



Kenya Union of Commercial Food and Allied Workers v Thika Water & Sewerage Company Limited (Cause 1063 of 2018) [2025] KEELRC 2380 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2380 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 1063 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

1. The Claimant is a legally registered trade union with a valid recognition agreement. Michael Njoroge Mwaura, the grievant, was employed by Thika Municipal Council on 5 December 2008, as an Account Clerk II, and later advanced to the position of Acting Finance Manager. The Respondent terminated the Grievant's employment on 21 April 2017. Claiming that the termination was unprocedural, unfair, and unlawful, the Claimant filed this suit, seeking;
 - I. A declaration that the termination of the Grievant's employment by the Respondent was unprocedural, unfair and unlawful.
 - II. That the Respondent be directed by this Court to reinstate the grievant unconditionally.
 - III. That the Respondent pays the Grievant for the period [three months] he was on suspension, Kshs. 782,041.6
 - IV. Compensation for unfair termination.
 - V. Costs of suit to the Claimant.
 - VI. Any other order the Court may deem fit to address the cause of justice.



2. The Respondent resisted the Claimant's claim by filing a Response to the Memorandum of Claim. It denied the cause of action, stating that the Grievant was terminated based on proven charges, and through a legal disciplinary process.

The Claimant's case

3. It was the Claimant's case that on 25th October 2016, the Grievant applied for annual leave of 40 days. The Respondent's Managing Director approved the application on 9th November 2016. His leave was scheduled to run from December 5, 2016, to February 1, 2017. At the time of applying for leave, he was working on the budget for the 2017-2018 financial year.
4. On 21st January 2017, the Grievant received an email from the Respondent's Managing Director, asking him to provide expenditure accounts, a monthly bank reconciliation report for December 2016 to December 2017, and payment vouchers for cheques whose details the Director did not disclose.
5. On 24th January 2017, he visited the Respondent's premises to present the Budget to the Managing Director. When he arrived at his office, the Director questioned him about whether he was aware of some cheques that had been double paid. The Grievant responded negatively and requested to review the documents upon his return from leave, so that he could provide a proper answer.
6. Instead of acceding to the Grievant's suggestion, the Director issued him a suspension letter. He directed him to hand over the report to Rosemary Wamaitha, who had been appointed the acting Finance Manager.
7. The Grievant responded to the suspension letter on 25 January 2017. Despite this, the Respondent proceeded to establish an investigating committee. The Committee comprised Mr. James Ngure [the chairperson], Stephen Njoroge [Secretary], Rosemary Wamaitha, Ms Jackline Kyalo and Mr. Mohammed Maina. By his letter dated January 25, 2025, he raised a concern and protested the composition of the Investigation Team.
8. It included members who had a direct interest in the matter and who could not be impartial. Mr. James Ngure signed the cheques in question. Stephen Njoroge, an internal auditor, would have identified and prevented the fraud. Jackline Kyalo was the assistant internal auditor, Rosemary Wamaitha was already acting in his role, and Mohammed Maina was a signatory of the alleged cheques.
9. On 26 January 2017, the Respondent's investigating committee submitted a report to the Managing Director without first allowing him to state his case.
10. On February 14, 2017, the Respondent issued another letter accusing The Grievant of suspected fraud, raising five allegations. He responded on February 16, 2017, addressing each of the accusations.
11. The Grievant stated that on 22 February 2017, he, by a letter of the same date, raised concerns about the composition of the Disciplinary Committee. To compound the earlier misstep, the Respondent had established a Disciplinary Committee comprising all the named individuals, and added Mr. Peter Kamau and Eline Wanjiku. Mr. Peter Kamau, who was his equal and a Technical Officer—not a financial expert or officer—was permitted to chair the Committee. Ms. Eline Wanjiku was his junior. The other members were his equals.
12. Without addressing the concerns of and protest by the Grievant, the Respondent proceeded to invite the Grievant to a disciplinary hearing, through their letter dated February 23, 2017, scheduled for March 3, 2017. On February 27, 2017, the Grievant objected to the composition of the Disciplinary Committee and the Respondent's failure to provide requested documents to his Union, the Claimant.



