



REPUBLIC OF KENYA



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**Mbeka v Kenya Power & Lighting Co. Ltd (Cause E008 of 2025)  
[2025] KEELRC 2283 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2283 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E008 OF 2025**

**JK GAKERI, J**

**JULY 31, 2025**

**BETWEEN**

**MOSES OKOLA MBEKA ..... CLAIMANT**

**AND**

**KENYA POWER & LIGHTING CO. LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced the instant on suit 18<sup>th</sup> February, 2025 alleging unfair/unlawful termination of employment, victimization, harassment and withholding of lawful dues and prayed for:
  - i. Declaration that termination of employment was unlawful.
  - ii. 12 month's compensation Kshs.1,020,000.00
  - iii. Gratuity Kshs.2,635,000.00
  - iv. Notice Kshs.255,000.00
  - v. Salary arrears Kshs.255,000.00
  - vi. Leave Kshs.425,000.00
  - vii. Exemplary damages
  - viii. Interest from July 2023 till payment in full.
  - ix. Any other relief the court deems fit.
2. According to the claimant he was employed in 2008 at basic salary of Kshs.45,686 and a net salary of Kshs.86,405 per month, and was authorised to drive the respondents vehicles effective 2<sup>nd</sup> April, 2014, was confirmed on 3<sup>rd</sup> August, 2018, issued with conditions of employment on 1<sup>st</sup> January, 2020



as per the CBA and served diligently until 12<sup>th</sup> June, 2023 when he received a notice to show cause on collection of materials from Mamboleo Stores that were unaccounted for, but according to him, he delivered the materials as instructed by the supervisors.

3. That he raised concerns about the materials with the CBM and the union representative Mr. Edward Were who emailed the CMB and copied Human Resource and O & M supervisors and as consequence was victimized and employment terminated on 18<sup>th</sup> August, 2023.

### **Respondent's case**

4. The respondent's case is simply that it employed the claimant effective 1<sup>st</sup> July, 2011 at a gross salary of Kshs.9,757.99 per month and other benefits enjoyed by permanent staff, salary was enhanced effectively 1<sup>st</sup> January, 2011 to Kshs.16,450.00 per month on 11<sup>th</sup> January, 2012 and was authorised to drive the respondent's vehicles effective 1<sup>st</sup> April, 2014 at Kshs.5,500 per month as a non-designated driver, but the authority was withdrawn on 1<sup>st</sup> November, 2016, reinstated on appeal and then revoked vide letter dated 2<sup>nd</sup> December, 2022.
5. The respondent avers that an Internal Investigation revealed that the claimant was responsible for misappropriation and illegal use of the respondent's resources in the form of materials he could not account for and the termination of his employment was lawful as he was issued with a notice to show cause, responded, invited for a disciplinary hearing, attended was found culpable and dismissed, appealed the dismissal but it was upheld by the appeals panel.
6. It prayed for dismissal of the suit with costs.
7. On cross-examination, the claimant admitted that he was employed as an Artisan in Operations and Maintenance and was a non-designated driver of the respondent and bound to act professionally, honestly and in the best interests of the respondent.
8. The claimant admitted that he had been subjected to disciplinary proceedings previously and received a notice to show cause on misappropriation of the respondent's property worth Kshs.11 million. That he collected materials for Huma and Geta Last Mile Scheme and was the team leader responsible for delivery only and had no evidence as to where the materials were delivered, but according to him no materials were lost as he delivered as instructed by his supervisors and had availed evidence during the hearing where he explained everything and adduced new evidence on appeal but the appeal was dismissed.
9. The claimant admitted having collected 30000 meters conductors from Mamboleo Stores and had evidence from the supervisor but none in court to show authorization to collect the goods and dropped them at Kisian and Miwani sub-stations. That he was not involved in the implementation of Sinyolo and Huma Village Schemes but delivered materials as a driver.
10. According to the claimant all allegations against him were fabricated and had presented evidence in Nairobi and not in court. Strangely, the claimant testified that he did not agree with counsel for the respondent that loss of materials was a ground for dismissal from employment.
11. On re-examination the witness testified that collection of goods involved a code given by the supervisor and there were no documents to be signed after delivery. That he reported the irregularities to Mr. Dan Okumu and David Were.



