



**Kiriga v East African Maltings Ltd & another (Cause E676 of 2022)
[2025] KEELRC 1649 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1649 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E676 OF 2022**

HS WASILWA, J

JUNE 4, 2025

BETWEEN

JOHN KIRIGA CLAIMANT

AND

EAST AFRICAN MALTINGS LTD 1ST RESPONDENT

EAST AFRICAN BREWERIES LTD 2ND RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 29th August 2022 and prays for judgment against the Respondents for: -
 - a. Three Month's pay in lieu of Notice of Ksh.2,765,434.4
 - b. Maximum compensation for wrongful dismissal and unfair termination of the employment contract as per Sections 49 and 50 of the [Employment Act](#), at the rate of the Claimant's annual salary of Ksh.11,061,737.76
 - c. Service pay of Ksh.12,444,454.98
 - d. Loss of income before retirement Ksh.77,432,1
 - e. Any further entitlement and/order that the Honourable Court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the Claimant submits on her final submissions
 - f. Certificate of service
 - g. Cost of the Cause
 - h. Interest on prayer 1,2,3 and 4 above from the date of filing this cause till payment



Claimant's Case

2. The Claimant states that he was initially employed by Kenya Breweries, one of the Respondent's affiliates as a storekeeper in 1993 and rose to the ranks in the Respondents' companies with his last position before termination being Operations Manager; which role was assigned to him and confirmed on 29th October 2010.
3. The Claimant states that he discharged his duties diligently and with minimal supervision; at the time of termination of his employment he was earning a monthly basic salary of Kshs. 921,811.48
4. The Claimant states that on 18th February 2020, his employment was terminated on grounds of alleged misconduct in his line of duty.
5. The Claimant states that his roles and responsibilities as an Operations Manager were: Barley malt production and storage; Supplying raw materials (barley, malt and sorghum) to East African Breweries PLC ('EABL') companies which include Kenya Breweries Ltd, Uganda Breweries Ltd, Serengeti Breweries Ltd and other third-party companies; Continuous improvements to drive and sustain high product quality, reduce costs, and drive innovations; Productions department's asset care management ensuring maximum utilization and timely maintaining equipment; Capital expenditure budgeting for the operations department upgrading/ modernizing/ automation of the plant to match the ever evolving world; Processing and storage at the Kampala Road site and at the Lesiolo grain storage site; and he was in charge of the personnel working in the operations department.
6. The Claimant states that he received a Notice to Show Cause letter on 30th December 2019 from the 1st Respondent citing that he had breached the Company's code of conduct by falsification and misrepresentation of stock records leading to the Company's loss of Kshs. 223,955,417.84. This shocked him as no issues had been raised in his department and he used to report with the Finance Department every month on the stocks.
7. He responded to the NTSC on 1st January 2020 and the employer gave their response on 3rd January 2020. He attended a disciplinary hearing on 8th January 2020 where he defended himself from the allegations.
8. The Claimant states that he received the disciplinary hearing minutes on 14th February 2020 and subsequently on 18th February 2020, he was issued with a termination letter.
9. The Claimant states that in accordance with the EABL Disciplinary Policy, he appealed the decision to terminate his employment in writing on 20th February 2020. However, the employer took more than 3 weeks to respond to his appeal contrary to the EABL Policy and the *Employment Act*.
10. It is the Claimant's case that the disciplinary process failed to follow the laid procedure as per the provisions of the *Employment Act*, the EABL Kenya Policy and the Diageo Code of Business Conduct. The disciplinary process was one-sided favouring the employer and not valuing the employee.
11. It is the Claimant's case that the termination was unfair as the allegations were unfounded and did not touch on his job description. He tried to engaged the Respondents' representatives with a view of reconciling the parties but the same was futile. The Respondents also failed and/or refused to make good his demands to payment of his terminal dues.