13. On 6th March 2017, the Grievant wrote to the Respondent's Managing Director, raising concerns about missing correspondence between him and the Respondent, and the Respondent's failure to supply him with crucial documents.
14. The Respondent later scheduled a document review session for April 4, 2017.
15. On 31 March 2017, the Respondent issued a show-cause letter regarding a bank deficit caused by unbanked funds, demanding a response within seven days. The Grievant replied on 3 April 2017, defending himself against the allegations. However, on 7 April 2017, the Respondent issued another letter concerning the same issue. The Grievant responded on 11 April 2017, stating that he had not been assigned the duties in question at the time the company suspended him.
16. On April 20, 2017, the Grievant confirmed his attendance at a scheduled meeting. However, on April 22, 2017, he received an email from the Respondent terminating his employment due to the allegations against him. On April 24, 2017, he received another email cancelling a scheduled disciplinary hearing.
17. The same day, he submitted an appeal against his dismissal, and the Claimant also wrote a joint appeal letter to the Respondent.
18. On 13th May, 2017, the Grievant requested disciplinary hearing proceedings, and on June 15, 2017, he was invited to an appeal hearing scheduled for June 27, 2017, which he confirmed he would attend. On July 28, 2017, he received the outcome of the appeal hearing, which was unfavourable. The Claimant formally contested the appeal decision, and on August 1, 2017, it reported a dispute to the Cabinet Secretary.
19. On September 14, 2017, the Cabinet Secretary appointed a conciliator to mediate. Several meetings were held, but the parties were unable to reach an agreement, resulting in a formal dispute on March 26, 2018. The conciliator recommended the unconditional reinstatement of the Grievant. As no resolution was reached, the matter was escalated to the court for adjudication and determination.
20. It was argued that the Respondent did not follow a fair disciplinary process in managing the Grievant's investigation and disciplinary issues. The investigation team did not involve the grievant in the process, and the resulting report was only made available to him after the hearing. This failure prevented him from having a proper opportunity to prepare his defence.
21. The Grievant was denied access to vital documents he had requested, which were essential for his defence. Moreover, the Respondent's refusal to allow him access to the office during his suspension prevented him from gathering necessary information. Despite his request to access the premises and obtain the required documents, the Respondent failed to facilitate this, significantly impairing his ability to defend himself.
22. There is no evidence to confirm that a shop steward representative, along with management representatives, made a recommendation on the matter as required under Article 20 of the Collective Bargaining Agreement. The records do not indicate that the disciplinary procedure outlined in the agreement was adhered to.
23. Cross-examined by Counsel for the Respondent, the Grievant stated that at the time of separation, he was Acting Finance Manager. His role involved performing banking reconciliations and paying stamp duty.



The Respondent's case

24. The Respondent presented one witness, Irene Ndirangu, to testify on their behalf. The witness adopted her witness statement dated 19th February 2024 as her evidence in chief.
25. The witness stated that she was the Secretary to the Disciplinary Committee that dealt with the Grievant's case.
26. She asserted that the Grievant was afforded all the opportunity and resources within reach of the Respondent to defend himself against the Charges that were preferred against him. Additionally, he was given adequate time to respond to the charges. He did respond both orally and in writing.
27. She further asserted that the Committee met the Grievant along with his legal representative on 3rd March 2017, as well as on 4th and 12th April 2017, and that the Claimant did respond to the charges. Upon considering the evidence adduced, the Disciplinary Committee recommended his dismissal.
28. The Committee handled the disciplinary proceedings competently and lawfully. They had no personal interest in the outcome of the hearing.
29. The Grievant failed to explain and account for the misleading and false bank reconciliations and to oversee the preparation of the cash book, resulting in the Respondent losing substantial amounts of money.
30. The Grievant appealed against the Disciplinary Committee's decision, and after being heard by the Respondent's Board, the appeal was dismissed.
31. As the overall person responsible for preparing the cash book, the Grievant was tasked with ensuring its accuracy. His admission that he forwarded bank reconciliations to the Managing Director without verifying their correctness is regarded as reckless and careless, especially because he submitted reconciliations for the wrong year.
32. The situation worsened when, after recognising his mistake, the Claimant did not take the initiative to correct it himself. Instead, he relied on a third party to send the alleged correct bank reconciliations without verifying their accuracy.
33. It was also stated that the composition of the Disciplinary Committee did not infringe upon the Grievant's rights or compromise due process. He has not demonstrated any disadvantage caused by the committee's composition, nor has he shown how any alleged disadvantage was not addressed through the appeal process before the Board.
34. Cross-examined by the Claimant's representative, the witness testified that at the material time, the Grievant was the Acting Finance Manager. She was unsure whether he had a written job description.
35. Following investigations, the Investigation Team compiled a report and included recommendations. The report identified the Grievant's failures.
36. The Grievant attended a disciplinary hearing after receiving an invitation via a letter dated 23rd February 2017. After receiving the invitation, he submitted a letter on 27th February 2017, raising concerns about the disciplinary process that had been initiated. He objected to the committee's composition. Despite this, the respondent went ahead with the disciplinary hearing.
37. She further testified that on 31st March 2017, the grievant was issued another show cause letter. This correspondence outlined the reasons why the Respondent intended to take disciplinary action against him. The grounds differ from those articulated in the dismissal letter.



