



Kenya Union of Commercial Food and Allied Workers v Thika Water & Sewerage Company Limited (Cause 1062 of 2018) [2025] KEELRC 2363 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2363 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1062 OF 2018**

**K OCHARO, J
JULY 31, 2025**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

THIKA WATER & SEWERAGE COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant, a duly registered trade union with recognition and a collective agreement with the Respondent, brings this suit on behalf of Margaret Wanjiku Muritu, [the grievant], against the Respondent, seeking declaratory, reinstatement, and compensatory remedies for the Grievant.
2. The Respondent opposed the Claimant's claim by submitting a Response to the Memorandum of Claim, denying the Claimant's cause of action against them. They argued that the Grievant's employment was lawfully terminated and, therefore, not entitled to any of the remedies sought by the Claimant on her behalf.
3. After hearing the parties on their respective cases, this Court directed them to file submissions. The submissions are on record.

Claimant's case

4. The Claimant stated that the Grievant was employed by Thika Municipal Council on April 8, 2008, and assigned to Thika Water & Sewerage Company Limited (the Respondent) as a Clerical Officer II. Subsequently, the Grievant was promoted to the role of acting senior accountant.
5. The Grievant diligently and conscientiously worked for the Respondent until 23 January 2017, when the Respondent suspended her on suspicion of fraud, as communicated in a letter of the same date.



In response, on 25 January 2017, she wrote back, denying the accusations. The Claimant also sent a letter dated 25 January 2017, lamenting that the Respondent had decided to suspend the Grievant and other employees without any prior investigation, and contrary to the stipulations of the collective bargaining agreement

6. On February 2, 2017, the Grievant received another letter from the Respondent. The letter outlined four allegations against her and required her to show cause why disciplinary action couldn't be taken against her on those accusations. She replied, stating inter alia that she could not adequately respond without access to certain requested documents. She also expressed concerns about the fairness of the disciplinary hearing, given that one of the investigating committee members had been confirmed in her position, and some were signatories to the cheques in issue. On the same day, the Claimant demanded the lifting of the suspension before further action was taken.
7. The Respondent invited the Grievant to a disciplinary hearing through a letter dated 23rd February 2017. Besides inviting her to the hearing, scheduled for 3rd March 2017, the letter accused her of not responding to the show cause letter dated 2nd February 2017. In response, on 27th February 2017, the Grievant clarified that she had already responded to the allegations and requested that records be amended accordingly. She expressed displeasure that the Respondent had decided to fix a date for the disciplinary hearing before addressing the issues raised by the union and herself.
8. On March 6, 2017, I wrote to the Respondent, protesting how the matter was being handled. She also sent a letter to the chairman of the disciplinary committee, raising concerns about the fairness of the process. She had written to the Respondent requesting that the hearing be postponed, but the Disciplinary Committee proceeded with it, denying her the opportunity to be defended.
9. On 28 March 2017, the Respondent issued a letter regarding the review of documents. The letter scheduled a further hearing for 4 April 2017. Subsequently, on 31 March 2017, the Grievant confirmed she would attend. On the day of the meeting, she sent a letter to the Managing Director through the disciplinary committee chairman, expressing serious concerns about how her case was being handled. The Respondent replied to her concerns in a letter dated 7 April 2017. The disciplinary hearing was rescheduled for 12 April 2017.
10. On 11 April 2017, the Claimant supported the Grievant's request for company-held documents. Two days later, the Grievant again wrote to the Respondent, protesting the response she received and requesting the Managing Director's intervention to obtain the necessary documents. However, on 21 April 2017, she received a dismissal letter via email.
11. Following her dismissal, the Grievant appealed the decision on April 24, 2017, citing six grounds for appeal. The Respondent later invited her to an appeal hearing on June 15, 2017. On June 16, 2017, she requested documents to support her defence, but her request was ignored. The appeal hearing took place on June 27, 2017.
12. On July 26, 2017, the Grievant requested an update on the appeal hearing. Instead of providing the hearing details, the Respondent communicated the outcome on July 28, 2017. The Claimant subsequently wrote to the Respondent on July 31, 2017, contesting the appeal decision.
13. On August 1, 2017, the Claimant escalated the dispute to the Cabinet Secretary, who appointed a conciliator on September 14, 2017. Several meetings were held, but the parties could not reach a settlement. As a result, on March 26, 2018, a disagreement was formally recorded. The conciliator then issued a report recommending the unconditional reinstatement of the grievant.
14. The Claimant argued that the Grievant was subjected to an irregular and non-transparent disciplinary process, despite raising objections before it began. In employment and labour relations, it is a well-



established principle that any officer involved in an investigation should not sit on the disciplinary committee reviewing that same matter. However, in this case, Mr. Ngure, the Commercial Manager, and Mr. Muhamed Maina participated in the investigation, despite being signatories to the bank account that was under scrutiny for fraud allegations.