Respondents' Case

12. In opposition, the Respondents filed a Statement of Response dated 30th November 2022.



13. The Respondents state that this Honourable Court lacks the jurisdiction to hear and determine this Claim against it since there was no employer and employee relationship between the 2nd Respondent and the Claimant within the meaning of section 12 of the *Employment and Labour Relations Court Act* No. 20 of 2011.
14. The Respondents admitted that the Claimant's roles and responsibilities as an Operation Manager are as stated herein and stated that the Claimant wilfully neglected to perform his duties and also carelessly and improperly performed his duties which from their nature he was required to perform carefully and properly.
15. It is the Respondents' case that on October 2019, they engaged Stealth Africa Consulting LLP to investigate alleged falsified or overstated book inventory and upon conclusion of its investigations and submission of its Report the Claimant was found culpable of the following;
 - a. Falsification, concealment, and presentation of fictitious and misstated stock records leading to a loss or potential loss of about Kshs. 200,032,246.09 due to stock variances;
 - b. The Claimant being in charge of converting the dip readings taken during stock takes into mass, was wilfully and grossly negligent by fraudulently and irregularly preparing, editing, falsifying, inflating and presenting fictitious stock take computations to conceal significant stock variances;
 - c. Inflation of the physical stock of barley to reflect figures that closely match stock figures in Systems Applications and Products (SAP) records and therefore, concealing material stock variances;
 - d. Admission that he manually keyed in numbers to represent mass instead of using standard computation factors without providing plausible explanation;
 - e. Provision of an unsupported estimate of barley held in the holding bins which computations he forwarded to the 1st Respondent's management.
16. The Respondents state that on 30th December 2019, the 1st Respondent issued the Claimant with a NTSC which he responded on 1st January 2020 and subsequently on 8th January 2020 a disciplinary hearing was held in which the Claimant was accompanied by his witness, Allan Riungu.
17. The Respondents state that during the hearing, the panel questioned the Claimant with regard to the basis of changing the densities when they had already been confirmed by Lesiolo or Nairobi as the case may be, the use of FIFO and his role as the Operations Manager in ensuring a documented process or knowledge transfer.
18. In response, the Claimant acknowledged that there was no system or documented process (SOP) that provides guidance on the change in the formula and that it was purely based on his personal experience. He further acknowledged that there was a documented process that would explain what he was manually adjusted and explain the variances; and that the process he was using left room for subjectivity and agreed that documenting the process was important.
19. The Claimant confirmed in the hearing that he would not inform the team in Lesiolo of any changes that he made therefore holding different numbers for the same location. And for Nairobi, he failed to communicate that he was not using the dip readings as submitted from the stock take to arrive at the stock numbers. He would also not share the assumptions he had used to arrive at the new numbers though indicating that they were estimates.



20. He proceeded to inform the panel that as the Operations Manager he was not confident of what the stock holding of barley for the 1st Respondent was and could not rely on what the system was reflecting as stock position and book values. That the formula at the material time could not provide an accurate picture of barley position. He further confirmed that there had been challenges in applying FIFO because barley produce for different years were combined in one silo.
21. It is the Respondents' case that upon considering the Claimant's response to the NTSC and the proceedings of the disciplinary hearing, it terminated the Claimant's employment vide letter dated 18th February 2020.
22. The termination was based on the facts that the Claimant edited, falsified and presented fictitious stock take computations by inflating the physical stock of barley to reflect figures that closely match book stock figure in SAP records and in the process; he intentionally concealed material stock variances; and manually amended numbers based on his experience and knowledge as opposed to a documented and auditable standard operating process thereby arriving at estimates of what the physical stock levels would be. This methodology as admitted by the Claimant did not deliver accurate outcomes. Lastly, he failed to develop Standard Operating Procedures as the Operations Manager to guide the process of converting dips into weights that articulated correct densities and failed to develop and implement critical business processes on management of stock.
23. The Respondents state that there was a valid and fair reason to terminate the Claimant's employment contract as the same related to the Claimant's conduct. The 1st Respondent genuinely believed that the matters stated in the termination letter existed at the time of termination of the Claimant's employment contract.
24. It is the Respondents' case that the Claimant lodged an appeal vide a letter dated 20th February 2020 in which he admitted his wrong doing as follows in verbatim: "As stated during the disciplinary hearing, I started handling stock computations in 2015 and the practice of using estimates was in existence even then and it has continued even now where it is embedded as a way of working in establishing stock holding at all the EAML sites. With hindsight, I realize I should have engaged the leadership on the best way to compute dip readings into stock numbers and I regret this unpremeditated oversight. While I accept that I failed to highlight the gaps in the process and also engage the leadership on the best way to compute dip readings into stock numbers, I wish to state that there was absolutely no ulterior motive nor intention on my part to defraud nor steal from the company which I have served faithfully for the past 27 years in various capacities. I therefore wish to appeal to the business through your office to reconsider this severe penalty on account of the following:
 1. I have served EAML and EABL with total dedication for the past 27 years and I have had no disciplinary issues
 2. There was no ill motive nor intention on my part to defraud nor steal from the Company and I sincerely regret that my actions or inaction has put the business in such a position
 3. This is a first offence which I sincerely regret."
25. The 1st Respondent stated that the Claimant was summarily dismisses pursuant to section 44 (4) (c) of the [Employment Act](#) No. 11 of 2007 as well as clauses 7.1, 7.2, 7.8, 7.12 of the Disciplinary Policy.
26. Despite his summary dismissal, the 1st Respondent agreed to pay him the following terminal dues; salary up to and including 18th February, 2020; pay in lieu of 28 leave days earned up to and including



