



**Bakery Confectionery Food Manufacturing and Allied Workers Union (K)  
v KenafriC Industries Limited (Employment and Labour Relations Cause  
E771 of 2022) [2025] KEELRC 528 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 528 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E771 OF 2022  
HS WASILWA, J  
FEBRUARY 25, 2025**

**BETWEEN**

**BAKERY CONFECTIONERY FOOD MANUFACTURING AND ALLIED  
WORKERS UNION (K) ..... CLAIMANT**

**AND**

**KENAFRIC INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this suit through a Statement of Claim dated 27<sup>th</sup> October 2022, asserting that it is a duly registered trade union with the mandate to institute proceedings and champion the interests of its members in the food manufacturing and related industries. The 1<sup>st</sup> respondent is a limited liability company engaged in the manufacture of sweets and confectioneries. The claimant and the respondent have a duly executed recognition agreement and collective agreements governing the terms and conditions of service.
2. The claimant avers that the grievant, a unionisable employee and member of the claimant, was employed by the respondent as a Machine Attendant from November 2000, earning a basic salary of Kes. 17,292.00 and a house allowance of Kshs. 4,669.00. The grievant had an untainted employment record and had rendered remarkable service to the respondent. However, by a letter dated 25<sup>th</sup> October 2019, he was issued with a Show Cause letter, accused of using milk powder meant for production to make tea without authorization.
3. In response, the grievant denied the allegations, claimed he was coerced into admitting them, and requested CCTV footage to establish the truth. Despite his response and representations, he was summarily dismissed by a letter dated 12th November 2019. The claimant contends that the CCTV footage played during the disciplinary hearing did not establish the allegations against the grievant.



- An appeal was lodged on 4<sup>th</sup> December 2019, but the respondent declined to consider it, citing time limitations.
4. Dissatisfied, the claimant reported a trade dispute to the Minister on 5<sup>th</sup> March 2020. The Minister appointed a conciliator, who, upon consideration, recommended that the grievant's termination be reduced to normal termination. The claimant accepted this recommendation and computed the grievant's dues at Kshs. 65,883.00, but the respondent declined to effect the payment. The claimant maintains that there were no valid reasons for termination, no substantive evidence was provided, and the disciplinary process was flawed.
  5. The respondent's actions were disproportionate and contrary to the principles of justice and equity, especially given the grievant's 19 years of service. The claimant further argues that the grievant was denied a fair opportunity to present his appeal and that the respondent's conduct contravened Section 45(4)(b) of the *Employment Act*, 2007.
  6. As a result of the termination, the grievant suffered loss of earnings and societal disruption, rendering him unable to secure alternative employment. The claimant, therefore, seeks an award against the respondents jointly and severally as follows: a declaratory order that the termination was unfair, based on invalid reasons, procedurally flawed, and thus null and void; an order for the award of terminal dues and benefits amounting to Kshs. 329,415.00 with interest at court rates from the date of filing until payment in full; and an order for the costs of the suit.
  7. The claimant filed a witness statement dated 12<sup>th</sup> March 2024, stating that he is a member of the claimant union, which he instructed to institute the suit on his behalf. He was employed by the respondent as a Machine Attendant from November 2000 and, at the time of his exit, was earning a basic salary of Kshs. 17,292.00 and a house allowance of Kshs. 4,669.00, totaling Kshs. 21,961.00.
  8. He asserted that he had an unblemished employment record and had rendered remarkable service to the respondent for 19 years. On 25<sup>th</sup> October 2019, he was issued a show cause letter accusing him of using milk powder meant for production to make tea without authorization. In his response dated 28<sup>th</sup> October 2019, he denied the allegations, stating that he had been ambushed by security personnel, coerced into admitting the allegations, and forced to sign a cautionary statement without union representation. He protested the process and requested that the CCTV footage be reviewed.
  9. A disciplinary hearing was scheduled for 31<sup>st</sup> October 2019, just two days after his response, which he attended. During the hearing, the CCTV footage was played, but it did not substantiate the allegations against him. Despite this, the respondent summarily dismissed him on 12<sup>th</sup> November 2019.
  10. The claimant reported the matter to the union, which lodged an appeal on his behalf on 4<sup>th</sup> December 2019. However, the respondent, in a letter dated 10<sup>th</sup> December 2019, declined to consider the appeal, citing time constraints. The union then escalated the matter to the Minister through a trade dispute letter dated 5<sup>th</sup> March 2020, citing wrongful, unfair, and unlawful dismissal. The Minister appointed Mercy Mangi of Nyayo Office Labour Office as the conciliator on 22<sup>nd</sup> June 2020. After considering the dispute, the Minister, in a report dated 10<sup>th</sup> November 2019, found that the claimant had not engaged in any misconduct and recommended his reinstatement or, alternatively, payment of his terminal dues. The union accepted the recommendation in a letter dated 2<sup>nd</sup> February 2021 and computed the claimant's dues, but the respondent declined to implement the conciliator's findings.
  11. The claimant asserted that his termination was without valid reason as no evidence was provided to support the allegations, despite the CCTV footage being reviewed. He maintained that the disciplinary process was unfair and predetermined to ensure his dismissal, disregarding his representations and