## Respondent's evidence

12. RWI, Mr. John Tollah confirmed that he was an auditor working for the respondent and an investigator and visited Sinyolo and Geta. That Huma and Geta was design and construction and thus outside the claimant's responsibilities.
13. RWI testified that the claimant could drive the respondent's vehicles to enable him perform his duties as an Artisan as he was not a designated drive and was supposed to decline the supervision requests to deliver materials.
14. That Geta and Huma were under contractors engaged by the respondent. The witness admitted that supervisors authorised release of goods from the stores and contractors were paid to collect goods from the store but in his case it was for purposes of misappropriation of goods as the request ought to have been made to the contractor as opposed to the claimant. The witness testified that the claimant should have raised the issue as it was not his duty to deliver goods, had a team of casuals and the respondent had accountability documents. RWI testified that for Huma and Geta the claimant signed for the materials as the user.
15. The witness confirmed that the email allegedly written by Were was not availed during investigations and the claimant did not inform the investigator about the whistle blowing.
16. RWI further confirmed that he had no verifiable evidence of receipt of monies by the claimant and the committee relied on the investigation report.
17. That Mr. Felix Okello and Fredrick Osedo were the claimant's supervisors who signed reservations and forwarded the code to enable the claimant collect materials but he did not deliver them at the site they were supposed to be delivered as there was no evidence of delivery at Kisian or Geta.
18. That Felix Okello and Fredrick Osedo confirmed having sent codes to the claimant but did not confirm having received the materials and Felix Okello's employment was terminated alongside the claimant's.
19. On re-examination RWI testified that the investigation was independent and he had evidence as to who collected the materials but they never used at the alleged site as there was documentation of usage. That the claimant acknowledged loss of materials.
20. RWII, Mr. Humprey Otuko confirmed on cross-examination that he knew the claimant and there were two officers below the CMB and Christine Ingutia was the County Engineer incharge of Sinyolo site.
21. That the claimant was an Artisan mate, a non-designated driver and was bound to ask if in doubt and his supervisor authorised his vehicle movement vide the work ticket and the Transport Department kept the record.
22. That a non-designated driver could be de-authorised by the respondent and the claimant's authority to drive was revoked on 20<sup>th</sup> December, 2022 for misuse of motor vehicle Registration Number KBN 837E and claims of an email were never raised during the hearing and Human Resource was represented at the hearing.  
RWII confirmed that the claimants salary was Kshs.86,405.
24. On re-examination, RWII testified that the claimant was responsible for materials issued to him and did not complain about any threats. The witness testified that the claimant was accorded an opportunity to explain himself, due process was followed and the dismissal of the claimant was warranted.



### Claimant's submissions

25. On procedural unfairness, counsel cited the provisions of Section 41 of the *Employment Act* and Article 47(1) and 50(1) of *the Constitution* of Kenya to submit that the claimant was not accorded a fair hearing because his request for time or documents was ignored and was not accorded time to defend himself at the hearing and was not allowed to call a witness citing the sentiments of the court in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR.
26. According to counsel, the investigation conducted by the respondent did not gather or disclose facts which a proper inquiry ought to have disclosed and the claimant was ambushed with a serious charge.
27. Reliance was placed on *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR as well as *Kyalo & 6 others V Kenya Railways Corporation PET. No. E049 of 2024*.
28. According to counsel, the notice given to the claimant was deficient, hearing was a sham, the investigation was perfunctory and the dismissal was procedurally unfair.
29. On substantive justification, counsel submitted that the respondent did not discharge the burden of proof under Section 43(1) of the *Employment Act* as there was no proof of misconduct by the claimant or loss, no audit trial of inventory or witness testimony and sites were not visited.
30. According to counsel, the respondent had no valid reason to terminate the claimant's employment, that the same was retaliatory for his whistle blowing.
31. Reliance was placed on *Peter Ndambuki & 68 Others V Kenya Meat Commission* [2019] eKLR, on pretextual dismissal.