18th February, 2020; and three (3) months' pay in lieu of notice; this payment would be made less any money owed to the Company.

27. The Respondents aver that the Claimant was a member of the EABL Retirement Benefits Scheme as well as the National Social Security Fund (NSSF) and therefore not entitled to service pay as pleaded.
28. It is the Respondents' case that there was no guarantee that the Claimant would work until the age of retirement and as such any claim for anticipatory salaries and employment benefits as pleaded is untenable. Further, the employment contract provided for termination by either party upon issuing 3 months' notice or payment of 3 months' salary in lieu of notice.

Evidence in Court

29. The Claimant (CW1) adopted his witness statement dated 29th August 2022 as his evidence in chief and produced his filed bundle of documents dated 29th August 2022 as his exhibits 1-18.
30. During cross examination, CW1 testified that he made manual entries and edited the same many times. There was predetermined ways of dealing with readings but they had other formulae to do the stocks.
31. CW1 testified that some formulae could not work at silos when drawing or filing them so they had to use estimates in the storage facilities. He is not aware of discrepancies of 2000 tonnes.
32. CW1 testified that he did not manipulate figures put on excel sheets but he did some estimates.
33. CW1 testified that book value and stock value should co relate in an optimum scenario; when he used estimates, he was not trying to match book value and stock value.
34. CW1 testified that he was in charge of converting dip reading into stock and not vice versa. He was to fit the numbers into an excel sheet and the formula could not work in all situations.
35. CW1 testified that his role was to compute stocks, when he estimated the figures, the same was reviewed by the Finance Department and the General Manager was the final approver of his work.
36. CW1 testified that variances were there every month, but they could account for them, they had other ways to provide estimates. Some bins had no formula and the formula could not work at the bottom of the silo.
37. CW1 testified that he was issued a NTSC and was invited for a disciplinary hearing which he attended with a representative and called a witness. He disputed many things in the report and he was given an opportunity to respond to the allegations.
38. CW1 testified that he was invited to clear with the company. He was a member of Tembo Sacco and had liabilities with the Sacco. The Sacco deducted Kshs 12,345,941 from his final dues
39. CW1 testified that his March 2020 payslips indicates he was paid his February 2020 and notice pay.
40. Willy Kagisha (CW2) stated he was the Respondent's head of finance and adopted his witness statement dated 13th September 2023 as his evidence in chief.
41. Upon cross-examination, CW2 testified that he was the overall in charge of stocks. In July 2019, there was a big variance. They were running low on barley and efforts to establish the variance was unsuccessful and the issue was escalated to the General Manager. An expert auditor was called to investigate the variance.
42. On re-examination, CW2 testified that the moisture content and infestation by insects caused the variance; also shrinkages and spillages can also cause variation.



