



**Kamundia v National Cement Company Limited (Cause E070 of 2021)  
[2025] KEELRC 1927 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1927 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E070 OF 2021  
M MBARÚ, J  
JUNE 30, 2025**

**BETWEEN**

**PATRICK NDIRANGU KAMUNDIA ..... CLAIMANT**

**AND**

**NATIONAL CEMENT COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant on 22 February 2016 and served in various positions, including the human resource manager. The claimant earned Ksh. 110,000 per month, including other benefits. On 14 October 2020, the respondent terminated the claimant's employment for non-performance, absenteeism, and lack of respect to seniors
2. The claim is that there was no notice prior to the termination of employment. The reasons provided lacked justification, were unlawful, and led to unfair dismissal. He was not allowed to defend himself, which is contrary to sections 41, 43, 44, and 45 of the *Employment Act* (the Act). He claimed the following dues,
  - a. Notice pay Ksh.110,000,
  - b. Gratuity pay Ksh.275,000,
  - c. 19.5 leave days Ksh.70,583,
  - d. 12 months' compensation Ksh.1,320,000,
  - e. Costs of the suit.
3. The claimant testified that he worked diligently for the respondent until 14 October 2020 at 3:37 pm. He was shocked to receive a termination notice via email, citing allegations of failing to provide a satisfactory working environment that resulted in a loss of life at the Samburu plant under



- construction. The respondent stated that his employment was terminated due to poor performance and negligence. No investigations were conducted regarding the alleged incidents at the Samburu plant, for which construction had been subcontracted under the Occupational Health and Safety Department.
4. The claimant testified that he was not notified to show cause or invited to a disciplinary hearing. At the time, he had accrued 19.5 leave days, which were not paid, and it was the respondent's practice to pay gratuity at the end of employment, which was not paid to him.
  5. In 2016, the human resource manager was paid a gratuity of Ksh.500, 000 as a send-off package for years of work, and in 2020, Omar Said was paid Ksh.100, 000. The claim for unfair termination of employment should be allowed.
  6. In response, the respondent argues that the claims are without merit. The termination of employment, as per the notice dated 14 October 2020, was preceded by a disciplinary hearing. The claimant's conduct during his employment involved consistently being absent from work without authorisation and leaving his place of work during working hours to indulge in drinking alcohol, contrary to the Act. The claimant received various warnings, both oral and in writing, and through emails, yet he failed to comply.
  7. Warnings preceded the letter of termination of employment issued to the claimant, a show cause letter dated 16 September 2020, to which the claimant failed to respond, and a letter inviting him to a disciplinary hearing dated 19 September 2020 for 24 September 2020. The notice terminating employment allowed for one month.
  8. The respondent adhered to the law when terminating employment. The claim for payment of November salary is not justified since no work was rendered. Gratuity pay is not lawful, and the claim is not justified.
  9. The claimant has consistently been absent from work, consuming all his leave days. The accrued leave days were paid together with terminal dues.
  10. The alleged practice of paying gratuities is not contractual or lawful, and the allegations should be dismissed with costs.
  11. In evidence, the respondent called Stephen Musyoka, the human resources manager, who testified that the claimant was employed on 16 March 2016 and assigned to the respondent's Athi River plant. He was later transferred to the Miritini/Samburu plant, and on various occasions, he would be absent without authorisation despite holding the position of human resources manager. The claimant was often out indulging in drinking alcohol, which resulted in verbal and written warnings.
  12. On 16 September 2020, the claimant received a notice to show cause, to which he failed to respond. He was invited to a disciplinary hearing on 24 September 2020, and the respondent terminated his employment on 14 October 2020, providing the claimant with one month's notice. This action was due to gross misconduct, including repeated absences from work.
  13. Musyoka testified that the claimant had formed a habit of disobeying his seniors and hence refused to respond to the notice to show cause. He was invited to a disciplinary hearing and allowed to bring another employee of his choice, but opted to attend alone. The allegations addressed during the disciplinary hearing on 24 September 2020 were that,
    - a. The claimant repeatedly absented himself from duty,