### Respondent's submissions

32. As to whether termination of the claimant's employment was procedurally fair, reliance was placed on the provisions of Section 45(2)(1) and 41 of the *Employment Act* as were the decisions in *Dairus Kiseu Mwamburi V Co-operative Bank* [2021] eKLR, *Postal Corporation of Kenya V Tanui* (supra), *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd* [2013] eKLR and *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* [2013] eKLR, to urge that the claimant was taken through a just and fair disciplinary process compliant with Section 41 of the *Employment Act* as evidenced by the documents on record.
33. As to whether the claimant's dismissal was substantively fair, reliance was placed on the provisions of Section 43, 44(1) (2) (3) and (4) of the *Employment Act* as well as the decisions in *Thomas Sila Nzivo V Bamburi Cement Ltd* [2014] eKLR, and the sentiments of the court in *Evans Kamadi Ltd* [2015] eKLR on the range of reasonable responses test as were those in *John Jaoko Othino V Intrahealth International* [2022] eKLR and *Kenya Power & Lighting Co. Ltd V. Aggrey Wasike Lukorito* [2017] eKLR on the test under Section 43(1) of the *Employment Act*. Counsel submitted that the respondent had reasonable and sufficient reason to dismiss the claimant from employment.
34. The Court of Appeal decision in *Kenya Revenue Authority V Reuwel Waithak Gitahi & 2 Others* [2019] eKLR was also cited to urge that the respondent had discharged the burden of proof.
35. On reliefs, counsel submitted that the claimant was not entitled to any including costs.



## Analysis and determination

36. It is common ground that the claimant was employed by the respondent effective 13<sup>th</sup> June, 2011 and served until 18<sup>th</sup> August 2023 when he was summarily dismissed from employment.
37. Although the claimant alleged to have discharged his duties with distinguished dedication and total commitment, in addition to being industrious, documents on record paint not so rosy a picture and as he admitted on cross-examination, he had been subjected to disciplinary proceedings earlier.
38. For instance, vide letter dated 7<sup>th</sup> July, 2014 the claimant was called upon to explain having illegally connected electricity to the respondent's house No.1 at Muyodi staff quarters, which he occupied. Subsequently a letter dated 11<sup>th</sup> August, 2014 demanded an explanation for 63 kilometers incurred in July 2014 and a further dated October 27<sup>th</sup> 2014 required an explanation as to extensive engine damage of motor vehicle KAY 493V under the claimant's care.
39. Similarly, his authorization to drive the respondent's vehicles was withdrawn vide letter date 1<sup>st</sup> November, 2016 but reinstated on appeal.
40. In a similar vein, vide letter dated 20<sup>th</sup> November, 2018 the respondent demanded an explanation from the claimant for having unprocedural disconnected electricity supply on account 15418027 for Hon. Secretary Aga Khan Hall on 10<sup>th</sup> September, 2018 at 15:15hours as it was unauthorized by the supervisor and was issued with a warning dated 10<sup>th</sup> January, 2019 and his authority to drive the respondent's vehicles revoked on 20<sup>th</sup> December, 2022.
41. By a notice to show cause dated 12<sup>th</sup> June, 2023, the respondent accused the claimant of having collected materials, namely; more than 217,000 meters of 50mm conductor worth kshs.11 million for donor funded KPLC Schemes which were unaccounted for among them being Huma Village Scheme and Geta Primary last mile collected after Kenserve Online Services had already implemented the Scheme.
42. In his letter to the General Internal Audit dated 8<sup>th</sup> May, 2023, the claimant explained his entire employment history.
43. For the period 2020 – 2023, the claimant stated that the Team leader was John Nyaberi and the claimant was the driver (KBN 837E). Other team members were Luke Odero and Collins Ouma and supervisors were Samson Oriwo – main supervisor, F. Osedo, F. Okello Soita, Stephen Musungu and Juliet Kemei.
44. That although Mr. Oriwo often commanded the claimant to assist other supervisors, sometimes he could refuse and would be reported to the CMB.
45. The claimant admitted that most of the materials delivered were received by the supervisors doing the projects and was unaware of who was behind the projects as he did as instructed.
46. The claimant admitted that he had a transport company with 5 vehicles contracted by a copia.
47. In a further statement recorded on 19<sup>th</sup> May, 2023, the claimant changed the earlier statement stating that ALL materials were received by the supervisors such as Kisian, Miwani and Kisumu East.
48. He admitted that as a Fundi, he could only pick what he was able to account for but in the instant case, supervisors could answer.



