



**Owiri v Kenya Revenue Authority (Cause E004 of 2024)  
[2025] KEELRC 1405 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1405 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E004 OF 2024  
DN NDERITU, J  
MAY 15, 2025**

**BETWEEN**

**FRANSISCA APONDI OWIRI ..... CLAIMANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. Through BS Advocates LLP, the claimant commenced this cause by way of a memorandum of claim dated 13<sup>th</sup> February, 2024, seeking for the following reliefs –
  - a. A declaration that the respondent’s action of termination of the claimant’s employment was without justification, unfair, inhumane and callous.
  - b. A declaration that the claimant is entitled to reinstatement with all benefits.
  - c. In the alternative, a declaration that the claimant is entitled to payment of her terminal dues and compensatory damages as pleaded.
  - d. An order that the respondent issues the claimant with a certificate of service.
  - e. Costs of the suit and interest on the compensatory damages.
2. As it is the procedure, the memorandum of claim was accompanied with a verifying affidavit, a list of witnesses, a written statement by the claimant, witness statements by Hillary Odhiambo, John Okoth Okungu, and Godfrey Otieno Odhiambo, a list of documents, and a bundle of copies of the listed documents.



3. The respondent entered appearance through Fridah Mwongera, Advocate and Maren Masai, Advocate and on 26<sup>th</sup> March, 2024 filed a response to the claim dated 12<sup>th</sup> March, 2024 seeking for the dismissal of the claim with costs for lack of merit.
4. On 3<sup>rd</sup> April, 2024, the claimant filed a rejoinder to the respondent's response dated 3<sup>rd</sup> April, 2024 and the witness statement by Sylvester Odiedo of even date.
5. On 20<sup>th</sup> September, 2024 the respondent filed its list of documents and a bundle of copies of the listed documents.
6. Subsequently, on 27<sup>th</sup> January, 2025 the respondent filed the written witness statements by Stella Chepchirchir (RW1) and Jackson Kyalo (RW2), and both testified in support of the respondent's case during the hearing.
7. The claimant's case came up in court for virtual hearing on 25<sup>th</sup> November, 2024 when the claimant (CW1), John Okoth (CW2), Godfrey Otieno Odhiambo (CW3), and Sylvester Odiedo (CW4) all testified and the claimant's case was closed.
8. The defence was heard on 28<sup>th</sup> January, 2025 when RW1 and RW2 testified and the respondent's case was closed.
9. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Wasilwa, filed his submissions on 3<sup>rd</sup> March, 2025 while counsel for the respondent, Miss Masai, filed her submissions on 6<sup>th</sup> March, 2025.

## II. The Claimant's Case

10. The claimant's case is expressed in the memorandum of claim, the rejoinder to the respondent's response, the oral and documentary evidence of the claimant and her witnesses (CW2 to CW4), and the written submissions by her counsel.
11. In her memorandum of claim, the claimant stated that she was initially engaged by the respondent as a Border Control and Enforcement Assistant on a three-years' fixed contract vide the letter of employment dated 27<sup>th</sup> February, 2019. Subsequently, the engagement was converted to permanent and pensionable terms vide a letter dated 1<sup>st</sup> January, 2022. She was earning a consolidated monthly salary of Kshs83,000/= as at the time of her dismissal.
12. It is further pleaded that vide a letter dated 19<sup>th</sup> April, 2023, the claimant's employment was terminated on the grounds that she facilitated the unprocedural processing and clearance of trucks KCZ 1X9J, KCY 3X0F and KCY 0X2Q (the three trucks) without ascertaining whether the taxes due had been paid; insubordination for failing to adhere to instructions shared in a Memo: C& B C/MLB/2020ENF/19 issued on 19/8/2020; and receiving an inducement of Kshs45,000/= for the unprocedural clearance of the trucks.
13. The letter of dismissal dated 19<sup>th</sup> April, 2023 stated as follows –

Ref: Conf/12323(25) 19<sup>th</sup> April, 2023

Francisca Apondi Owira

Border Control Assistant

Customs & Border Control Department

Malaba



Cell Phone: 0712223XXX

Dear Francisca,

#### Termination of Services

Reference is made to this office's letter Ref: Conf/12323(21) dated 23<sup>rd</sup> December, 2022 that was addressed to you on Negligence of duty and Insubordination, whose charges are well within your knowledge and your representations (oral and written) thereof.