38. When the Grievant was asked to give the bank reconciliations, he was on leave. He initially provided the wrong set, but later, through Mr. Thuo, submitted the correct one.
39. She further testified that internal audits were carried out regularly; however, she couldn't tell whether there were any that identified failures on the part of the Grievant.
40. Some of the Disciplinary Committee members were his juniors. The Board decided to involve those who had investigated the matter as members of the Disciplinary Committee. Why the decision was made, she couldn't explain.
41. The decision dismissing his appeal was communicated to him by letter. However, the letter didn't explain the reasons why the appeal was rejected.
42. She further stated that Clause 9.4 of the Collective Bargaining Agreement between the Respondent and the Claimant provided for service pay. As such, the grievant was entitled to the benefit. The Respondent didn't pay him any terminal dues because he had not cleared with them. For the same reason, he hasn't been issued with a certificate of service.

Analysis and determination

43. The Parties filed their respective submissions per the directions of this Court.
44. I have carefully considered the pleadings, evidence and submissions, and the following issues emerge for determination, thus;
 - I. Whether the termination of 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

45. There is no dispute that the Grievant was at all material times an employee of the Respondent, and that the latter summarily dismissed him on 21st April 2017. However, the parties strongly disagreed about whether the dismissal was fair.
46. For a termination of an employee's employment or summary dismissal of an employee from employment, to pass the fairness test, it must be established that the same was procedurally and substantively fair. Procedural fairness pertains to the process leading up to the decision to terminate/summary dismiss, while substantive fairness concerns the decision itself.
47. Before I explore further the statutory aspect of procedural fairness, it is crucial that I address this matter. The Claimant contended that the investigation team did not hear him before they made their report. In essence, the question posed is whether the right to procedural fairness applies to investigative proceedings. I understand him as asking whether investigations conducted by or on behalf of an employer must be carried out in conformity with the audi alteram partem rule.
48. Fairness, integrity, and transparency are essential principles in workplace processes and disciplinary procedures. When an investigator anticipates potential adverse consequences for an employee under investigation, the employee must be afforded an opportunity to be heard before any adverse findings, recommendations, or decisions are made, particularly when the investigation will form the basis of a disciplinary process against the employee. I say this because in such situations, where the investigation may adversely affect the employee, it constitutes an administrative action.



49. In the South African case of *Masetiha v President of the Republic of South Africa & another* 2008 [1] SA 566[CC] Para 75, the Court stated that the audi alteram partem principle derives from the tenets of natural justice, which are rules of procedure, “it is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision.”
50. In the persuasive case of *Msiza v Motau N.O and Another* [78587/2018[2020] ZAGPPHC366;2020, the High Court of South Africa stated;

“55. In my view, where an investigator knows or is expected to foresee that his findings, remarks and conclusions will have consequences for the party on whose behalf an investigation is conducted and for the party against whom findings will be made, he is obliged to listen to both sides and the party who is likely to be affected by the adverse finding is entitled to demand the right to be heard before an adverse remark or finding, conclusion or decision against him is made against him.....”
51. It cannot be available for the employer to argue that the affected individual would have an opportunity to clear his name in disciplinary proceedings, or that he may have recourse to a claim for damages. As such, the investigator’s failure will undoubtedly negatively impact the subsequent disciplinary process against the employee.
52. Section 41 of the *Employment Act* 2007 establishes a procedure that any employer considering terminating an employee’s employment or summarily dismissing him or her must follow. It is well established that the procedure is mandatory. The Procedure has three ingredients. The employer must inform the employee of their intention to take action against the employee and the reasons therefor. The employer must then afford the employee an adequate opportunity to prepare and make a representation on the grounds. Lastly, before making a final decision, the employer must consider the representations made by the employee and/or the person accompanying them.
53. Where an employee requests documents or information that would enable them to prepare for the representation, the documents or information must be provided to them in sufficient time, as required by the principles of procedural fairness and natural justice. It is undisputed that before the hearing, the Grievant requested various documents, including the bank reconciliation documents in question, the investigation report, and cheques from the Respondent, all of which were inexplicably not supplied.
54. The minutes of the Disciplinary hearing of 3rd March 2017, [page 5], explicitly note that the Grievant asked for the documents and implicitly indicate they had not been supplied. The Committee decided that the documents would be provided to him before the next hearing was scheduled. As the minutes of 4th April 2017 show, the documents were not supplied to the Grievant. The email correspondence from the Grievant to the Respondent’s Managing Director also confirms that he requested the documents.
55. In the case of *Regent Management Ltd v Wilberforce Ojiambo Oundo* [2018] eKLR, the Court underscored that if an investigation report forms the basis for disciplinary action, the employer must share it with the employee in advance, enabling them to prepare an adequate defence. I cannot see it in any other way.
56. Undeniably, the grievant raised concerns about the composition of the Disciplinary Committee and questioned their impartiality, as nearly all of them had been involved in the investigations and had conflicts of interest due to their involvement, with some being directly connected to the matters in question. The Grievant explicitly explained how. The Respondent’s witness testified that, despite