49. That not all deliveries were recorded by guards at the delivery point and in particular Kisian and Kisumu East. Asked about when he performed his duties, the claimant was emphatic that there was none and could not recall the phone number of any of the casuals who used to assist him.
50. Finally, asked if he reported the supervisors to management in Kisumu, the claimant the evaded the question.
51. In his response to the notice to show cause, the claimant wondered where the 217000 meters of 50mm conductors whereas only 38000 and 21200 had been identified for Huma and Geta.
52. That he could not tell whether the job had been done or not and only signed having received the goods and the collected materials would be checked and cross-checked to confirm before leaving the store and had no knowledge of how materials were booked, approved or posted and collected goods as advised by the supervisor whose instructions had to be obeyed or risk insubordination charges.
53. That all the works executed in receiving and using materials was a per his job description and prescription by the supervisors. The claimant testified that he took auditors and investigators to various sites where materials were used.
54. Finally, the claimant lamented about the plight of junior employees working for the respondent and the futility of reporting supervisors. He however did not state having reported any supervisor to anyone.
55. The claimant's overall response was that the supervisors were answerable as he was a mere driver and his only duty was to collect materials from the store and deliver them to designated site and leave.
56. From the foregoing, the issues for determination are:
  - i. Whether termination of the claimant's employment was fair/lawful; and
  - ii. Whether the claimant is entitled to the reliefs sought.
57. Concerning the 1<sup>st</sup> issue, it is common ground that for a termination of employment to pass the fairness test, the employer is required to discharge the burden of proof under the provisions of Section 41, 43 and 45(2) of the *Employment Act* as regards a valid and fair reason relating to the employee's conduct, capacity or compatibility or operational requirements of the employer and additionally, that the procedure used in the termination of employment was fair.
58. Put in the alternative, the employer must demonstrate that it had a substantive justification to terminate the employee's employment and that it did so in accordance with a fair procedure, as exquisitely captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (supra)

“...However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
59. The Court of Appeal echoed similar sentiments in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR.
60. On this issue, counsels for the parties adopted contrasting positions with the claimant's counsel maintaining that the termination of employment was substantively and procedurally unfair.



## Reason for termination

61. Section 43(1) of the [Employment Act](#) provides:

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

62. Under Section 45(2)(a) and (b) of the Act the employer is required to prove a valid and fair reason for termination of the employee's employment.

63. The reasons for the claimant's dismissal from employment by the respondent were set out in the letter of dismissal dated 17<sup>th</sup> August, 2023 are identical to those set forth in the notice to show cause dated 12<sup>th</sup> June, 2023 namely; collecting more than 217000 meters of 50mm conductor valued at Kshs.11million among other items for various donor funded and KPLC Schemes which were misappropriated and could not be accounted for.

1. Huma Village Scheme Ref:B24142018090015 (38000 meters)
2. Geta Primary last mile scheme Ref:B241420 19070001 (21200 meters) after the scheme had been implemented by Kenserve Online Services.

64. In his response dated 15<sup>th</sup> June, 2023, the claimant did not expressly deny having collected the materials as alleged but questioned the balance between the figures quoted and additionally explained the usage of materials at Sinyolo and Manyatta which were not part of the notice to show cause.

65. On cross-examination, the claimant admitted having collected 3000 meters from Mamboleo Store and Geta Scheme and Huma as well, and as adverted to elsewhere in this judgment, in his statement to the auditor recorded on 8<sup>th</sup> May, 2023 he stated that "most of the materials were received by the supervisors but in a further statement recorded a day later stated that "all" materials were received by the supervisors.

66. The inconsistency would appear to suggest that supervisors were not available to receive the materials in all instances and the receiver was not named.

67. During the hearing the claimant admitted that he took materials to Huma but did not do the work. The claimant admitted that the 38000 meters of conductor were about six (6) drums and admitted having dropped them on site and made trips to the site and delivered to Mr. Felix Osendo.

68. The claimant testified that he realized he was being misused too late when he was in it and did not sign any delivery of materials.

69. Similarly, in his response to the Internal Audit Queries the claimant blamed his supervisors by name Mr. Oriwo, the overall supervisor and Mr. Felix Okello but did not include their names in the response to the notice to show cause written about a month later.

70. In a nutshell, the claimant's sole defense is that the supervisors were the architects of the fraudulent reservation and misappropriation of the respondent's materials as he was a junior employee whose only mistake was acting in accordance with the supervisor's instructions as he was bound to.

71. Significantly, from the evidence on record, the claimant joined the respondent around 2008 as per the Audit report as an Artisan Mate and the alleged activities took place many years later.