43. CW2 testified that the process of receiving the grains is based on sampling which cannot be accurate. Grain stock taking is not a science and cannot be 100% correct.
44. Sylvester Ndeda (CW3) adopted his witness statement dated 13th September 2023 as his evidence in chief.
45. On cross-examination, CW3 testified that there was significant loss which was realised in July 2019. Only 4000 tonnes of barley was received the entire year.
46. CW3 testified that the Claimant was not in charge of the Molo site, however, the NTSC does not mention the Molo site with regard to the Claimant.
47. On re-examination, CW3 testified that the Claimant was not in charge of Molo site but the total amount of losses included Molo.
48. The Respondent's witness (RW1) Anthony Ngige stated he is the CEO of the audit firm, Stealth Africa Consulting Llp and that he was the chief investigator in this matter.
49. RW1 testified that he was contracted by the Respondent to conduct investigations due to issues in the 1st Respondent company, after the investigations, he prepared a report dated 7th January 2020 which he adopted as his evidence in chief and exhibit.
50. During cross examination, RW1 testified that they found stock missing; grain was lost hence this was stippling records. However, he did not indicate in the report where the stocks was being moved.
51. RW1 testified that he does not know when the Claimant stopped computing the figures and he cannot confirm the figure he was terminated upon.
52. RW1 testified that at the time the Claimant took over the role, the variance was already at 3000 as the Respondent was already experiencing variances. The investigation started on 21st June 2019 and covered the period from 2015 when the Claimant started computing figures.
53. RW1 testified that the investigation was not meant to pin down the Claimant, they were just checking what he did. The Respondent continued to experience variances even after the Claimant left.
54. RW1 testified that the report indicated empty silos could not be objectively determined. some silos were declared empty through estimates but when opened they found grains. Only dip reading process could account for estimates and they could not apply when content was at cone level. Content could be found by passing it through a weigher outside.
55. RW2 testified that they were not provided with a policy on what was to be done when dip reading was not available as some silos had no measurements. And they were no records before 2015.
56. RW1 testified that the figures could be inputted manually if the formula was not used. However, the Claimant was still on the wrong as the silos were not before cone level and excel did not provide for this. Where silos were at cone level, he can to input manually.
57. It is RW1's testimony that it noted in the report that the loss was due to spillage of grain due to transfer. Further, grain was exposed to rain and this altered the moisture. These affected the final reading and lead to variance in the book figure.
58. RW1 testified that there were silos which could not be documented, the Claimant relied on memory due to experience. He was to get real measurements of the silos and at the time of the investigations those silos did not have the measurements.



59. RW1 testified that he calculated barley stock figures of Molo, Kampala, and Lesiolo, however, the Claimant was in charge of Kampala Road and Lesiolo and the loss figures were attributed to these two plants. They separated the Molo plant.
60. RW1 testified that the figure used to terminated the Claimant is 491757 metric tonnes, the same variance figure for the three plants combined.
61. The Respondent's second witness, Muthoni Njoroge (RW2) stated she was the 2nd Respondent's Human Resource Business Partner. She adopted her witness statement dated 12th March 2024 as his evidence in chief and produced the filed documents in support of the case as her exhibits.
62. During cross-examination, RW2 testified that the NTSC refers to investigation report which was a preliminary investigation not before this court.
63. RW2 testified that she is not aware whether the Claimant was supplied with Standard Operating Procedures when he took up the role, however, the Respondents conducted training for their staff. There is no documentation showing the Claimant was trained.
64. RW2 testified that clause 3.6.2 of the EABL Disciplinary Policy provides an employee should be informed of the committee's decision within 5 days. The Claimant was informed vide an email 3 weeks after the hearing that there was a delay and the committee was still reviewing the case and would communicate in due course.

