche learned counsel holding brief for Mr. Ouma, appeared for the respondent. Counsel relied on their respective written submissions which the appellant’s counsel opted to briefly highlight.
  32. Mr. Aim stated that he would rely on his written submissions dated 13<sup>th</sup> December 2022. Counsel submitted that the dispute revolved around unlawful termination. The appellant’s employment was terminated because he converted to his personal use, a safe belonging to the respondent. The other two charges in the notice to show cause were dropped due to insufficient evidence.
  33. Counsel submitted that the appellant was given oral authority by the managing director to use the safe. The appellant returned the safe before being issued with a show cause letter. Counsel submitted that the issue surrounding the safe occurred in 2014 and at the time of renewal of his contract in 2016, the respondent was aware of the same.
  34. In answer to the question by the court, counsel submitted that the safe was borrowed from the accounts clerk which was inconsistent with the allegation that the appellant had obtained consent from the managing director. Counsel conceded that although the appellant borrowed the safe to secure funds for his brother’s funeral, he kept the safe for five months and used it for his business.
  35. In his written submissions, the appellant pointed out that the *Employment Act* does not define the term ‘gross misconduct’, and only outlines situations which may amount to gross misconduct under Section 44(4). He submitted that for the alleged conversion of the safe to be termed as ‘serious enough’, the respondent was required to prove that the appellant took the safe without permission or authority, with the intent of dispossessing the respondent of the same.
  36. The appellant conceded that he took the safe to keep the funds he had collected during his brother’s funeral. He, however, submitted that he was given permission by the managing director, who was his immediate supervisor, to take the safe, and he returned the safe in good condition. He reiterated that the managing director gave him oral authority to use the safe, which evidence was uncontroverted. He submitted that the burden was on the respondent to call the managing director to either confirm or deny the allegation that he had given him oral authority to take and use the safe. Therefore, he faulted the learned Judge for holding that there was no approval, consent, or authority from the employer for the use and keeping of the asset, and thereby arrived at a wrong conclusion.
  37. While relying on the cases of Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR, Muthaiga Country Club vs Kudheih Workers [2017] eKLR, and Kenya Revenue Authority vs Reuvel Waithaka Gitahi & 2 Others [2019] eKLR, the appellant submitted that the respondent failed to discharge their burden of justifying his dismissal. He was of the view that the respondent failed to prove the elements of conversion because if they had done so, they would not have renewed his contract.



38. As regards unfair termination, the appellant submitted that Section 44(2) of the *Employment Act* prohibits dismissal without notice or with less notice. He also submitted that he was not issued with a certificate of service as required under Section 51 of the Act. He pointed out that his dismissal was contrary to Section 41(2) of the Act. He argued that the respondent did not inform him of the allegations for which he was being placed on suspension as the letter only indicated that he was being suspended for unacceptable behavior. He submitted that he was suspended for no just cause and that the notice to show cause was an afterthought. He submitted that he was suspended on 1<sup>st</sup> July 2016 without reasons; by the manager and not the board of directors.
39. The appellant further submitted that the disciplinary hearing he was subjected to was unlawful because, he was not given the opportunity to prepare for the hearing; he was not allowed to be heard in the presence of a fellow employee, witness, or legal representative; he was not notified in advance of the witnesses, if any, that would testify against him or given their statements in advance; and that the respondent did not have an internal disciplinary mechanism to warrant fairness in procedure.
40. The appellant submitted that he honoured the invitation to appear before the board of directors dated 20<sup>th</sup> July 2016, only to discover that it was a disciplinary hearing. He submitted that having previously attended such meetings, he was under the impression that it was one such meeting and that the respondent should have expressly indicated that he was appearing before the board for a disciplinary hearing. He was of the view that he was ambushed with the hearing.
41. The appellant submitted further that because the invitation letter did not specify the nature of proceedings before the board, he did not appear before the board while accompanied by a fellow employee of his choice as provided for under Section 41(1) of the *Employment Act*. He submitted that the respondent ought to have informed him of the requirement to be accompanied by someone during the disciplinary hearing. He relied on the case of *East African Portland Cement Company Limited vs Nduati & 4 Others* [2022] KECA 1202 KLR in support of this submission.
42. The appellant submitted that the respondent did not have internal disciplinary mechanisms that could guarantee fairness as there was no human resource policy manual to guide him. In any event, he was asked to step outside while the respondent's witnesses testified. He submitted that the hearing was not done by an impartial body as the managing director who suspended him was among the people present at the meeting as part of the panel hearing the case against him.
43. The appellant submitted that he was never issued with a warning letter prior to his dismissal. While relying on the case of *National Bank of Kenya Ltd vs Samuel Nguru Mutonya* [2019] eKLR, the appellant submitted that the learned Judge failed to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee.
44. The appeal was opposed. Mr. Okeche wholly relied on the written submissions dated 2<sup>nd</sup> March 2023. In answer to the court's question as to whether the managing director gave oral authority, counsel submitted that the managing director did not testify to that effect because he had resigned from the respondent's employment at the time of the hearing.
45. In their written submissions, the respondent submitted that the evidence adduced suggested that the appellant was involved in acts bordering on misappropriation of the respondent's properties. Under Section 44(4) (g) of the *Employment Act*, the respondent as an employer could dismiss the appellant because he committed serious misconduct involving property.
46. The respondent pointed out that under Section 47(5), the burden of proving an unfair termination rested upon the employee, and the employer was only required to justify the grounds for termination.