the lack of supporting evidence. Given his 19 years of service with a clean record, he argued that his termination was disproportionate and contrary to the principles of justice and equity.

12. He further stated that the decision to terminate him was neither fair nor justifiable under any circumstances, considering his years of service. Consequently, he seeks to be paid his terminal dues and benefits as pleaded in the memorandum of claim. He concluded by stating that this was all he wished to present in his witness statement.

### **Claimant's Written Submissions**

13. The Claimant filed written submissions dated 13<sup>th</sup> January 2025 in respect of the Suit instituted through a Memorandum of Claim dated 27<sup>th</sup> October 2021, accompanied by a Verifying Affidavit sworn by the Claimant's General Secretary, a List of Witnesses, a Witness Statement, and a List of Documents, all of even date. The Claimant filed ten documents as evidence and subsequently filed a witness statement dated 12<sup>th</sup> March 2024. The Respondent defended the Claim through a Statement of Response dated 21<sup>st</sup> February 2023 and later filed a List of Witnesses, a Witness Statement, and a List of Documents, all dated 26<sup>th</sup> January 2024, along with forty-three accompanying documents.
14. The hearing proceeded on 26<sup>th</sup> November 2024, where the grievant adopted his witness statement as his evidence-in-chief and was cross-examined and redirected. The Claimant produced documents from the List of Documents dated 27<sup>th</sup> October 2022, which were admitted as exhibits 1-10. Upon the closure of the Respondent's case, the Court directed the parties to file written submissions.
15. The Claimant was employed by the Respondent in November 2000 as a Machine Attendant, earning a basic salary of Kshs. 17,292 and a house allowance of Kshs. 4,669, making a gross salary of Kshs. 21,961. The Claimant had an untainted employment record. His letter of appointment was dated 21<sup>st</sup> October 2000, and his employment took effect from 1<sup>st</sup> November 2000. On 25<sup>th</sup> October 2019, the Claimant was served with a show cause letter dated the same day, accusing him of utilizing milk powder meant for production purposes to make tea without authorization.
16. In his response, the grievant stated that he was coerced by security personnel into admitting the allegations without union representation and denied the accusations, requesting the CCTV footage for verification. The Claimant was summarily dismissed through a letter dated 12<sup>th</sup> November 2019, leading to the present suit.
17. The Respondent, in its Statement of Response, contended that the termination was lawful as the grievant had failed to adhere to company policy. The claim is anchored on unfair termination under the *Employment Act*, 2007 (Revised). Section 45 of the *Employment Act*, 2007 provides that termination must be based on a valid reason and should follow fair procedure. Section 45(2) states that termination is unfair if the employer fails to prove that the reason for termination is valid, fair, and in accordance with fair procedure.
18. Section 43(1) mandates the employer to prove the reason for termination, failing which the termination is deemed unfair. Section 47(5) states that in claims of unfair termination, the burden of proving the unfair termination lies with the employee, while the burden of justifying the grounds for termination rests on the employer.
19. In *Young (EA) Limited v. Samuel Gikumba Mbiuki* (2020) eKLR, Justice Onesmus Makau held that termination is unfair unless the employer proves that it was based on valid and fair reasons and conducted through a fair procedure. In *Pius Machafu Isindu v. Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal held that an employer must prove the reasons for termination under Section 43, demonstrate that they are valid and fair under Section 45, and justify the grounds