15. Additionally, there is no record showing that a shop steward representative and management representatives at the disciplinary committee made a joint recommendation on the matter, as required under Article 20 of the CBA. The Respondent's failure to provide the documents requested by the grievant during the disciplinary hearing and in court was a legal misstep, amounting to a violation of Section 10 of the *Employment Act*, 2007.
16. The Claimant argues that only the CCTV footage from the bank or other relevant bank documents could have conclusively determined who made the withdrawal in question. Without such evidence, the grievant should not have been held responsible for the alleged fraud.
17. Cross-examined by the Respondent's Counsel, the Grievant stated that she was a supervisor in the Respondent's accounts section. Administratively, she had the authority to withdraw money from the bank.
18. The suspension letter outlined the accusations against her and expressed that the cheques were withdrawn in her name. She couldn't tell who withdrew the money, as the Respondent didn't give her the documents she had requested. If they had, she would have known who withdrew the money or whether the withdrawals were made under her name.
19. She stated that, through their letter dated 28th March 2017, the Respondents informed her that the documents were available for review.
20. Through her letter dated 4th April 2017, addressed to the Managing Director, she indicated that she was signing cheques in favour of James Thuo and Rebecca to collect funds. The Management would send people to obtain her signature and subsequently withdraw the funds.
21. The Respondent did not have CCTVs. The footage she was referring to was that of the bank's CCTV cameras.
22. In her evidence under re-examination, she testified that she was not given any job description. Further, the authority to encash cheques was not in writing.
23. Though the suspension letter provided cheque numbers, that was insufficient information, without copies of the cheques and register, to enable her to know the truth without referring to vouchers and the register.
24. Though through their letter dated 28th March 2017, the Respondent indicated that the documents she had sought to be availed were available for review, they were never. They were not even presented before the Court.

Respondent's case

25. The Respondent's case was presented through the evidence of Irene Ndirangu. It is the Human Resources Manager. The witness adopted the contents of her witness statement dated 19th February 2024 as her evidence in chief.
26. 7. It was asserted that the Grievant's disciplinary proceedings were carried out in strict compliance with the law. The Grievant was given all necessary documents and information to prepare her defence.



27. Despite these provisions, the Grievant failed to adequately explain the double cash withdrawals made in her name, leading to findings of culpability. Additionally, the Respondent sought CCTV footage from the relevant bank to assist in the investigation; however, the bank failed to respond. The Respondent's internal investigation report found the Grievant liable rather than exonerating her.
28. The Respondent further asserts that the absence of formal disciplinary hearing proceedings before the Committee's decision did not infringe on the Grievant's rights or render the decision unlawful. Both the Disciplinary and Appeal Committees determined that the charges against the Grievant were substantiated.
29. Furthermore, the Respondent asserts that the Employment and Labour Relations Court Procedure Rules 2016 do not require the production of documents under Rule 20. The Grievant was provided with full access to the necessary resources to defend herself against the charges. She was also promptly informed of the allegations and allowed to respond both in writing and orally.
30. The Disciplinary Committee held meetings with the Claimant and her legal representative on several occasions, including 3 March, 4 April, and 12 April 2017, during which she presented her defence. After deliberations, the Committee confirmed the charges and recommended her dismissal, in line with company policies and legal guidelines. The Respondent Disciplinary Committee panel was competent, lawfully convened, and had no personal interest in the outcome of the case.
31. In her evidence in cross-examination, the witness stated that at the time of separation, the Grievant was an accountant.
32. The Disciplinary Committee comprised Mr. James Ngure, Mr. Njoroge, Jackline Kyalo, Rose Wamaitha, and Mohammed Maina. Mr Ngure was the Respondent's Commercial Manager.
33. The Grievant was accused, among other things, of making double payments. She was the Respondent's banking agent. After the signatories had signed the cheques, she would then withdraw the money from the bank. Double payment refers to instances where a voucher is used for two withdrawals. The Finance Department was initiating the vouchers.
34. The witness further testified that she couldn't determine the full scope of the investigation. However, all she could confirm was that it concerned fraudulent activities. One voucher could be paid using two cheques.
35. The investigation team prepared a report, but she was unsure whether they had requested a statement from the Grievant.
36. Mohammed Maina and James Ngure were signatories; the Grievant was not. All the cheques that the Grievant could use were signed by these two individuals. The Managing Director, Dr. Moses Kinya, was also a signatory.
37. The members of the Respondent's Disciplinary Committees are expected to be independent.
38. The witness stated further that the matter was reported to the police. However, she was unsure whether there was any report from them, and whether the grievant was charged with any criminal offence.
39. During one of the times when a withdrawal was done, the Grievant was away in Mombasa for sports. The ticket dated September 5, 2017, shows that she travelled to Mombasa. The Grievant was the only bank agent. She may have authorised another person to step in for her during her absence.
40. Through a notice to produce dated 25th June 2018, the Claimant asked for the production of specific documents. The Respondent didn't file the documents.