Management has considered your case carefully and the reasons advanced in mitigation found unacceptable since it is confirmed that indeed on 20<sup>th</sup> August, 2020 while working as a Border Control Assistant based at Malaba One Stop Border Post (OSBP) you committed the following malpractices;

1. That you facilitated unprocedural processing and clearance of the trucks with registration numbers; KCY 0X2Q, KCZ 1X9J and KCY 3X0F which were ferrying uncustomed goods without ascertaining whether taxes due had been paid which is a clear case of negligence of duty on your part.
2. That you failed to adhere to the instructions given by the Station Manager vide the memo Ref:C&BC/MLB/2020/ENF/19/08/2020/1 dated 19<sup>th</sup> August 2020 that was shared with you on the same day via lotus email at 6.37pm which is a clear case of insubordination on your part. The said memo provided inter alia that:
  - i. The consignment are subject to 100% verification
  - ii. The clearance of trucks will only be done from 0800hrs to 1700hrs.
3. That on 20<sup>th</sup> August 2020, you received an inducement of Kshs. 45,000 from Mr John Opuma (the clearing agent) through his phone number 0758XX741 to your proxy number; 0791XXX528 registered in the name of Godfrey Odhiambo Otieno in order to facilitate clearance of the said consignment. Your colleague Ms. Edith Carren Onyao, confirms through her statement that the said proxy number belongs to you since you had shared it with her and she had it saved in her mobile phone.

Further analysis of the Mpesa transactions established that the proxy mobile number belongs to you since transactions were traced from the said proxy number to your husbands' mobile number; 0722128XXX and that you sent money from the proxy line to your other number 0712223XXX, your family members as well as to your colleagues as shown under Table 2 (page 28) of the investigation report.

Your irregular and unprocedural processing of the said consignment occasioned revenue loss amounting to Kshs. 4,506,117.

Accordingly, the above stated malpractice confirms your culpability for Negligence of duty and Insubordination, which



are serious offences of gross misconduct that warrant for your summary dismissal in line with the provisions of Section 44.4 (c), (e) and (g) of the Employment Act 2007 as read with Clauses 6.1.1.5, 6.2.5.2, 6.2.5.4, 6.2.5.6, 6.2.5.9 and 6.2.2.12 of the KRA Code of Conduct.

Consequently, your services with Kenya Revenue Authority (KRA) are hereby terminated with immediate effect for gross misconduct in line with the above quoted provisions of the statutes.

You are hereby instructed to surrender any Authority's property that may have come into your possession by virtue of your employment including Staff Identification Card and Medical Smart Cards immediately you receive this letter.

You will be paid Basic salary, House and Transport allowances up to and including 19<sup>th</sup> April 2023, as well as three months' salary in lieu of notice upon clearance, less any liability to the Authority. You will also be paid NSSF benefit when due in line with the NSSF Act, as well as your Pension benefits in line with the terms of the Authority's Pension Trust Deed and Rules upon production of Pension Commutation Form (PCF) and the Clearance Certificate. Further and pursuant to Section 27(5)&(6) of the Public Officer Ethics Act 2003, you will be required to complete and submit a final Declaration of Income, Assets and Liabilities form for the period from 1<sup>st</sup> November, 2021 to 19<sup>th</sup> April, 2023 for onward transmission to Public Service Commission of Kenya (declaration form attached). A certificate of service will be issued as provided for under Section 51(1) of the Employment Act, 2007.

Please take note that you have a right to appeal against this decision within thirty (30) days from the date of receipt of this letter in accordance with the provisions of the KRA Code of Conduct Clause 9.1.1.

Such an appeal should be addressed to the Commissioner, Corporate Support Services (CSS) and should be forwarded through the Deputy Commissioner - Human Resource, Kenya Revenue Authority.

This letter is issued in duplicate, the dotted copy to be signed and returned to the undersigned for records.

Yours Sincerely,

Angeline Mutua

For: Deputy Commissioner - Human Resource

cl File copy

Sign:..... Date: .....