Claimant's Submissions

65. The Claimant submitted on three issues: - what was the Claimant's role as an operations Manager; whether the termination of the Claimant's employment was wrong, unfair and/or illegal; and is the Claimant entitled to the reliefs sought in the claim.
66. The Claimant submitted that he was the Operations Manager for the 1st Respondent, an affiliate of the 2nd Respondent as confirmed vide a letter dated 29th October 2010. As the Operations Manager, he was in charge of Lesiolo and Kampala Road sites only and was reporting to the General Manager.
67. The Claimant submitted that the Respondent's witness, the Human Resource Manager conceded during cross examination, the Claimant was never provided with the Standard Operating Procedures (SOPs) of his department, but it was the Respondent's contention that he tasked to come up with SOPs, however, this was never documented as part of his job description.
68. Additionally, the Claimant was expected to use certain formulas in stock computation but the said formulas were not documented and no evidence presents in court for reference. Therefore, it is the Claimant's submission that the reasons cited by the Respondents on termination of his employment were not within his job description thus the termination was wrongful, unfair and unlawful.
69. On procedural fairness, the Claimant submitted that Clause 3.3.1 of the EABL Disciplinary Policy stipulates that a NTSC letter shall contain details about the alleged misconduct or poor performance to enable the employee prepare an answer. The Claimant was never issued with the details of the investigations leading to the conclusion of his alleged misconduct prompting the issuance of the NTSC contrary to the law and the EABL Disciplinary Policy. This denied the Claimant a fair chance and enough details required to enable him respond to the NTSC and prepare for the disciplinary hearing.
70. The Claimant submitted that he was never supplied with the forensic report from Stealth Africa Consulting Llp, the report is dated 7th January 2020 whereas the disciplinary hearing was conducted on 8th January 2020. Therefore, the Claimant responded to the allegation against him without knowledge



of the report which the Respondent relied on against the rules of natural justice on fairness and in contravention of Article 47 of *the Constitution*, Section 4 of the *Fair Administrative Action Act* and the various provisions of the *Employment Act*.

71. The Claimant submitted that the 1st Respondent intimated their final decision on the hearing by issuing a termination letter dated 18th February 2020, more than one month after the conduct of the hearing. This delay was in contravention of clause 3.6.2 of the EABL Disciplinary Policy that provides the employee will be informed of the decision in writing within 5 working days.
72. It is the Claimant's submission that the Respondents failed to adhere to the laid down procedures and policies under the EABL Disciplinary Policy and Sections 41,43 and 45 of the *Employment Act* as the disciplinary process was flawed by irregularities. Therefore, the termination was unfair.
73. On substantive fairness, the Claimant submitted that his letter of appointment and job description did not require him to come up with SOPs in the process of conversion of dips into weights; the employer was expected to supply their employees with the requires SOPs and training to enable them deliver on their jobs.
74. The Claimant further argued that despite lack of a policy guideline on stock computation formula, he was charged with disregarding formulas and instead manually keying in figures. He explained during the hearing why it was necessary to key in figures in instances where the formula was not application and that the stock variance was the difference between the book value and stock available using the formula. This was supported by the audit forensic report that highlighted the inconsistencies in dip readings which were later converted into stock and the report further confirmed there were come storage bins and silo that did not have readings and therefore impossible to use the dip reading formula to calculate stock.
75. The Claimant submitted that the audit forensic report mentioned numerous reasons why variances could be experienced such as moisture content in barley grains. It also identified human resource gaps that might have contributed to loss or potential loss of 4,917.57 metric tonnes alleged by the Respondent and recommended in page 142 that the department should train and build capacity of staff in areas of conversion of stocks and that the stock accounting staff did not know what was expected of them.
76. It is the Claimant's submission that the Respondents failed in their capacity to train them as to what their job entails, failed to issue them with SOPs and therefore the employer was to blame if any losses occurred due to operational failures. Reliance was placed in *Jane Samba Mukala v Ol Tukai Lodge Limited [2013] KEELRC 794 (KLR)*.
77. On the third issue, it was submitted for the Claimant that the final figure of the alleged loss of 4,917.57 of barley translating to Kshs. 223,955,417.84 included losses from Molo site which was outside his mandate, Sylvester Ndeda (CW3) was in charge of Molo site. The forensic report on page 42 and 43 clearly stated that the barely stock figures calculated was from Lesiolo, Molo and Kampala Road.
78. It is the Claimant's submission that the employer wrongfully and unfairly applied figures of alleged loss in terminating his employment using work done on a site he was not in charge of. This indicate he was the only person targeted for termination as no action was taken against the person in charge of Molo site or even the General Manager who were both implicated in the forensic report dated 7th January 2020.
79. On the fourth issue, the Claimant submitted that his termination was predetermined as he was answerable to the Finance Manager and General Manager who responsible for reviewing his monthly