the Grievant's protest, the Respondent decided to proceed with the disciplinary hearing without addressing the protest first.

57. In my opinion, the Grievant's protest was not unfounded given the issues at hand. Ensuring impartiality by a committee or panel in any workplace disciplinary process is crucial. Any concerns about impartiality should be addressed by the employer either before the disciplinary hearing begins, if raised early enough, or considered during the hearing if raised later.
58. Section 43 of the *Employment Act*, 2007, places a duty on the employer to prove the reason[s] for the termination of an employee's employment in a dispute regarding the termination. In my view, where the employer contends that they issued a show cause letter to the affected employee, informing them of the accusations against them, the decision to terminate their employment must be based on those grounds or any of them. Otherwise, to allow any other ground that the employee wasn't informed of and didn't defend himself against would render nonsensical the purpose for which Section 41 of the Act exists.
59. Section 45 of the Act imposes a further duty on the employer to prove that the reason was fair and valid. Time and again, this Court has held that to terminate an employee's employment on matters that he was not asked to defend himself against cannot be deemed fair and valid by any means. The Respondent's witness admitted that the Grievant was dismissed on grounds different from those that were set out in the show cause letter. In light of this, I have no hesitation in concluding that the reason was fair and valid. The Respondent didn't, therefore, discharge their burden under Section 45 of the *Employment Act*.
60. I have carefully considered the Respondent's witness's evidence and conclude that it does not in any way address how the Grievant committed the alleged gross misconduct, if at all. The evidence is too vague. Furthermore, the documents upon which the decision to dismiss him was based were not supplied to the Court, just as they were not provided to the Grievant during the disciplinary proceedings. Placing the documents before this Court was pivotal. In the absence of the documents, I am unable to conclude that the dismissal was justified.
61. The non-production of the documents was notwithstanding that the Grievant had issued a Notice to produce documents herein. An adverse inference is hereby safely made.
62. By reason of the foregoing, I am not persuaded that summary dismissal against the Grievant was substantively fair.

Issue II.

63. The Claimant sought the reinstatement of the Grievant. This is a case where I could have ordered reinstatement. However, the authority to do so is limited by the operation of law, section 12[3] of the *Employment and Labour Relations Court Act*. Since the dismissal of the Grievant, it has now been beyond three years.
64. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, the Court held that, "As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3)(vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary, and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such a relationship against the will of one of them.



That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction, like where the employer is a large organisation in which personal contact between the affected employee and the officer who took action against him will be minimal.”

65. Section 49[1][c] of the *Employment Act* confers upon this Court the authority to award compensatory damages for unfair and wrongful dismissal. However, this authority is discretionary and exercised on a case-by-case basis. I have carefully examined how the Grievant’s employment was terminated without regard to procedural and substantive fairness, the length of the Grievant’s service, and that the Respondent failed to prove that he caused the termination, and I hold that he is entitled to the compensatory award of five months’ gross salary, amounting to KShs. 1,303,402.60.
66. Having established that the summary dismissal was unjustified and that the investigation leading up to the disciplinary hearing was unfair, I see no reason to conclude that the relief sought by the Grievant for payment of the unpaid salary during his suspension is unwarranted. To deny the Grievant this entitlement would amount to rewarding the Respondent for their misconduct.
67. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
 - I. A declaration that the summary dismissal against the Grievant was unfair and wrongful.
 - II. Compensation pursuant to section 49[1][c] of the *Employment Act*. Five months’ gross salary, KShs. 1,303,402.60.
 - III. Salary for the months the Grievant remained under suspension, KShs. 782, 041.56.
 - IV. Interest on the awarded sum, at court rates from the date of this Judgment till full payment.
 - V. Costs of the suit.

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

OCHARO KEBIRA

JUDGE