Cc: Commissioner Customs & Border Control - for information

Chief Manager, C&B - for appropriate action on the payroll'

14. It is pleaded that the claimant had been requested by a colleague, Veronica Wachuka, to relieve her on 19<sup>th</sup> August, 2020 as she was attending to a sick child in Nairobi, a request that the claimant heeded to. It is pleaded that the claimant and one Edith Carren Onyao were manning the custom outward upper exit gate, where the claimant was to operate the Simba Operating system to confirm custom taxes had been paid by operators of the trucks exiting the port, while Carren Onyao was responsible for physically ensuring that the payment receipts issued from the Simba system for the trucks tallied and appended the final release stamp.
15. It is further pleaded that Carren Onyao, in her statement during the internal Investigations, confirmed that the Simba Operating system was not working on the night of 19<sup>th</sup> August, 2020 and conceded that there was no way she could have confirmed that taxes had been paid but still went ahead and released the trucks.
16. It is pleaded that the claimant did not inspect or clear the three trucks on the said night, and as per Carren's letter of 28<sup>th</sup> August, 2020, she had released the trucks without confirming from the system whether the Forms F147 presented were in order.
17. The claimant pleaded that Carren released the trucks on her own volition and that at no point did the claimant append her signature on any document to indicate that she released the trucks.
18. The claimant pleaded that her termination was unfair as she did not verify any payments on the night of 19<sup>th</sup> August, 2020 due to downtime in the Simba System. She further stated that she turned away one John Opoma who was the clearing agent/paper pusher of the three trucks that were released unprocedurally. She pleaded that Edith Carren Onyao had confirmed that she was responsible for the release of the three trucks from the customs area.
19. The claimant further pleaded that due to the downtime in the Simba system she was unaware of the instructions that required 100% verification and clearing of trucks only between 0800 hours and 1700 hours although she claimed to have cleared no trucks on the material date and time.
20. The claimant pleaded further that she did not own the mobile telephone line number 079165\* and was not aware of the origin and purpose of the alleged Kshs45,000/- referred to in the statements of John Okoth Okungu and Godfrey Otieno Odhiambo.
21. The claimant pleaded that she had no control over the persons who sent money to her relatives and that the findings in the investigation report dated 27<sup>th</sup> October, 2020 were unsupported, considering that the police investigations absolved her.
22. The claimant lamented that her termination was unjustifiable and punitive, as it denied her the opportunity to work, grow, and resulted in her loss of income.
23. The claimant seeks for reinstatement or, in the alternative, compensation for unfair termination as set out in the preceding part of this judgment.
24. In her testimony in court, the claimant adopted her filed witness statement on record as her evidence-in-chief and adopted her filed documents as Exhibits C-Exh-1 to C-Exh-10. She stated that she was an employee of the respondent at Malaba Border Post and was responsible of manning the Simba Operating system to ensure that taxes were paid for goods entering into the country. She stated that goods with unpaid taxes could not leave the port.



25. In cross-examination, she stated that she informed Caren Onyao not to release goods without confirmation of payments as the Simba system was not working. She conceded that she interacted with one John Opoma on the night of 19<sup>th</sup>/20<sup>th</sup> August, 2020 and she had referred him to her boss. She stated that Kshs45,000/- was payable to a clearing agent, John Okoth.
26. She further stated that only empty trucks were allowed to leave the port, and only Caren Onyao had the responsibility to stamp documents and release the trucks from the inland port.
27. CW2, adopted his statement dated 13<sup>th</sup> February, 2024 as his evidence in chief and conceded that he was a forwarding and clearing agent and the ex-husband of the claimant. He stated that he recorded a statement at Mbale Police Station and stated that Godfrey Otieno Odhiambo was allegedly his business partner although he again conceded that that he had no evidence to prove that. He conceded that Kshs45,000/= was a payment made to him.
28. CW3, testified that he is allegedly a business partner of CW2 in an informal arrangement. He stated that he received in his Mpesa Account Kshs45,000/- on behalf of the CW2 which was his commission for some work done.
29. In cross-examination, CW3 conceded that he had no evidence or contract to demonstrate why CW2 was paid Kshs45,000/- through his Mpesa line notwithstanding that the money was paid through him as CW2's M-Pesa account had allegedly exceeded the day's M-pesa limit.
30. CW4, Sylvester Odiedo, testified that he is a clearing and forwarding agent running an unregistered agency, Sylvester & Sons. He pleaded that on 20<sup>th</sup> August, 2020 persons who later identified themselves as DCI officers arrested him and took him to Bungoma Police Station, where the drivers of the impugned three trucks were asked if he was their clearing agent but they denied.
31. He pleaded that John Opoma had taken up the clearing task/paper pushing for the subject three trucks from John Okoth Ogungu (CW2) since CW4 was late. He stated that John Opoma was responsible for the clearing of the three trucks at the Malaba border post and was to pay Kshs45,000/= to CW2 vide the number 079165XXXX as his commission for having been involved in packaging of the goods from Kampala. He conceded, however, that he had no documentation for the arrangement which he alleged was verbal.