- under Section 47(5). Section 41 sets out a mandatory and elaborate process requiring notification and hearing before termination. The Respondent must, therefore, establish that the reasons for termination were valid and justifiable under Sections 43 and 45.
20. The summary dismissal letter dated 12<sup>th</sup> November 2019 cited that the grievant accessed the blending room, scooped milk powder, and used it for personal purposes. However, in the show cause letter dated 25<sup>th</sup> October 2019, the grievant was accused of using milk powder stored in the blending room to make tea without authorization. The Claimant argued at paragraph 15 of the Memorandum of Claim that no valid reasons were demonstrated to justify the termination, no evidence was provided to support the allegations, and despite the Respondent availing CCTV footage during the disciplinary hearing, there was no justification for the dismissal. The grievant explained that he accessed talc powder from the blending room, which was open to all employees during production, and denied using milk powder for personal use.
  21. Under Section 47 of the *Employment Act*, 2007, once an employee disputes the validity of the reasons for termination, the burden shifts to the employer to prove the validity of the reasons. The Respondent claimed that the grievant violated company policy but did not produce any such policy document. The grievant testified that the blending room was accessible to all employees, and he picked talc powder, not milk powder. The Respondent's witness, Julius Ang'oli (RW1), testified that the grievant used milk powder for personal use. The Respondent produced CCTV footage during the disciplinary hearing, which was also played in court. However, the footage merely showed the grievant accessing the dye room and picking an item, and it was confirmed that anyone could access the room and take production materials.
  22. During cross-examination, RW1 was asked whether the footage could distinguish between milk powder and talc powder, but he failed to provide a conclusive response. Further, the footage did not show the grievant using milk powder for personal purposes. RW1 was not present during the alleged incident, was not the grievant's supervisor, and had no first hand knowledge of the allegations. No witness testified to seeing the grievant make tea using milk powder, and the CCTV footage did not establish this fact.
  23. The Respondent relied on a confession statement allegedly signed by the grievant on 24<sup>th</sup> October 2019. However, the grievant testified that he was coerced by security personnel into signing a pre-drafted statement in the absence of a union representative. No evidence was presented to rebut this claim, and no security officer testified to refute the grievant's allegations. RW1 confirmed that as of 24<sup>th</sup> October 2019, the grievant had not been issued with a show cause letter, making it irregular for him to be compelled to confess to allegations that had not been formally put to him as required by Section 41 of the *Employment Act*, 2007.
  24. The Respondent claimed that the grievant violated company policy but did not produce any such policy document as evidence. In totality, the Respondent did not prove that the grievant used milk powder for personal purposes or that he violated any company policy. The Respondent failed to establish that the termination was based on valid and justifiable reasons. In *Wanyera v. Central Isiolo Investment Limited* (Appeal E002 of 2023) [2024] KEELRC 596 (KLR) (8 March 2024), Justice Onesmus Makau held that terminating an employee based on allegations requires the employer to provide cogent proof. The employer must conduct independent investigations, and failure to provide evidence renders the allegations unsubstantiated. The Court of Appeal in *Philip Amwayi Wokinda v. Rift Valley Railways Limited* (2018) eKLR held that an employer must call material witnesses to prove allegations. If such witnesses are not called, an adverse inference may be drawn against the employer.