entries and religiously approved his entries without any complaint within the period he served as Operations Manager. Further the Human Resource Manager confirmed in his testimony that annual audits conducted did not implicate the Claimant. Despite implicating his bosses, it is only the Claimant whose service was terminated which is a clear case of discrimination.

80. The Claimant submitted that Respondents' allegation on the losses are doubtful as RW1 confirmed that no criminal proceedings were preferred against him despite the alarming amounts allegedly lost as a result of his actions.
81. On the final issue, the submitted that he has discharged his duty under Section 47 of the [Employment Act](#) and has proved to this court that his termination of employment as wrongful, unfair and unlawful and he is therefore entitled to the reliefs sought.

Respondents' Submissions

82. The Respondents submitted on two issues: - whether the Claimant's employment was lawfully terminated by the 1st Respondent; and whether the Claimant is entitled to the reliefs sought.
83. On substantive fairness, the 1st Respondent submitted that they had a valid reason to terminate the Claimant's employment contract on grounds of gross misconduct. They relied on Section 44 of the [Employment Act](#) that defines gross misconduct as when 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; and Clause 7 of the EABL Disciplinary Policy ("the Policy") which provides a non-exhaustive list of offences regarded as gross misconduct including deliberate falsification of records and misrepresentation, concealment or grossly inaccurate reporting occasioning loss or potential loss (including lost business opportunity) to the company. The penalty for these offences being summary dismissal.
84. The Respondents submitted that in 2015, the Claimant started computing dip readings into physical stock for inventory purposes. In computing the dip readings into the physical stock, the 1st Respondent uses an excel sheet that has an inbuilt formula in order to achieve close to accurate dip readings and would help to account for any error that would threaten the accuracy of the results.
85. However, in 2019, the 1st Respondent became concerned with the large variances between the stock received from its suppliers and the physical stock that had been fed onto the system. The discrepancies were too huge that the Claimant and his superiors could not find a suitable explanation for them as admitted by CW2 and CW3 during hearing.
86. Consequently, the Respondents engaged the services of Stealth Africa Consulting LLP to provide clarity on the causes of the discrepancies. Stealth Africa Consulting LLP conducted extensive investigations including a thorough review of the procedures at the various sites and the roles of every officer throughout the process and obtaining statements from the officers including the Claimant herein. Thereafter, they prepared the Final Report on 7th January 2020 ("the Report") which established that about 5,315.12 Metric tonnes could not be accounted for.
87. The Respondents submitted that course of the Stealth Africa investigation, the investigators conducted several interviews with the Claimant as they sought to understand why the figures were different. They established that the Claimant disregarded the set formula based on what he termed as his experience and manually input his own figures. Clause 3.5.1.4 of the Report detailed how the Claimant manipulated the data from his computer and disregarded the established formula in the spreadsheet in keying in his own figures and the Claimant admitted the same during the disciplinary hearing.