### **III. THE RESPONDENT'S CASE**

32. The respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1 (an Assistant Manager) and RW2 (an investigator) and the written submissions by its counsel.
33. In the response to the claim and from the testimonies of RW1 and RW2, it was pleaded that the claimant was dismissed for negligence and insubordination. It is pleaded that on 20<sup>th</sup> August, 2022 the claimant ignored instructions from the station manager issued on 19<sup>th</sup> August, 2022 directing the clearance of trucks only between 0800 hours and 1700 hours and facilitated the unprocedural processing and clearance of the three trucks without ascertaining that taxes and customs had been paid.
34. It was further pleaded that the claimant received a sum of Ksh45,000/= from a clearing agent, John Opoma, for facilitating the clearance, which sum the respondent established had been sent to the claimant's proxy Mpesa line number 079165 and later sent to the claimant, her family, and colleagues. It was pleaded further that Edith Carren Onyao confirmed that the proxy line 079165\*\* belonged to the claimant, as the claimant had given the number to her and she Carren had saved it on her phone in the name of the claimant.



35. It is pleaded that the claimant's conduct occasioned to the respondent a loss of revenue of Kshs4,506,117/= in uncollected taxes.
36. It was further pleaded that the claimant was issued with a show cause letter on 23<sup>rd</sup> December, 2022 which she responded to on 2<sup>nd</sup> January, 2023. The claimant was invited to a disciplinary hearing vide a letter dated 10<sup>th</sup> March, 2023 and the hearing was conducted on 23<sup>rd</sup> March, 2023.
37. It was pleaded that the claimant was taken through a fair disciplinary process by a well-constituted panel and she was found culpable and she was dismissed. It is further pleaded that the claimant appealed against her termination on 17<sup>th</sup> October, 2023 but the respondent upheld the dismissal.

#### **IV. Submissions**

38. The claimant's counsel submitted globally to the effect that the claimant was implicated in a scheme which was masterminded by RW1, Edith Caren Onyao, John Opomo, and Joel Kibaki. It is further submitted that under Sections 41, 43, 45 & 47 of the Employment Act (the Act) the respondent failed to prove that the reason for the dismissal of the claimant was valid. Citing *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR), it is submitted that the respondent failed to tender evidence against the claimant to reasonably establish that there existed a valid lawful reason for dismissing her.
39. On the other hand, counsel for the respondent identified the following issues for determination – Whether the reason for termination was substantively just; Whether the claimant's employment was procedurally fair; and, Whether the claimant is entitled to the remedies sought.
40. On the first issue, it is submitted that the reasons for the claimant's dismissal were neglect of duty, insubordination, and for receiving an inducement of Kshs45,000/= to facilitate unprocedural clearance of consignments on the three trucks.
41. It is submitted that based on Section 44(4) (c) of the Act, the claimant's negligence amounted to gross misconduct in her failing to perform her duties as contemplated under Section 5(1) of the Kenya Revenue Authority Act (Cap 469).
42. It is further submitted that under Section 44(4) (e) of the Act, the claimant was guilty of insubordination for having failed to follow the respondent's instructions sent via email and which email the claimant received. It is submitted that the claimant's responsibility to the respondent did not change, whether she was on duty or relieving a colleague.
43. It is submitted that since she played a part in the unprocedural clearance of the trucks and further received an inducement for the said unprocedural clearance, she violated Sections 6.1.2.5.2, 6.1.2.3.4 & to 6.1.2.3.1 of the respondent's Code of Conduct.
44. It is further submitted that the claimant's dismissal was lawful as the claimant was taken through a fair hearing process before her dismissal as per Section 41 of the Act. Counsel cited *Rhoda Olwenyo Mombo V Masinde Muliro University of Science* (2022) KEELRC 490 (KLR) in support of that argument. It is further submitted that the respondent carried out investigations, culminating in issuance of a show-cause letter to the claimant dated 23<sup>rd</sup> December, 2022. It is submitted that the claimant responded to the show cause letter and later appeared before a disciplinary panel that ultimately recommended her dismissal. Further, the claimant appealed the dismissal vide a letter dated 17<sup>th</sup> May, 2023 but the dismissal was upheld on 31<sup>st</sup> August, 2023.