25. The Respondent failed to discharge its burden under Section 43 of the *Employment Act*, 2007, while the Claimant discharged his burden under Section 47(5). The validity of the reasons for termination was not proved, and the termination was substantively unfair.
26. The Claimant further submitted that where there is no genuine reason leading to termination of employment, any dismissal amounts to unfairness as there is no valid or fair reason to justify the same. In reliance on *Peter Wangai v Egerton University* (2019) eKLR, the Employment and Labour Relations Court held that even where all procedural requirements are followed, such does not negate the lack of substantive reasons for termination. A fair process in addressing allegations against an employee does not sanitize the invalidity and unfairness of the reasons, as procedural safeguards are only a final element to Section 45(2) of the *Employment Act*, 2007. Procedural fairness should only arise where there is a substantive reason to justify termination. A sham trial process does not cure an unfair termination. In the present case, the allegations made against the grievant were baseless, lacked material evidence, and the Council's decision to dismiss him for gross misconduct was inconsistent with the findings and defenses presented, thereby rendering the termination unfair and contrary to Sections 43 and 45 of the *Employment Act*, 2007.
27. The Claimant asserted that under Section 41 of the *Employment Act*, 2007, substantive fairness in the disciplinary process must be upheld. The grievant's disciplinary process was merely cosmetic and aimed at terminating his employment without due consideration of his defense and available material evidence. The decision to terminate him was disproportionate, particularly considering his 19 years of service.
28. The grievant was denied an opportunity to canvass his appeal, despite lodging an appeal against his dismissal through the Claimant union via a letter dated 4<sup>th</sup> December 2019. However, the Respondent, in a letter dated 10<sup>th</sup> December 2019, declined to entertain the appeal on the grounds that it was time-barred. The grievant's long service and unblemished employment record were disregarded in the termination decision, contrary to principles of justice and equity. While the Respondent annexed various Show Cause and Warning letters, the Claimant contended that under Clause 17(a)(iv) of the Collective Bargaining Agreement (CBA), such warnings should have been expunged from the employment record as they had become invalid. The CBA provides that where an employee completes nine months from the date of any warning without committing another offense, any warning in their record shall be deemed invalid. The last Warning Letter issued to the grievant was dated 13<sup>th</sup> June 2018, which expired by 13<sup>th</sup> March 2019, rendering it and all prior warnings invalid. Consequently, these records should be disregarded, and the grievant's termination found to be disproportionate, given his long tenure.
29. The Claimant maintained that the grievant's termination was substantively unfair and sought relief as pleaded in the Memorandum of Claim. Under Section 35 of the *Employment Act*, 2007, an employee is entitled to notice in the event of termination. Clause 4(a) of the CBA provides for notice periods based on employee classification. Given the grievant's 19 years of service, he was entitled to three months' notice, translating to Kshs. 65,883, based on his gross salary of Kshs. 21,961. Regarding compensation for unlawful termination, Section 49 of the *Employment Act*, 2007, mandates the court to exercise discretion and award compensation of up to 12 months' salary.
30. In *Kenfreight (E.A) Limited v Benson K. Nguti* (2019) eKLR, the Supreme Court held that once a court finds that termination was unlawful, the appropriate remedy is guided by Section 49, which allows for any or all of the listed remedies provided discretion is exercised judiciously and guided by Section 49(4)(m). In the present case, the grievant was employed in November 2000 and terminated on



12<sup>th</sup> November 2019, amounting to approximately 19 years of service. The abrupt termination, which had no legal basis, warrants maximum compensation of Kshs. 263,532.

31. Finally, the Claimant urged the court to allow the claim as pleaded and exercise its discretion to award costs, as costs ordinarily follow the event.