47. The respondent submitted that they issued the appellant with a show cause letter which he responded to, but failed to address himself on the issues raised. The respondent further submitted that when the respondent was invited to the disciplinary hearing, the panel listened to his presentation and arrived at the conclusion that he had failed to discharge his duties keenly, and thereby recommended his dismissal from employment.
48. The respondent submitted that the dismissal letter issued to the respondent stated the reasons for his termination as provided for under Section 43 of the *Employment Act*.
49. The respondent submitted that the appellant did not have permission to convert the safe for personal use. In any event, the burden of proof rested upon the appellant to prove that he was given permission to use the safe.
50. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules provides that:
- “(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power —
- a. to re-appraise the evidence and to draw inferences of fact;
- b. ...”
51. We must defer to the findings of fact made by the trial court, especially where they are based on the credibility of witnesses because the trial court had the added advantage of hearing and seeing the said witnesses testify. Nevertheless, we would be entitled to interfere with those findings if they are based on no evidence or a misapprehension of the evidence or if the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. In the case of *Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212* this Court espoused that mandate or duty as follows:
- “On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
52. We have carefully considered the record, the submissions made by counsel, the legal precedents cited, and applicable laws. The issues for determination are whether the appellant was unfairly terminated and whether he was entitled to the reliefs sought.
53. It is common ground that the reason for the appellant’s termination was the conversion of the respondent’s safe, for personal use. Although three allegations of misconduct were leveled against the appellant, only the allegation of using the safe was proved as the appellant conceded to having taken the safe. It was the respondent’s witness’ testimony that the charge regarding the power saw was dropped during the disciplinary hearing, and that although the dismissal letter included the allegation regarding the tractor, the same was not proved.
54. The issue then arose as to whether the appellant obtained oral permission from the managing director to use the safe. What is not in dispute is that the safe was handed over to the appellant by the respondent’s accounts clerk.
55. It follows, therefore, that the appellant took the respondent’s safe for personal use. He took the safe intending to keep funds collected during his brother’s burial but even after the burial he continued to use the safe for his business and only returned it after he was asked to do so.



56. According to Black's Law Dictionary, misappropriation is;

“The application of another's property or money dishonestly to one's own use.”

57. Merriam-Webster's definition of misappropriation is;

“To take (something, such as money) dishonestly for your own use; to appropriate (something) wrongly.”

58. It follows, therefore, that misappropriation does not necessarily connote theft or embezzlement. The misuse of any company asset for personal gain may amount to misappropriation.

59. To our minds, the action by the appellant of taking the respondent's safe and using it for his business, amounted to misappropriation. The question then to be answered is, having decided to dismiss the appellant due to the misappropriation of the safe, did the respondent follow due procedure?

60. Whether the appellant was unfairly terminated is a question of fact and law. However, the law places an obligation on the employee to discharge his obligations. The onus is first on the employee to prove that his dismissal was unfair. The employer is then required to prove the dismissal was justified. In the case of Pius Machafu Isindu v Lavington Security Guards Limited, (supra), this Court had this to say on the issue:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law.

The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); and prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

“...to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees...”

Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:

“(5) 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 of the termination of employment or wrongful dismissal shall rest on the employer.”

So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under



section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

61. Section 44(4) of the [Employment Act](#), provides a list of what may constitute gross misconduct. The Section provides that:

- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
- a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
  - b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
  - c. an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
  - d. an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
  - e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
  - f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
  - g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

62. For purposes of the present appeal, subsection (4)(g) was invoked to justify the misappropriation of the respondent's assets. It is not in dispute that the appellant took the respondent's safe and used it for his personal business. However, the issue here is whether due process was followed by the respondent in terminating the appellant's employment.