45. Citing a plethora of decisions – Kenya Airways Limited v Aviation & Allied Workers Union Kenya (2014) eKLR; Kenya Revenue Authority v David Mwangela (2025) KECA 262 (KLR); Rhoda Olwenyo Mombo (Supra) & Asebe v Kenya Revenue Authority (2025) KEELRC 183 (KLR), it is submitted that the claimant is not entitled to the reliefs sought as the dismissal was fair, just, and lawful.

## V. Issues for Determination

46. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
- a. Was the dismissal of the claimant by the respondent wrongful, unfair, and unlawful?
  - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought in the claim?
  - c. Who should bear the costs of the cause?

## VI. Dismissal

47. The facts and the circumstances leading to the dismissal of the claimant are not in dispute. The evidence on record is that vide a letter dated 19<sup>th</sup> April, 2023 the claimant was dismissed on the grounds that she facilitated the unprocedural processing and clearance of trucks KCZ 1X9J, KCY 3X0F, and KCY 0X2Q without ascertaining whether the taxes due had been paid; insubordination for failing to adhere to instructions shared in a Memo: C& B C/MLB/2020ENF/19 issued on 19/8/2020; and, receiving an inducement of Kshs45,000/= for the unprocedural clearance of the said trucks.
48. It is the claimant's case that she was wrongfully and unfairly dismissed as she did not verify any payments on the night of 19<sup>th</sup> August, 2020, due to downtime in the system (Simba) used. In her testimony she stated that she turned away one John Opoma, the clearing agent of the trucks allegedly released unprocedurally. She further asserted that Edith Carren Onyao had admitted that she was responsible for releasing the three trucks from the customs area.
49. The claimant further stated that she was unaware of her superiors' instructions that required 100% verification and clearing of trucks between only 800 am and 1700 hours only, although she cleared no trucks on that night. She further asserted that she neither owned Mpesa mobile line number 079165XXXX or knew the origin and purpose of the alleged Kshs45,000/- referred to in the statements of John Okoth Okungu and Godfrey Otieno Odhiambo and said to have been sent to her as an inducement. The claimant challenged the dismissal on the basis that the reason for her dismissal was not unjustified.
50. On the other hand, the respondent takes the view that the claimant was negligent in failing to exercise proper judgement when performing her duty thus aided in the unprocedural clearance of the three trucks. Further, the claimant was accused of insubordination for failing to follow lawful instructions and for receiving an inducement of Kshs45,000/= which, according to the respondent, amount to gross misconduct under the Act. The respondent asserts that the misconduct by the claimant formed reasonable grounds for summary dismissal.
51. A plethora of decisions from this court (ELRC) has by now, and to a large extent, settled the law on what constitutes substantive and procedural fairness – See for example Mary Chemweno v Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno v Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro vs Teachers Service Commission (2012) eKLR.