72. As an Artisan Mate and a non-designated driver of many years of service, it is difficult to countenance that the claimant was totally ignorant of what was happening. The claimant was not employed as a driver. He was an Artisan Mate whose core duty was in construction but expressly acquiesced to being turned into a driver by these supervisors without any reservations. In any event he admitted there was no maintenance work at the sub-stations and driving became his job courtesy of the supervisors.
73. The plea of ignorance relied upon during the hearing did not convince the disciplinary panel as inter alia whereas the claimant admitted having received the materials from stores, there was no shred of evidence as to where or to whom he delivered the materials and was sufficiently intelligent to tell whether work was going on at any of the sites he allegedly delivered materials.
74. Surprisingly, the claimant did not allege that in the collection or delivery of materials he was being accompanied by anyone who could confirm the delivery or with whom the supervisors would be at the point of delivery.
75. On the alleged whistle blowing, the claimant tendered no scintilla of evidence as to when the matter was reported and how.
76. Although Mr. David Were, the union representative stated that he wrote an email to the CMB with a copy to Human Resource, no such evidence was adduced before the disciplinary hearing for purposes of verification.
77. Relatedly, neither the response to the Internal Audit dated 8<sup>th</sup> May, 2023 nor the response to the notice to show cause dated 15<sup>th</sup> June, 2023 indicated that the claimant disclosed the questionable deliveries he was being called upon to undertake to anyone. It only came up during the hearing.
78. If indeed there was an email, the claimant had sufficient time to ensure that Mr. David Were availed it at the hearing or approach Human Resource for a copy.
79. The lamentation in the 3<sup>rd</sup> last paragraph of the response to the notice to show cause could have availed the claimant if he had evidence to show that he reported the matter and no action was taken and/or that after reporting, his supervisors threatened him and he reported the threats or victimization as well.
80. The allegations remained unsubstantiated.

**Would a reasonable employer have acted otherwise in the circumstances?**

81. Section 43(2) of the *Employment Act* provides:

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.

82. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others* (supra) the Court of Appeal held:

We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.



83. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test. In the case of *Bamburi Cement Limited vs. William Kilonzi* [2016] eKLR this Court expressed itself on the nature of proof required as follows...

Similar guidelines are to be found in Halsbury’s Laws of England, 4<sup>th</sup> Edition, Vol. 16(1B) para 642, thus: -

“...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

84. Similarly, in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR B. O. M. Manani J expressed the view that:

In other words it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists”.

See also *Naima Khamis V Oxford University Press (EA) Ltd* (supra), *Evans Kamadi Misango V Barclays Bank of Kenya Ltd* (supra) and *British Leyland UK Ltd V Swift* [1981] I.R.L.R 91.

85. In the instant case there is sufficient evidence that the claimant collected materials from the respondents stores which were unaccounted for as there was no evidence that the same were delivered to the site they were collected for or for the designated purpose and the claimant adduced no evidence that he reported his concerns to his seniors in Kisumu or Nairobi or to anyone.
86. Relatedly, the claimant could not pass as a clueless driver, because he was a Professional Artisan, not a designated driver and if in doubt as testified by RWI, he ought to have enquired and having admitted in writing that he could refuse/decline some commands” by Mr. Oriwo, there was no reason why he could not do so for Mr. Felix Okello and Fredrick Osendo who were not his main supervisor as his handwritten letter to the General Internal Audit dated 8<sup>th</sup> May, 2023 stated.
87. In the court’s view, a reasonable employer in such circumstances would not have acted differently.
88. It is the finding of the court that the respondent has proved that it had a valid and fair reason to terminate the claimant’s employment.

## Procedure

89. On procedure, parties have again adopted contrasting positions with the respondent contending that it was fair. The claimant maintained that it was unfair because the claimant was not accorded a fair hearing, notice was inadequate and was not given an opportunity to defend himself.