88. It is the Respondents' submission that the outcome of the forensic audit was that the Claimant deliberately falsified records of the 1st Respondent's barley stocks. Consequently, he misrepresented, concealed, and inaccurately reported the position of the stocks, occasioning a loss /potential loss of more than Kshs. 200 Million upon the 1st Respondent. It is upon this basis that they decided to terminate the Claimant's employment. Therefore, the termination of the Claimant's employment was substantively fair.
89. On procedure fairness, the Respondents submitted that the termination of the Claimant's employment was procedurally just and fair as it followed the steps enunciated under Section 41 of the *Employment Act*.
90. The Respondents submitted that the 1st Respondent issued the Claimant a NTSC dated 30th December 2019 which mirrored the allegations in the Report tendered by Stealth Africa LLP. As per Clause 3.3.2 of the Disciplinary Policy, the Claimant had 72 hours to respond to the show cause letter and he responded to the letter on 1st January 2020.
91. Having found the Claimant's response to be unsatisfactory, the 1st Respondent invited him to a disciplinary hearing in accordance with Clause 3.3.6 of the Policy on 3rd January 2020. The disciplinary hearing took place on 8th January 2020, where the Claimant confessed to manipulating the stock records and providing unsupported estimates of the barley stocks. The hearing took place within 5 working days from the date of notification of the hearing as stipulated in Clause 3.5.1 of the Policy.
92. Subsequently, after considering the Claimant's representations at the hearing, the 1st Respondent decided to terminate the Claimant's employment on 18th February 2020. This is in accordance with Clause 3.6.2 of the Policy that provides that the outcome of the hearing should be communicated to the employee within 5 working days.
93. It is the Respondents' submission that Clause 2.1 of the Policy clarifies that failure to follow one step or process shall not be deemed to be a breach of the process as long as the process followed ultimately complies with the relevant employment law in Kenya. Likewise, Clause 2.2 of the Policy permits the employer to adjust the timelines accordingly in order to support the disciplinary process. The 1st Respondent via the Human Resource Department sent the Claimant an email dated 29th January 2020 informing him that the committee was still reviewing his submissions to arrive at a decision. This is proof of the length of time and consideration that went into deciding to terminate the Claimant's employment and dispels the Claimant's allegation that the Respondents failed to follow the set timelines in the Policy.
94. The Respondents submitted that the Policy provided for an opportunity for appeal, the Claimant wrote to the Human Resource Director on 20th February 2020 appealing the decision of the disciplinary panel. This appeal was subsequently dismissed on 16th March 2020 in light of the evidence of gross misconduct.
95. It is the Respondents' submission that based on the foregoing, the 1st Respondent has discharged their burden of proving that the termination of the Claimant's employment was substantively and procedurally fair under Section 41 of the Act.
96. On the second issue, the Respondents' submitted that Section 44(1) and (2) of the *Employment Act* provides that an employer can terminate an employee's employment contract without notice or with less notice than would have ordinarily been paid to the employee in the event of summary dismissal for a fundamental breach of their employment contract. However, the 1st Respondent paid the Claimant a further three month's pay in lieu of notice as substantiated by the Claimant's payslip for his terminal



- dues. The 1st Respondent therefore urges the Court to reject the prayer for notice pay to prevent the Claimant's unjust enrichment through a double payment of dues.
97. The Respondents submitted that the termination of the Claimant's employment was procedurally and substantively fair as extensively submitted to in the first issue. Therefore, the Claimant cannot be entitled to compensation for wrongful dismissal and unfair termination as the facts neither support nor demonstrate the existence of the same.
98. The Respondents submitted that Section 35(6) of the *Employment Act* excludes the payment of service pay where an employee is a member of—
- a. a registered pension or provident fund scheme under the *Retirement Benefits Act*;
 - b. a gratuity or service pay scheme established under a collective agreement
 - c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - d. the National Social Security Fund.
99. The Respondents submitted that the Claimant was not only a member of the National Social Security Fund (NSSF), but also a member of a provident fund scheme established by the 1st Respondent. The 1st Respondent specifically remitted Kshs. 200 each month towards NSSF on behalf of the Claimant. Therefore, the Claimant is duly excluded from payment of service pay under Section 35(6) of the Act.
100. On the prayer for loss of income before retirement, the Respondents relied Court of Appeal in the case of *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd (Civil Appeal 25A of 2013) [2014] KECA 765 (KLR)* where the Court of Appeal when considering remedies available in case of unfair dismissal relied on the decision of the court in *Engineer Francis N. Gachuri -vs- Energy Regulatory Commission- Industrial Cause No. 203 of 2011*, where it was held follows:
- “There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the un procedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word ‘permanent employment.’”
101. I have examined all the evidence and submissions of the parties herein. The claimant was terminated vide a letter to him from the respondents dated 1st February 2020 which set out reasons for the termination including editing, falsifying and presentation of fictitious stock take computations by inflating the physical stock of banking to reflect figures that closely match book stock figure on SAP records. It was indicated he intentionally concealed material stock variance and manually amended numbers based on his experience and knowledge as opposed to documented and auditable standard operating process thereby arriving at estimates of which the physical stock levels should be.
102. It was also indicated that the claimant admitted all these during the disciplinary hearing. The claimant was also accused of failing in his role to come up with standard operating procedures to guide the process of converting dips into weights that articulated correct densities. That he also failed to develop and implement critical business processes especially on management of stocks. From the evidence on record the claimant indeed accepted making estimates while clearing stocks especially when dealing with dip readings. The claimant in his evidence conceded that there was no documented process that would explain what he manually adjusted and explain the variances.