52. The bottom-line in due process is that an employer must have a lawful reason and adopt the proper legal procedure before terminating or dismissing an employee.
53. The law in its wisdom recognizes that employment contracts, like all other contracts, are organic and shall come to an end at some point in time. There are a variety of reasons that could terminate a contract of employment, and the *Employment Act* (the Act) provides for many such reasons. Employment is personal in nature and hence death of an employee brings the relationship to a natural end. Sections 40 (redundancy), 43, 44, 45, and 46 of the Act provide for reasons and circumstances that may form good reasons or grounds for termination or dismissal. Similarly, Sections 35, 36, 40, and 41 of the Act provide for germane pointers towards what constitutes procedural fairness.
54. It is in the context of the foregoing that the facts and evidence in this cause shall be weighed in determining if the dismissal of the claimant was substantially and procedurally fair and lawful.
55. What this court is invited to determine is whether the dismissal met the reasonable test as enunciated by Lord Denning in *British Leyland UK Limited v Swift* (1981) I.R.L.R. 91, wherein it was held that –
- The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably takes a different view...”
56. It is not disputed that the claimant was on duty on 19<sup>th</sup> August, 2020 when the three trucks were unprocedurally released from the Malaba Customs Port without paying the necessary taxes and customs. The claimant alleges that her colleague, Carren Onyao, with whom she was working in that shift, was solely responsible for releasing of the three trucks.
57. Carren Onyao, during the investigations conducted by the respondent (see page 262 of the respondent’s list of documents), stated that the number to which the Kshs45,000/= was sent by the clearing agent of the said three trucks belonged to the claimant. At page 202 of the respondent’s list of documents, John Opoma, the clearing agent, in his statement while in custody stated that he had met the claimant at the respondent’s office on the night of 19<sup>th</sup> /20<sup>th</sup> August, 2020, and since the Simba system had not been working, the claimant had given him the phone number 079165XXXX to which Kshs45,000/= was sent for the three trucks, as each truck ought to have paid Kshs15,000/= as tax.
58. The respondent’s case is that the said amount was paid to the claimant’s proxy as an inducement to allow the unprocedural clearance of the trucks. The said position was informed from the investigations by the respondent into the Mpesa statement of the phone number 079165XXXX which showed that the claimant, her relatives, and her friends had received funds from the same Mpesa line/account.
59. The claimant on her part alleged that she was not aware of any monies paid out to the alleged proxy or the purpose therefor. From the evidence adduced by the respondent, and based on Section 43 of the Act, all that an employer is required to prove is the reason(s) for the termination or dismissal and the said reason(s) for termination of a contract are the matters that the employer at the time of the termination or dismissal of the employee genuinely believed to exist.
60. The test is whether the respondent reasonably believed that the claimant had negligently allowed the said three trucks to be unprocedurally and unlawfully cleared contrary to instructions that had been sent on the said date 19<sup>th</sup> August, 2020 and also whether she acted fraudulently for receiving Kshs45,000/= from the clearing agent/paper-pusher of the said trucks.



61. During the hearing in court, the claimant admitted that she was on duty on the material date of 19<sup>th</sup> August, 2020, working hand in hand with Carren Onyao. The claimant was responsible for manning the Simba system to confirm that taxes were paid, and Carren, on the other hand, was to physically confirm that F147 forms had all the necessary stamps and then release the trucks. The claimant admitted that she met the clearing agent of the said trucks on the material day, but alleged that she did not know if the said three trucks were cleared by her colleague.
62. Clearly the duty of the claimant and her colleague was to work together and in tandem to ensure that all taxes and customs were paid in support of the respondent's operational needs. The three trucks were unprocedurally cleared while the claimant was on duty together with others. The show-cause letter was issued to the claimant to which she responded. The charges against the claimant were serious enough to warrant summary dismissal of those culpable under Section 44 of the Act.
63. In the circumstances, the court finds that the respondent had a genuine, reasonable, and or probable ground(s) upon which to dismiss the claimant as envisaged under Section 43(2) of the Act.
64. The investigations report by the respondent demonstrates that the claimant in concert with Carren, CW, CW3, and CW4, conspired to defraud the respondent of revenue and earn illegal kickbacks by releasing the three trucks ferrying goods taxes whereof were not paid. It cannot be true that the said three trucks were released from the port without the knowledge of the claimant who was manning the payment and clearance system. The claimant had a duty and indeed an obligation, as a responsible employee, of ensuring that no trucks left the port until and unless all customs and taxes were paid in full.
65. In any event, there were strict instructions that no truck was to leave the port as clearance was to be done only between 0800 hrs hrs and 1700 hours.
66. Clearly and evidently, the claimant was negligent and even reckless in performance and execution of her duties.
67. The report demonstrates how the Mpesa line wherein Kshs45,000/= was paid belonged to the claimant and how the monies was later shared. It does not matter that the said Mpesa line was not registered in the official name of the claimant. The court takes judicial notice that many Kenyans operate Mpesa lines that are not registered in their names for various reasons and mainly to cover fraudulent, or insincere, and dishonest transactions. It is not beyond imagination that the line where the Kshs45,000/= was paid in fact belonged to and was operated by the claimant.
68. In regard to procedural fairness, this court has held in the past, and even now, that a disciplinary hearing is not expected to meet the standards of a court trial, as the courts are subject to strict rules of law, evidence, and procedure. However, rules of natural justice apply in disciplinary hearings in that no one may be condemned unheard; an employee has a right to all information and particulars of charges before the hearing; and an employee has a right to test the evidence by way of cross-examination. An employer has to establish a prima facie case against an employee for the hearing to meet the minimum threshold for a fair hearing as envisaged under Section 41(2) of the Act, Article 47 of *the Constitution* and the various provisions of the *Fair Administrative Action Act*.
69. There is no contest by the claimant that disciplinary proceedings were conducted. In any event, the evidence on record confirms that the claimant was issued with a show-cause letter on 23rd December, 2022 (see pages 277 to 280 of the respondent's list of documents) which was preceded by investigations conducted by the respondent and an investigation report dated 27th October, 2020 (see pages 7 to 45 of the respondent's list of documents).



