



**Mutuma v Chaina Railway 21st Bureau Group (Kenya) Company Limited (Appeal E002 & E004 of 2024 (Consolidated)) [2025] KEELRC 726 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 726 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
APPEAL E002 & E004 OF 2024 (CONSOLIDATED)**

**B ONGAYA, J  
MARCH 7, 2025**

**BETWEEN**

**KENNETH MUTUMA ..... APPELLANT**

**AND**

**CHAINA RAILWAY 21ST BUREAU GROUP (KENYA) COMPANY  
LIMITED ..... RESPONDENT**

*(Being an appeal from the ruling and orders of the Hon. Barbra Ojoo,  
Senior Principal Magistrate in ELR Cause No.E008 of 2023 at Mavoko)*

**JUDGMENT**

1. The appellant filed in the trial Court a statement of claim on 23.02.2023 and through Limo & Njoroge Advocates. The appellant prayed for judgment against the respondent for:
  - a. A declaration that the summary dismissal of the claimant on 17.01.2023 amounts to wrongful and unfair termination.
  - b. One month's salary in lieu of notice Kshs.62,516.00.
  - c. 12 months' salary compensation for unfair termination Kshs.750, 192.00.
  - d. Costs of the suit.
  - e. Interest on b, c, and d above.
  - f. Any other relief the Honourable Court will deem fit to grant.
2. The appellant's case was pleaded as follows:



- a. The respondent employed the appellant as a Tipper Driver on 01.06.2021 to work on a construction project at Athi River area at Kshs.29, 097.00 basic monthly salary. As at termination the gross monthly pay was Kshs. 62, 516.00.
  - b. On 17.01.2023 the respondent summarily dismissed the claimant from employment upon unsubstantiated claims. The dismissal was unjustified and procedurally unfair because the reason was not fair and laid down procedure was not followed as envisaged in sections 43, 45, 41 and 45 of the *Employment Act*, 2007.
3. The respondent filed the response to the statement of claim on 28.03.2023 and through M/S Wambugu & Muriuki Advocates. The respondent prayed that the suit be dismissed with costs to the respondent and further pleaded as follows:
- a. The respondent employed the claimant at monthly gross salary of Kshs.40, 916.00 plus overtime payments that varied.
  - b. The appellant was severally interdicted for gross misconduct upon selling project materials to third parties without respondent's authority.
  - c. On 17.01.2023 a meeting was held with the drivers and stern warning issued with respect to numerous reports by their supervisor about drivers' gross misconduct that occasioned the respondent great losses.
  - d. The appellant was reported to have made lesser trips than other drivers. The respondent's efforts to reach the claimant were futile because the appellant did not pick calls. Later he picked the call, was questioned about his whereabouts and he admitted to have been selling the project materials to third parties he did not disclose to the respondent. The dismissal was therefore strictly in accordance with the law.
4. In the reply to the statement of response, the appellant denied to have sold the project material and further denied he had admitted to doing so.
5. In the judgment delivered on 17.01.2024 the trial Court found that the appellant had failed to challenge the respondent's case and evidence that the claimant had been warned severally or previously interdicted about the same misconduct and had further failed to controvert the respondent's evidence that he had sold company materials on the material day and previous instances. The trial Court thus returned, "...Such a work record does not speak well of the claimant's work ethic." The trial Court found that the appellant had failed to obey lawful and proper command within his scope of duty, from a person placed in authority over him, and, which amounted to gross misconduct per section 44(4) (e) of the *Employment Act*, 2007. The trial Court found that the termination was fair in substance and procedure.
6. The appellant filed the memorandum of appeal dated 13.02.2024 and prayed as follows:
- a. The appeal be allowed with costs to the appellant.
  - b. The Judgment of the trial Court dated 17.01.2024 be set aside and substituted with an order of the Court allowing the appellant's claim as prayed for in the Statement of Claim dated 17.02.2023.
  - c. Any such further or other relief that the Honourable Court may deem fit and just.
7. The memorandum of appeal had 7 grounds and the submissions filed for the respondent have reduced them into the following issues for determination:



- a. Whether the summary dismissal was procedurally fair.
  - b. Whether the summary dismissal was substantively fair.
  - c. Whether the appellant was entitled to the reliefs sought in the statement of claim.
8. On the 1<sup>st</sup> issue, it is submitted for the appellant that prior to dismissal of the appellant, the respondent failed to comply with section 41 of the Act on notice and hearing. It is stated that the trial Court failed to address the issue of procedural unfairness. It is submitted that it was not enough that RW1 summoned the appellant to his office, interviewed him and issued the summary dismissal. For the respondent it was submitted that the appellant confirmed that he attended the meeting of 17.01.2023 where the drivers were warned and he had attended as was summoned on the material day.
9. The Court has considered the submissions. The Court observes that section 41 of the Act provides as follows:
1. 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.
  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.
10. On the other hand, section 44 of the Act provides as follows:
1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
  2. Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
  3. Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
  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.

11. The court returns that section 41(2) as read with section 44(1) and (2) show that in cases of summary dismissal on account of gross misconduct, the employer may terminate an employee with shorter or no notice provided the employee has been heard by the employer in relation to the misconduct. In the instant case the respondent alleged gross misconduct and the appellant has confirmed that he was summoned, heard and then the summary dismissal followed. It appears to the Court that the respondent substantially complied with the cited statutory provisions on dismissal procedure on account of summary dismissal. The 1<sup>st</sup> ground of appeal will collapse.
12. On the 2<sup>nd</sup> issue, it is submitted for the appellant that the respondent cited section 44(4) (g) on suspicion of committing an offence against the employer or employer's property while the trial Court cited section 44(4)(e) on disobeying lawful command to justify the finding of gross misconduct. The Court finds that the trial Court may have had the mix up. Nevertheless, by evidence, the claimant had confirmed that he had attended the meeting of 17.02.2023 where instructions by way of a warning was given to all drivers to desist the gross misconduct in issue, and, in disobedience of that instruction, the appellant was found culpable of selling the project materials to undisclosed third parties. It appears to the Court that the findings by the trial Court did not defeat the reason for the dismissal and did not amount to a misdirection on the facts and evidence on record. The record shows that the appellant testified and confirmed that on the material day and incident leading to the dismissal, he had made only one trip. The account by RW is found credible and on a balance of probability that the appellant was culpable per the reasons for the termination. The reasons related to the appellant's conduct and the respondent's operational requirements as per section 45 of the Act and are found to have been fair.
13. To answer the 1<sup>st</sup> and 2<sup>nd</sup> issues, the trial Court's finding that the dismissal was fair in procedure and substance is upheld.
14. In the circumstances, to answer the 3<sup>rd</sup> issue, the trial Court did not err in dismissing the suit.

In conclusion the appeal is dismissed with costs and the Deputy Registrar to return the case file to the Sub-Registry at Machakos forthwith.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 7TH MARCH, 2025**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