### **Respondent's Case**

32. The Respondent filed a Statement of Response dated 21<sup>st</sup> February 2023, denying each and every allegation of fact and law in the Memorandum of Claim except those expressly admitted. The Respondent admitted paragraphs 1 and 2 of the Memorandum of Claim as they were merely descriptive of the parties but clarified its address for service as care of Chege Kibathi and Company Advocates LLP. The Respondent admitted the contents of paragraphs 3 and 4 of the Memorandum of Claim. It denied the contents of paragraph 5 and averred that the Claimant had previously been served with warning letters. The contents of paragraph 6 were admitted except for the issuance of a show cause letter dated 25<sup>th</sup> October 2019. The Respondent denied the allegations in paragraph 7, stating that there was no coercion by the Respondent's security and that the Claimant's member wrote a statement voluntarily seeking mercy. The Respondent further denied paragraph 8 and 9 and averred that the grievant was subjected to a fair hearing, where the evidence against him was not sufficiently challenged, leading to his summary dismissal. It further stated that the grievant had an opportunity to view the CCTV footage but denied the allegations, and during the trade dispute, the footage was played and confirmed that the grievant had indeed committed the unlawful act.
33. The Respondent admitted paragraph 10, stating that it complied with Clause 17(e)(ii) of the Collective Bargaining Agreement and the company's Human Resource Policy on appeal timelines. The Respondent admitted paragraphs 11, 12, and 13. In response to paragraph 14, the Respondent averred that the cheque of Kshs. 3,825.00 constituted all dues owed, including days worked and not paid as of 13<sup>th</sup> November 2019 and any earned but untaken leave. The Respondent stated that the grievant confessed in a letter dated 24<sup>th</sup> October 2019 to utilizing the Respondent's property without authorization, which was substantiated by CCTV footage. It maintained that the confession letter and footage were available, but the grievant or his representative never requested to view it. The Claimant lodged a trade dispute at the Ministry of Labour, where the conciliator reviewed the footage and confession letter and found the grievant culpable despite his denial. The Respondent denied paragraph 18(b), asserting that the grievant did not provide any evidence that he was authorized to use the Respondent's property. It stated that the grievant's actions fell within the provisions of section 44(4) (g) of the *Employment Act*, justifying summary dismissal. The grievant initially expressed remorse and sought mercy but later denied the allegations in his response to the show cause and during the hearing.
34. The Respondent stated that it was a stranger to the contents of paragraph 16 and put the Claimant to strict proof. It denied paragraph 17, maintaining that the summary dismissal was lawful as the grievant failed to adhere to company policy regarding the use of company property. The Respondent disputed the claims in paragraph 18(f), asserting that the Claimant was not entitled to notice pay as he was summarily dismissed and was not eligible for compensation for unfair termination. The Respondent admitted the jurisdiction of the court and the contents of paragraph 20 of the Memorandum of Claim. It prayed that the suit be dismissed with costs to the Claimant, including interest on costs at court rates.
35. The Respondent filed a Witness Statement dated 26<sup>th</sup> January 2024 by Julius Angoli, the Human Resource Manager of the Respondent Company, who was duly authorized to make the statement. He stated that the facts of the matter were well within his knowledge. The Respondent engaged the services of the Claimant on 21<sup>st</sup> October 2000 as a Machine Attendant. On or about 24<sup>th</sup> October 2019, the



Respondent's security personnel reported a case of unlawful use of the Respondent's property by the Claimant's member, where milk powder was used for personal purposes without authorization.

36. The reported offense was substantiated by a confession letter and CCTV footage showing the grievant committing the offense. On 25<sup>th</sup> October 2019, the Respondent issued the Claimant with a show cause letter on charges of using company property for personal use without the requisite authority. Consequently, the Claimant was invited to a disciplinary hearing held on 31<sup>st</sup> October 2019, which was attended by various individuals, including the Claimant's member. After considering the Claimant's response to the show cause letter and submissions made during the disciplinary hearing, the Respondent arrived at the decision to terminate the Claimant's employment for gross misconduct under section 44(4)(g) of the *Employment Act*, 2007. This decision was communicated to the Claimant in a letter dated 12<sup>th</sup> November 2019. The Claimant was dismissed after being afforded a fair hearing as prescribed under section 41 of the *Employment Act*. The Respondent stated that the Claimant was not entitled to notice pay as he was summarily dismissed and was not eligible for compensation for unfair termination in the circumstances of the case. That was all the witness had to state for the time being.