41. The matter underwent conciliation, but the parties were unable to reach a compromise.
42. The signatories properly signed the cheques in issue. Before they could sign the cheques, they were required to see payment vouchers, as they couldn't sign any without a voucher.
43. During the suspension period, she was not paid any salary based on the Collective Bargaining agreement.
44. The Grievant complained about the composition of the Disciplinary Committee. Rosemary, a member of the Committee, was a member of the investigation team.
45. The Respondent didn't pay her terminal dues as the Respondent did not clear her.
46. She asserted that the stipulations of the Collective Bargaining Agreement could not oust those of the Respondent's Human Resource Manual. The Respondent followed its manual to the letter.

Analysis and determination

47. This Court has carefully considered the pleadings, evidence and submissions by the parties, and the following issues emerge for determination, thus;
 - I. Whether the summary dismissal against the Grievant was procedurally and substantively fair.
 - II. Whether the Grievant is entitled to the reliefs sought.
 - III. Who should bear the Costs of the suit?

Issue 1

48. For termination to be considered fair, two statutory aspects must be demonstrated to be present, substantive justification and procedural fairness. Procedural fairness concerns the process leading to the decision to terminate an employee's employment or summarily dismiss an employee from employment, and, substantive justification, the decision itself. Also see *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
49. In a dispute regarding termination of an employee's employment or summary dismissal of an employee from employment the onus of proof lies on the employer. The court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR observed on the duty thus :-

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed.”
50. Section 41 of the *Employment Act* establishes a mandatory procedure that an employer must follow when considering terminating an employee's employment. The process outlined in the provision has three key steps: notification, hearing, and consideration. The employer shall notify the employee of their intent and the grounds for it. They must give the employee sufficient opportunity to prepare and present a case regarding the grounds. Finally, the employer must consider the employee's and/or



the accompanying person's (such as a colleague or trade union representative) representations before making a final decision.

51. It is essential to point out that the provisions of section 41 shouldn't be read in isolation from the relevant provisions of *the Constitution* of Kenya, 2010, the Fair Administrative Actions Act, and the tenets of natural justice. Additionally, the Collective Bargaining Agreement [if any], and the Human Resource policies and manual stipulations, for as long as they align with the stipulations of the section.
52. Before dismissing an employee summarily, the employer must genuinely follow the statutory process, not merely undertake it superficially.
53. Allowing an employee to prepare and present their case adequately does not simply mean giving the employee time on the floor to make representations during the disciplinary hearing. It is more comprehensive than that. When documents or information are in the employer's possession that form the basis of the disciplinary action or are necessary for the employee's defence, they must be provided; otherwise, the process will be deemed a sham. The employer's duty to provide these is even greater if the affected employee requests specific documents for that purpose. The employee's right to access documents is rooted in the right to be heard [audi alteram partem]. See also *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR.
54. After reviewing the material provided by the parties, I conclude that the disciplinary action was allegedly based on several documents, including vouchers that allegedly enabled double withdrawals, cheques, a voucher register, an investigation report, and bank statements. Undoubtedly, as early as before the disciplinary proceedings commenced, the Grievant requested specific documents and or access to them to enable her to prepare for her response to the accusations. The Respondent didn't provide the documents.
55. Without supplying the Grievant with the documents, the Respondent decided to convene a disciplinary hearing on 3rd March 2017. On this date, the hearing only partly proceeded before being adjourned when the Grievant and the Claimant's Shop Steward insisted that it could only continue once the requested documents were furnished. These included the payment voucher that was paid twice, cheque images from Equity Bank, CCTV footage showing how the amount in question was withdrawn, bank statements, payment vouchers, cheque registers, and the investigation report. As indicated in the minutes of the hearing, the Disciplinary Committee adjourned the proceedings and instructed that the documents be provided before scheduling another hearing.
56. Apparently, the Respondent rescheduled the hearing to 4th April 2017. In her letter dated 31st March 2017, the Grievant undertook to attend the hearing but protested that she had only been provided with the investigation report. On 4th April 2017, she wrote a detailed letter, raising the issue of the impartiality of the Disciplinary Committee, and emphasising the need for the Respondent to furnish her with the documents she had requested.
57. The Court observes that by its letter dated 31st March 2017, contrary to the decision by the Committee to have the documents supplied to the Grievant, the Respondent invited her to attend their offices to scrutinise the documents, except for the investigations report, which was to be sent to her.
58. On 7th April 2017, the Respondent wrote to the Grievant in response to her letter dated 4th April 2017, informing her that she could only be supplied with some of the documents, and not others. The hearing was rescheduled for 12th April 2017. The Grievant's and Claimant's protests against the Respondent's position, through their letters of 11th April 2017, did not lead to any change of heart on the part of the Respondent; the hearing had to proceed anyway.