- b. On 25 August 2020, employees at the Samburu plant stopped working at 9am while the claimant was absent from work. Efforts to call the claimant to address other employees were not successful.
  - c. The strike lasted 3 hours and affected the product until Christine Chelimo, the human resources officer, addressed the issue; however, the claimant had not returned to work.
14. The claimant refused to respond to these allegations and quarrelled bitterly, challenging the notice. This prompted the respondent to convene a disciplinary hearing, during which it was deemed necessary to terminate the claimant's employment and issue written notice. The claimant was invited to hand over his duties, but declined.
  15. The respondent stated that Erastus Mwanzia Musyoka, the Deputy Group Human Resources Manager at the Devki Group of Companies, testified that the group of companies includes the respondent. He was notified of the claimant's conduct following his transfer from the Athi River plant to the Miritini plant, which included absenteeism from work. His gross misconduct escalated when he failed to attend to his duties and subsequently abandoned work during working hours for drinking sprees. Despite being issued warnings, he did not change his behaviour. A show cause notice dated 16 September 2020 was issued to him, which he failed to address.
  16. Mwanzia testified that due to the COVID pandemic in 2020, the disciplinary hearing was held through a hybrid meeting, with some members attending via teleconferencing while others were present physically. The employment period of the claimant was filled with warnings for misconduct and gross misconduct, during which he was repeatedly absent from work without authorisation from the respondent. The refusal of the respondent to acknowledge the show cause notice stemmed from a failure to respect his seniors and justified the termination of employment through a notice dated 14 October 2020. The claimant was allowed one month, yet he never reported to work. The claims made are not justified and should be dismissed.
  17. At the close of the hearing, both parties agreed to file written submissions.
  18. Only the claimant complied and filed written submissions on 28 April 2025.
  19. The claimant argued that the respondent employed him; however, Devki Steel Mills Limited issued the notice terminating his employment. The witnesses called by the respondent acknowledged these facts, yet there was no employment relationship between the claimant and that entity. In the case of *Christine Adot Lopeiyo v Wycliffe Mwathi Pere* [2013] eKLR, the court distinguished between an employment contract and a service contract. Although the claimant was a respondent employee, he was not employed by Devki Steel Mills Limited. The company that employed and paid salaries is considered the employer, as held in *Patrick Mutua Mwanzia & 19 Others v Habo Group of Companies* [2018] eKLR.
  20. Under section 45(2) of the Act, termination of employment must be valid, and the employer must adhere to fair procedures as established in *Felix Mutie Musango v Tin Can Manufacturers Limited* [2020] eKLR. In this case, the claim was not conducted through a fair procedure, and there were no valid reasons justifying the termination of employment. The claimant received notice of the termination of his employment on 14 October 2020, which included four allegations. There was no prior notice or disciplinary hearing. The alleged shocking incident the respondent cited as grounds for termination was not brought to the claimant's attention before the termination notice was issued. The claimant was accused of negligence leading to loss of life at the Samburu Plant; however, this matter was not included in the disciplinary proceedings.



21. The termination notice indicated that it stemmed from recent events over the last two days and was not part of the show cause notice dated 14 October 2020. The fair procedure requirements under section 45 of the Act were not adhered to. Under section 41 of the Act, the claimant was entitled to know the allegations against him to respond. In this instance, the respondent did not fulfil its legal duty under section 43 of the Act. There were no valid reasons leading to the termination of employment, as held in *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR.
22. The disciplinary hearing conducted by Devki Steel Mills Limited, rather than by the respondent, was irregular and did not meet the threshold set under section 41 of the Act. There was no privity of contract. The evidence presented by Erastus Musyoka on behalf of the respondent that the respondent was part of the group of companies does not align with the employment contract.
23. The claimant is entitled to notice pay and compensation for the unlawful and unfair termination of his employment. At that time, he had accrued 19.5 days of leave. The notice period was set to end in November 2020, and the salary for that month is pending.