### **Respondent's Written Submissions**

37. The Respondent filed written submissions dated 4<sup>th</sup> February 2025 opposing the Claimant's Memorandum of Claim dated 27<sup>th</sup> October 2022, in which the Claimant sought a declaratory order that the termination of the grievant's services was unfair, based on invalid reasons, procedurally flawed, and thus illegal, null, and void.
38. The Claimant also sought terminal dues and benefits amounting to KES 329,415.00 with interest from the date of filing the suit until payment in full, as well as the costs of the suit. The Respondent opposed the claim by filing a Response and accompanying documents dated 27<sup>th</sup> February 2023. The Claimant was employed as a Machine Attendant under competitive terms aligned with the *Employment Act*. On 24<sup>th</sup> October 2019, the Respondent's security personnel reported that the grievant had unlawfully used the Respondent's property by using milk powder for personal use without authorization.
39. Investigations were conducted, and the grievant confessed to the misconduct, leading to a recommendation for disciplinary proceedings. The disciplinary proceedings were conducted in accordance with the *Employment Act*, after which the grievant was summarily dismissed for gross misconduct. The grievant was his own witness, and his testimony was inconsistent and self-incriminating. The Respondent's Human Resource Manager testified on behalf of the entity, giving a corroborated and candid testimony.
40. On the issue of whether the Claimant's employment was unlawfully and illegally terminated, the Respondent relied on Section 43 of the *Employment Act*, which places the burden on the employer to prove the reason for termination. Where the employer fails to do so, the termination is deemed unfair under Section 45. Section 44(4)(g) of the *Employment Act* provides that an employee commits, or is reasonably suspected of committing, a criminal offense against the employer or to the employer's substantial detriment. Section 45(5) places a further burden on the employer to prove that the termination was valid and fair.
41. The Respondent cited *John Jaoko Othino v IntraHealth International* [2022] eKLR, where Justice Ocharo relied on *British Leyland UK Ltd v Swift* [1981] IRLR 91, stating that if no responsible employer would have dismissed the employee, then the dismissal was unfair, but if a reasonable employer might have done so, then it was fair. The Respondent further relied on *Evans Kamadi Misango v Barclays Bank of Kenya Limited* [2015] eKLR, which held that an employer must demonstrate a valid reason for termination that a reasonable employer would act upon.



42. Halsbury's Laws of England (4th Edition, Vol. 16, p. 482) supports the range of reasonable responses test, where dismissal is fair if it falls within a reasonable band of employer responses. In *M'Ituamka M'Marambei (Suing as the legal representative of the Estate of Peter Miriti) v Board of Management - Miathene High School* [2020] eKLR, the Court relied on *Larkin v Nassau Electric R. R. Co.* 98 N.E. 465 (N.Y., 1912), stating that contradictory testimony indicates untrustworthiness due to carelessness, uncertain memory, or dishonesty. The Respondent also cited Section 107(1) of the [Evidence Act](#), which places the burden of proof on the party that alleges a fact.
43. The Respondent argued that the termination procedure was lawful, and the issue in contention was the reason for termination. The grievant was dismissed under Section 44(4)(g) of the [Employment Act](#) for unlawfully using company property without authorization, an act also prohibited under Clause 18(v) of the Collective Bargaining Agreement (CBA), which states that an employee cannot use company property for personal use without permission. The grievant wrote a confession letter dated 24<sup>th</sup> October 2019 (REXB-28), acknowledging that it was an offense to take milk powder and seeking mercy. Although the grievant later claimed he wrote the letter under duress, he failed to prove this under Section 107(1) of the [Evidence Act](#). He also alleged reporting the duress to the Claimant, but no action was taken before the disciplinary hearing.
44. The Respondent stated that no claim of coercion was raised during the disciplinary proceedings or the Ministry of Labor dispute session. The CCTV footage, which the grievant admitted to viewing during the disciplinary hearing, showed him in an orange overall approaching the blending room at exactly 00:00:09 to 00:00:14, peeping inside and outside before entering. The conciliator's ruling (PEXB-9) dated 10<sup>th</sup> November 2020 observed that the grievant had no business in the blending room. The Respondent's minutes revealed contradictions in the grievant's explanations—he initially claimed he went to get a spanner but later changed to collecting talc powder. The grievant's silence during cross-examination on the peeping incident was seen as self-incriminating.
45. The Respondent further submitted that the grievant's employment history indicated misconduct. He had been previously suspended (REXB-5) and subjected to multiple disciplinary actions (REXB-13 & 16). A letter dated 21<sup>st</sup> June 2016 (REXB-10) showed that he had previously confessed to consuming tea in the factory, which he acknowledged as an offense. The Respondent argued that this demonstrated a pattern of misconduct, comparable to the current case. The Respondent maintained that the grievant should not have been in the blending room, and the contradictions in his explanations, as well as the CCTV footage, undermined his credibility. The Respondent submitted that the grievant's dismissal was justified based on the confession letter, CCTV footage, and his contradictory statements.
46. On the issue of whether the Claimant was entitled to any compensation, the Respondent argued that the grievant's dismissal was for valid reasons. The Claimant failed to prove unlawful termination, and thus, no relief was due under Sections 35, 36, and 49 of the [Employment Act](#). The Respondent contended that the claim for three months' notice in lieu of termination under Clause 4 of the CBA was baseless, as Clause 18 permitted summary dismissal. Section 44(1) and (3) of the [Employment Act](#) provides that summary dismissal occurs when an employee fundamentally breaches their contract.
47. The Respondent cited *John Nganga Ngigi & Another v Nairobi Hospital* [2016] eKLR, where the court held that when summary dismissal is justified, the contractual notice period is not payable. Since the Respondent proved the reason and procedural fairness of the summary dismissal, the Claimant was not entitled to notice pay.