59. In my view, given the circumstances of the case, the documents and information that the Grievant requested were essential for a meaningful defence against the allegations she faced. The reasons provided for not supplying those documents and information were unreasonable and make little sense to this Court, especially since the Respondent had committed to providing all of them prior to any further hearing. The Respondent's inexplicable change of stance and disregard for protests from both the Grievant and the Claimant indicate a lack of candour, bad faith, and a rush to conclude the process due to a predetermined outcome.
60. Justice should not only be done, but should manifestly and undoubtedly be seen to be done- see *R v Sussex Justices, ex parte McCarthy* [1924]1KB 256. This principle applies in employment settings to avoid overlap of investigative and adjudicative roles. The core principle of natural justice, particularly the rule against bias [*nemo iudex in causa sua*-no one should be a judge in their own cause], is equally applicable. It is on this basis that I take the firm view that if a person participates in investigating allegations against an employee, they are seen as having formed an opinion, or at least being perceived as having an interest in the outcome. Serving on the disciplinary committee in the same matter compromises both actual impartiality and perceived impartiality.
61. The assertion by the Claimant that a number of those who were involved in investigating the matter were also in the Disciplinary Committee was not discounted but admitted by the Respondent. Those who were signatories of the cheques that were in issue, and even accused of having encashed some, too. I find no difficulty in concluding that the Disciplinary Committee was not impartial and had an interest in the outcome of the proceedings.
62. In light of the foregoing, I hold that the summary dismissal against the Grievant was unfair. The proceedings against her before the committee and the decision reached by them are null and void.
63. The Claimant issued a notice to produce dated 25th June 2018, requiring the production of the payment vouchers, movement register under the custody of the Respondent's Managing Director, the bank statements for the period the alleged transactions took place, cheque leaves within the period in question, and cheque movement register. As admitted by the Respondent's witness, the documents were not produced before this Court. In my view, contrary to the Counsel for the Respondent's submissions, the failure to produce the documents has consequences. This Court hereby draws an adverse inference that had the documents been produced, they could have exonerated the Grievant.
64. I have carefully considered the investigation report tendered in evidence by the Respondent and conclude that without production of the documents, it is difficult to discern the culpability of the Grievant, as the observation and recommendations section is too general and doesn't specifically point a finger at the Grievant but at the system and practices.
65. By reason of the foregoing premises [para. 63-65], I find that the Respondent didn't discharge its duty under sections 43 and 45 of the *Employment Act*. The dismissal was substantively unfair.

Issue II

66. The Claimant sought inter alia reinstatement of the Grievant. In the circumstances of this matter, this could be a suitable case where the order of reinstatement could have been justifiably granted. However, this Court is not able to grant the order, as by operation of the law, section 12[3] of the Employment and Labour Relations Court, it isn't possible. It is now more than three years since the dismissal of the Grievant.



67. Undeniably, the Grievant was not paid during the time she was on suspension. Having found, as I have hereinabove, that the summary dismissal against her was both procedurally and substantively unfair, I have no compelling reason to deny her compensation for the unpaid salary for the period.
68. Under section 49[1][c] of the *Employment Act*, the Court is bestowed with the power to grant compensatory damages for unfair termination of an employee's employment or wrongful summary dismissal. The power is discretionary and exercised depending on the circumstances of each case.
69. I have carefully considered the circumstances under which the Grievant was summarily dismissed as brought forth hereinabove, including that she was on the recommendations of a not impartial Disciplinary Committee, the fact that I would have ordered her reinstatement but for the shackles of the provision of the law referred to hereinabove, and the length of her service for the Respondent, and conclude that she is entitled to the compensatory relief, five months' gross salary, KShs. 465 000.
70. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms;
- I. A declaration that the Summary dismissal against the Grievant was unfair.
 - II. Compensation pursuant to the provisions of Section 49[1][c] of the *Employment Act*, five months' gross salary, KShs. 465,000.
 - III. Unpaid salary for the period the Grievant was under suspension, KShs. 279,000.
 - IV. Interest on the awarded sum at court rates from the date of this Judgment till full payment.
 - V. Costs of this suit.

READ, SIGNED AND DELIVERED THIS 31ST DAY OF JULY 2025.

OCHARO KEBIRA

JUDGE.