### **Determination**

24. In a letter dated 22 March 2016, the respondent appointed the claimant as the Human Resources Officer, effective from 22 February 2016.
25. Through a notice dated 14 October 2020, the respondent terminated the claimant's employment for the following reasons: various complaints regarding the claimant's performance, including negligence, absenteeism, and lack of respect for the claimant's seniors.
26. The reason was that the claimant was absent from duty without authorization for several days. For the last two days, we have been shocked by some incidents at the Samburu plant, which have led to loss of life.
27. The employer has the prerogative to discipline its employees. However, such prerogative must be applied within the confines of the law. The power must not be exercised in a manner that is contrary to the law and the internal regulations that govern the relationship between the parties. Where there is evidence of manifest abuse of this power, the court will intervene to ensure observance of due process. In *Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others* [2017] eKLR, the court held that it will only interfere where due process is breached. See *Otoch v Muthaura & another* [2022] KEELRC 13564 (KLR).
28. The notice terminating the claimant indicated that he frequently absented himself from work. The notice to show cause dated 16 September 2020 required the claimant to respond to the following:
  - a. Not informing management in advance the cases pending in court,
  - b. Failing to address the employee disputes and being away from the plant,
  - c. Not solving Mombasa water issue,
  - d. Not conducting weekly safety meetings,
  - e. Not overseeing plant housekeeping issues,
  - f. Repetitively being absent from work.
29. The termination notice further noted that for the last two days we are shocked by some incidents that have happened at Samburu Plant leading to loss of life.



30. Two days before 14 October 2020 would mean 12 October 2020. What the court could discern from the evidence of Mwanzia and Musyoka was that while the claimant was undergoing disciplinary proceedings and pending determination from 24 September 2020, on 12 October 2020, there was an incident at the Samburu plant that led to the loss of life. A decision was taken to terminate his employment.
31. The evidence provided by the claimant is correct to the extent that he was only surprised on 14 October 2020 to receive the termination notice at 3:37pm. In response to the notice at 4:53pm, the claimant observed that,
- ... I am thankful for the chance you gave me in Devki. ...I did not fail in my job, all that I failed in was in the politics that came with the job, since politics was not in the jurisdiction of my job, I will complete the month you have given me in the termination...
32. The case concerning the loss of life was not investigated. The details are absent from both the termination notice and the show cause notice, and it only transpired in the last two days.
33. It is imperative that, even when the employer is eager to sanction an employee who has committed misconduct or gross misconduct, they ensure adherence to section 41(2) of the Act. This requires that the employee be issued notice and permitted to attend and make their representations. The Court of Appeal addresses the motions in the case of *Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)* [2022] KECA 540 (KLR) (13 May 2022) (Judgment), that;
- ...Four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being:
- a. An explanation of the grounds of termination in a language understood by the employee;
  - b. The reason for which the employer is considering termination;
  - c. Entitlement of an employee to have a representative of his choice when the explanation of the grounds of termination is being made;
  - d. Hearing and considering any representation made by the employee and the representative chosen by the employee.
34. The due process for gross misconduct is aptly summarised in the case of *Chepkuto v Egerton University Investment Co Ltd* [2024] KECA 1848 (KLR), which states that Section 44 of the *Employment Act* requires the employer to demonstrate that the employee's conduct reflects a fundamental breach of their contractual obligations. This breach may arise from various actions or omissions listed in that section and related issues. Furthermore, Section 41 of the Act outlines the procedure for notification and hearing before termination on the grounds of gross misconduct.
35. Further, sections 41, 43, and 45 of the *Employment Act* are not only concerned with the presence of valid reasons or grounds for termination. They also require the employer to observe due process in handling the release of the offending employee. The employee must be informed of the accusations against him; given a chance to defend himself; permitted to call witnesses in support of his case; and notified of the decision taken by the employer to terminate his services, as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR).
36. In this case, no action was taken despite the respondent addressing the various acts of misconduct relating to the claimant during the disciplinary hearing held on 24 September 2020. On 12 September 2020, the incident leading to a loss of life occurred. This seems to have prompted the respondent to consider the pending disciplinary decision concerning the claimant. However, new matters had arisen,