103. The respondent witness 1 in his evince admitted that the variances continued even after the claimant left. He also admitted that only dip reading process could account for estimates and they could not apply when content was at low level.
104. Respondent witness 2 also testified that they were not provided with a policy on what was to be done when dip reading was not available as some silos had no measurements and they had no records before 2015. Respondent witness 2 agreed that figures could be imputed manually if the formula was not used. RW1 also noted that the loss was also attributed to spillage of grain on transfer and also exposure to rain which altered the moisture this affecting the final reading leading to variance in the book figure. RW1 also testified that where silos could not be documented the claimant relied on memory due to experience. That the claimant was to get real measurements of the silos and at the time of the investigations, these silos did not have the measurements.
105. RW1 also testified that the figures used to terminate the claimant is 491,757 metric tonnes, the same variance figures for three plants combined in Kampala road, Lesiolo and Molo yet the claimant was not in charge of Molo.
106. From the foregoing evidence, it is true that the claimant did fix some figures manually and he admitted this in evidence attributing this to instances where the correct figures could not be imputed as alluded to by the RW1.
107. The same witness confirmed that there were instances when some readings were not available and so figures had to be inserted manually. The action by the claimant of imputing figures manually cannot therefore be an omission on the claimants part. Section 43 of the Employment Act 2007 states as follows:
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
108. Indeed, for an employee to be dismissed or terminated there must be valid reason for the same. In the case of the claimant the reasons leading to his dismissal have been explained which show no intentional concealment of stocks. The RW1 was able to explain why some stocks had variances or had to be imputed manually. There is no indication that the claimant wilfully altered stocks for a bad motive.
109. This being the case and the claimant having explained why there were occasions for alteration or manual imputing the reason for dismissal based on an explainable situation is not a valid reasons o warrant dismissal of the claimant.
110. As concerns due process, the claimant was indeed given an opportunity to be heard and during the disciplinary process called his witnesses and so did the respondents. The RW2 testified that under clause 3.6.2 of EABL disciplinary policy, an employee was to be informed of the committee's decision within 5 days. The claimant was however informed of the decision 3 weeks later. The RW2 therefore admitted that the respondents failed to follow their own policy document.
111. Section 45(2) of the Employment Act 2007 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.

112. From my analysis of the evidence above, it is therefore my findings that the dismissal of the claimant was not based on valid reasons and due process was not followed and so it was unfair and unjustified.

113. Having found as above, I find for the claimant and I find that he is entitled to compensation for the unfairness meted against him. I therefore award him compensation for the unfair termination and given the gravity of accusations against him which were unfounded and the length of time he had served the respondents and there being a difficulty in possibility of finding an alternative job at his age, I award him 9 months salary as compensation = 9x Kshs 919,861.48= Kshs 8,278.753.32/- less statutory deductions.

114. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgement.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH OF JUNE, 2025.

HELLEN WASILWA

JUDGE