70. The claimant responded to the show-cause letter vide her letter dated 2<sup>nd</sup> January, 2023 (see pages 282 to 290 of the respondent’s list of documents) denying all the allegations. Vide a letter dated 10<sup>th</sup> March, 2023 (see pages 292 to 293 of the respondent’s list of documents), she was invited to a disciplinary hearing that was held on 23<sup>rd</sup> March, 2023.
71. The court finds and holds that the claimant was taken through a fair disciplinary process before a well-constituted panel and found culpable of the charges/allegations and subsequently dismissed vide a letter dated 19<sup>th</sup> April, 2023. Although the minutes of the hearing were not availed it is clear that the hearing proceeded culminating in the termination letter indicating that the claimant’s mitigation was found to be unacceptable. The claimant, in argument, does not challenge or dispute that the disciplinary hearing was held and conducted as pleaded and confirmed by the respondent.
72. The evidence on record confirms that the claimant appealed the dismissal vide a letter of 17<sup>th</sup> October, 2023 (see pages 298 to 305 of the respondent’s list of documents), but the dismissal was upheld after the claimant was invited and indeed appeared before an appeal panel vide a letter dated 20<sup>th</sup> July, 2023 (see pages 306 to 307 of the respondent’s list of documents).
73. 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 to 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, chosen by the employee within subsection (1) make.”
74. In the considered opinion of this court, and it is so held, the respondent met the tenets of the above provision and no objection was raised by the claimant on the procedural fairness. The claimant’s assertion that the respondent ought to have called John Opoma, who is not its employee, to testify does not hold water as the respondent can only exercise administrative action over its employees. The disciplinary hearing was not a criminal trial where a higher standard of proof applies. In any event, the claimant was equally free to call the said persons as her witness in this cause.
75. In the circumstances, the court finds and holds that the claimant was accorded both substantive and procedural fairness and hence the dismissal was justified, fair, and lawful.

## **VII. Reliefs**

76. Having held that the dismissal of the claimant was justified, fair, and lawful, the court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.
77. Prayer (a) is for a declaration that the respondent’s action of termination of the claimant’s employment was without justification, unfair, inhumane and callous. This has been determined in the foregoing paragraphs of this judgment wherein it has been found and held that the dismissal was fair, just, and lawful.



78. Prayer (b) is for reinstatement with all benefits. The court has found that the claimant's dismissal was justified and thus the claimant is not entitled to reinstatement.
79. Prayer (c) is for payment of her terminal dues and compensatory damages as pleaded. There were no particulars of the terminal dues that the claimant is seeking from the respondent. The respondent on the other hand stated that all terminal dues were paid to the claimant upon clearance. The claimant did not raise an objection to this position or prove non-payment or a balance thereof. The court has held that the dismissal was justified and lawful thus the claimant is not entitled to any compensation under Section 49 of the Act.
80. Prayer (d) is for a certificate of service under Section 51 of the Act. The respondent produced a copy of a certificate of service (see page 309 of the respondent's list of documents) stating that the claimant was issued with the same upon clearance. The claimant did not submit on the said issue or deny having received the same. If the claimant has not collected the said certificate, the respondent is directed to release the same to her forthwith.
81. From all the foregoing, the court finds and holds that the entire cause lacks merit and the same is hereby dismissed.

### **VIII. Orders**

- i. This cause is hereby dismissed in its entirety for want of merits.
- ii. Each party shall bear own costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 15<sup>TH</sup> DAY OF MAY, 2025.**

.....

**DAVID NDERITU**

**JUDGE**