63. It is trite that under Section 35(3) and (4) of the [Employment Act](#), both the employee and employer have specific rights regarding termination of employment. An employer or employee has the right to terminate an employment contract without notice, provided it is done in accordance with the law and established procedures. An employer can summarily dismiss an employee for gross misconduct.



64. However, Section 44 requires the employer to demonstrate that the employee's conduct shows a fundamental breach of their contractual obligations. This breach can arise from a variety of actions or omissions listed in that section, along with any related issues. But that is not all, Section 41 provides the procedure for notification and hearing before termination on grounds of gross misconduct. An employer must, before terminating the employment for gross misconduct:

“...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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

65. In the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, the Court summarized the procedure for termination as follows:

“Section 45 of the Act makes provision *inter alia* that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

66. In this case, the reason given by the respondent was that the appellant misappropriated company property by taking the safe, using it for his business, and not returning it until he was asked to do so. Based on the foregoing, we would agree that this was enough reason that could be termed as gross misconduct, that would attract summary dismissal.



67. In summary, the respondent was justified in dismissing the appellant from its employment due to the appellant's act of gross misconduct by taking the respondent's safe with the intention of personal gain. However, the appellant was not accompanied by another employee or a shop floor union representative of his choice, during the disciplinary hearing conducted by the respondent. Section 45(3) of the Employment Act provides that:

“(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”

68. Although the reasons for the dismissal of the appellant met the threshold, he was not allowed in the room at the disciplinary hearing while the respondent's witnesses testified, nor was he accompanied by a representative of his choice. He was also not notified that he was attending a disciplinary hearing.

69. It is also worth noting that although the managing director ought to have notified the respondent's Board of Directors before suspending the appellant, he failed to do so and suspended the appellant on his own accord. It was observed in *Judicial Service Commission vs Mbalu Mutava & Another* [2015] eKLR that:

“The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in *Ridge v Baldwin* (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.”

70. Based on the foregoing, it is apparent that the provisions of Section 41 were not adhered to during the disciplinary hearing. For that very reason, we find that the termination of the appellant's employment was unfair. For avoidance of doubt, termination of employment is deemed to be unfair on the following grounds under Section 45(2) of the Employment Act:

“A termination of employment by an employer is unfair if the employer fails to prove:

- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason:-
  - i. related to the employee's conduct, capacity or compatibility; or
  - ii. based on the operational requirements of the employer; and
- c. that the employment was terminated in accordance with fair procedure.”  
Emphasis added.

71. The elements of a claim for unfair dismissal were explained in *Tolley's Employment Handbook*, 20<sup>th</sup> Edition at paragraph



53. 1 at page 984 as follows:

“An employer who dismisses an employee without good reason or without following a fair procedure lays itself open to a claim for unfair dismissal. When such a claim is brought, the employer has to establish the reason for dismissal...if the dismissal is found to be unfair the employer can be ordered to re-engage, reinstate or to pay compensation to the ex-employees.”

72. Similarly, in the case of *CMC Aviation Limited vs Mohammed Noor*, (supra), this Court stated inter alia that:

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract.”

73. Section 49 of the *Employment Act* provides that:

- “(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, a labour officer may recommend to the employer to pay to the employee all or any of the following –
- a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
  - b. where dismissal terminates the contract before the completion of any service upon the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
  - c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

74. Section 49(4) of the *Employment Act* sets out several factors which a labour officer has to consider when deciding whether to recommend the remedies available to the claimant. In determining a complaint or suit for wrongful dismissal or unfair termination of employment, Section 50 requires the Industrial Court to take into consideration the same factors. They are as follows:

- “a. the wishes of the employee;
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
  - c. the practicability of recommending reinstatement or re-engagement;



- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer;
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. any expenses reasonably incurred by the employee as a consequence of the termination;
- k. any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonable mitigate the losses attributable to the unjustified termination; and any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."

75. In this instance, the appellant wholly contributed to his termination by taking the safe and failing to return it immediately after the burial of his brother. He proceeded to use the safe for his business and only brought it back after the managing director ordered him to. The trial court held that the appellant was entitled to his salary for the last two months when he had worked and also to pay in lieu of the 30 days leave which had accrued to him.

76. We hold the considered view that the appellant had failed to persuade this Court that he was entitled to any other compensation, apart from that which the trial court had awarded him.

77. In the result, the appeal lacks merit, and is hereby dismissed, with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.



Signed

**DEPUTY REGISTRAR.**