- and without notice or a hearing, they were used against the claimant, resulting in the termination of his employment.
37. The claim that there was wrongful, unlawful, and unfair termination of employment is correct. Despite the respondent operating a fully resourced human resources office under the group of companies and conducting a disciplinary hearing on 24 September 2020, no action was taken. Abruptly terminating employment due to the incident that occurred on 12 October 2020 without due process was to ambush the claimant, resulting in the unfair termination of his employment.
  38. Regarding the remedies sought, the notice dated 14 October 2020 gave the claimant 30 days' notice. He was therefore expected to serve his notice period.
  39. In tabulating his termination dues for November 2020, the respondent paid the claimant,
    - a. Leave days Ksh.11,871,
    - b. Notice zero,
    - c. Service Ksh.233, 625.
  40. The respondent submitted work records for the days the claimant was absent without authorisation. The claimant does not dispute these records.
  41. Absence from work is gross misconduct as defined under section 44(1)(a) of the Act. During the disciplinary proceedings held on 24 September 2020, the claimant could not explain his gross misconduct, allowing the respondent, as the employer, to sanction summary dismissal. This was subsequently reduced to termination of employment, with a notice period of 30 days being granted.
  42. Under section 19 of the Act, the employer can deduct pay for the days the employee is absent from work without authorisation. This is given context when calculating terminal dues.
  43. The claim for notice pay was contextualised in the notice dated 14 October 2020 and the tabulation of terminal dues in November 2020.
  44. On the gratuity payment claim, the claimant asserts that the respondent's practice was to pay gratuities to departing employees. He provided two instances where one employee received Ksh. 100,000, and another was repaid Ksh. 500,000. The differences in these payments remain unexplained.
  45. The Court of Appeal, in addressing the payment of gratuity to an employee in the case of *Alsaidco Alarm Limited v Njeru* [2023] KECA 1127 (KLR), determined that where there is evidence that the employer has paid contributions under social security, such as to NSSF, directing the employer to pay gratuity would violate the principle against double compensation. Since the Respondent was paying NSSF dues for the claimant's benefit, he was not entitled to pursue gratuity pay, which is gratuitous and at the employer's discretion. This position is reiterated in the case of *Muchiri v Security Guards Services Limited* [2024] KEELRC 1807 (KLR).
  46. On the compensation claim, considering the findings above that the claimant's employment was unfairly terminated, the court is bound to assess the compensation due under section 45(5) of the Act, taking into account the employee's work record. In this instance, the claimant was guilty of gross misconduct at termination. Rather than opting for summary dismissal, the respondent terminated his employment while permitting him to serve the notice period. To award compensation under the claimant's circumstances would effectively reward gross misconduct. Although the reasons for termination were distinct from the substantiated gross misconduct identified in the disciplinary hearing on 24 September 2020, claiming compensation would undermine the principles of fair labour



practices. In the case of Lilian W. Mbogo-Omollo v Cabinet Secretary, Ministry of Public Service & Gender & another [2020] KEELRC 53 (KLR), even with a finding of no due process, the employee was awarded Ksh. 10 in compensation under section 49 of the *Employment Act*. In the case of Lele v Mwaura t/a Gongoni Market [2025] KEELRC 1076 (KLR), the court granted zero compensation to an employee whose employment had been unfairly terminated, citing his work record's blemish due to gross misconduct.

For the claimant, a zero award is appropriate.

47. The analysis above considered that each party should bear its costs on the claim for costs.
48. Accordingly, the claims addressed above shall suffice. Each party is to bear its costs.

**DELIVERED IN OPEN COURT AT MOMBASA, THIS 30 JUNE 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