48. Regarding costs, the Respondent submitted that costs should follow the event, citing *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR. The Respondent urged the Court to consider the parties' conduct and the circumstances leading to the suit. In conclusion, the Respondent submitted that the suit was an abuse of the court process, as the grievant was validly and fairly dismissed. The Respondent prayed that the Court find the claim meritless and award costs to the Respondent.
49. I examined all the evidence and submissions as submitted herein. The claimant has averred that he was wrongfully terminated by the respondents without valid reason and without following due process.
50. From the letter terminating the claimant's services, it was indicated that he was terminated for using milk powder which was meant for production for personal use. It was also indicated that during the disciplinary hearing it was established that he accessed the blending room and scooped the milk powder which he did not use for production purposes but for his own personal use.
51. The respondents also indicated that the claimant had confessed to the offence. From the documents produced by the respondent the letter from the claimant admitting culpability is attached. The claimant had averred that he was coerced into admitting the offence in his letter of 24/10/2019.
52. Before his termination, the claimant was issued with a show cause letter dated 25/10/2019. He responded to the letter vide his dated 28<sup>th</sup> October 2019 indicating he was forced into signing a document he never authored and he denied admitting any culpability. He was thereafter invited to a disciplinary hearing slated for 31<sup>st</sup> October 2019 vide the letter of 29<sup>th</sup> October 2019.
53. During the disciplinary hearings the claimant denied stealing any milk. He indicated that he went to the store to get a spanner and not milk. The respondent produced the CCTV footage of the day which showed claimant accessing the dye room. The footage did not show him using milk powder.
54. During the hearing before this court respondent witness 1 told court that there was no evidence from anyone to rebut the statement that the claimant was coerced to sign the signature and that no one saw him use the milk powder.
55. None of the persons who saw the claimant use the milk powder were summoned as witnesses during the hearing and none was also called as a witness before this court.
56. Having considered the show cause letter issued to claimant and response by the claimant, the claimant refuted claims of any wrong doing. There is actually no one who witnessed the claimant making tea with the milk powder he is said to have taken from the dye room.
57. As concerns the disciplinary hearing, the claimant has averred that the respondent also sought to rely on previous expired warning letters which at clause 17(a) (iv) of the CBA should have been expunged from the employment record as being invalid after 9 months from the date of the last warning.
58. Having considered the evidence and submissions, I conclude that the termination of the claimant was unfair and unjustified as per section 45(2) of the *employment act* 2007 which states as follows:
- (2) 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 employees 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.

59. In term of remedies, I find for the claimant and award him as follows:

1. 3 months' salary in lieu of notice as per the CBA =  $21,961 \times 3 = 65,883/-$ .
2. 6 months' salary as compensation for unlawful termination =  $6 \times 21,961 = 131,766/-$   
TOTAL = 197,649/- less statutory deductions.
3. The respondents will pay costs of this suit plus interest at court rates w.e.f the date of this judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HELLEN WASILWA**

**JUDGE**