90. It requires no belabouring that the provisions of Section 41 of the *Employment Act* are mandatory as held in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR as well as *Jane Samba Mukula V Ol Tukai Lodge Ltd* [2013] eKLR.
91. The essentials of Section 41 of the Act were set out in where in *Postal Corporation of Kenya V Andrew K Tanui* [Supra) the Court of Appeal held:
92. Four elements must thus be discernible for the procedure to pass muster: -
- (i) an explanation of the grounds of termination in a language understood by the employee;
  - (ii) the reason for which the employer is considering termination;
  - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
  - (iv) hearing and considering any representations made by the employee and the person chosen by the employee”.
- The court is guided accordingly.
93. In this case, the claimant admitted having received the notice to show cause dated 12<sup>th</sup> June, 2023 setting out the charges against him and a response was needed within 3 days from the date of receipt of the letter and he responded by letter dated 15<sup>th</sup> June, 2023.
94. The claimant did not seek extra time or any document(s) to enable him respond more effectively. He responded to the charge substantively.
95. Equally, the claimant was invited for a disciplinary hearing vide letter received on 5<sup>th</sup> July, 2025 slated for 10<sup>th</sup> July, 2023 at 10:30am and did not write back seeking more time or any document or information.
96. Importantly, the invitation notice reproduced the charges as per the notice to show cause and informed him of the venue, date and time of the meeting and his right to be accompanied by a fellow employee of his choice as well as right to adduce evidence or call witnesses and the claimant had two witnesses during the hearing, Mr. David Were and Mr. Kodeyo who signed the minutes.
97. During the hearing, the claimant confirmed receipt of the notice and his witnesses. The chairperson of the meeting stated the reason(s) for the hearing and set out the charges as per the notice of show cause in the presence of Mr. David Were and Peter Kodeyo and accorded the claimant time to explain about the schemes and hearing proceeded till conclusion and the claimant had the last word before the chairperson thanked him and closed the meeting.
98. Relatedly, the dismissal letter dated 17<sup>th</sup> August, 2023 set out the reasons for termination and informed the claimant of his right to appeal within one (1) year and he appealed vide letter dated 11<sup>th</sup> January, 2024, was invited for an appeal hearing scheduled for 24<sup>th</sup> June, 2024 at 2:45pm vide letter dated 13<sup>th</sup> June, 2024, appeared for the hearing and the Appeals Panel upheld the dismissal.
99. In his appeal letter dated 11<sup>th</sup> January, 2024, the claimant contested the reason(s) for dismissal from employment. He did not challenge the procedure employed by the respondent in any respect.
100. However, and as contended by the claimant’s counsel, the respondent neither availed witness nor witness statements during the disciplinary hearing, yet the respondent relied exclusively on the Investigation Report No. 18 – 2022/2023 Misappropriation of materials West Kenya Region.



101. Notwithstanding the fact that the comprehensive and extensive report implicated many other persons, it was the basis upon which the claimant was charged and the entire case against him was grounded on the report. Indeed, RWI, Mr. John Tollah confirmed on cross-examination that the disciplinary committee relied on the Investigation Report that the claimant enriched himself as his Mpesa statements revealed the flow of cash. This is evidence the claimant ought to have been confronted with for rebuttal including statements made by other persons touching on him.
102. Without such evidence, the claimant could not mount a formidable defense to the allegations facing him.
103. The accountability of documents of the respondent referred to by RWI were not availed to the claimant for rebuttal.
104. It is trite law that avilment to the employee of evidence an employer intends to rely on in a case involving the employee is a basic tenet of the right to fair hearing.
105. In *Judicial Service Commission V Mbalu Mutava & another* [2015] eKLR the court held: -
- The right to fair hearing under the common law is a general right albeit a universal one. It refers to the three features of natural justice identified by Lord Hodson in *Ridge V Baldwin* (supra)...”
106. Similarly, in *Oi Pejeta Ranching Co. Ltd V David Wanjau Muhoro* [2017] KECA 329 (KLR), the Court of Appeal held: -
- ... that coupled with the fact that he had no knowledge of the audit findings he had no fair chance to advance his defense. In the circumstances therefore cannot be said that the termination process was fair”.
107. Finally, in *Postal Corporation of Kenya V Andrew K. Tanui* (supra) the court of Appeal expressed the view that:
- ... The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness outside a judicial setting. The respondent faced serious indictments which could torpedo his entire career and destroy his future...
- For all those reasons, we agree with the trial court that the procedure adopted by the appellants was short of a fair one. We so find”.
- See also *Regent Management Ltd V Wilberforce Ojiambo Oudo* [2018] KECA.
108. The foregoing sentiments apply on all fours to the circumstances of the instant case.
109. Since non avilment of witness statements and documents to the employee impedes preparations of his/her defence to the charges it implicates the right to fair hearing.
110. It does not lie upon the employer to determine whether the statements or documents are beneficial to the employee’s case or not.
- The law requires that they be availed prior to the hearing.



111. Thus, although the respondent substantially complied with the procedural precepts, it compromised the claimants right to fair hearing by non-availability of documents, which ultimately vitiated the process.
112. Applying the test in Section 45(4) and (5) of the *Employment Act*, it is the finding of this court that termination of the claimant's employment by the respondent was procedurally unfair within the meaning of Section 45 of the Act.

#### Appropriate Reliefs

- i. Having found that termination of the claimant's employment by the respondent was unfair, the declaration sought is merited.
- ii. Notice pay
- Having found that termination of the claimant's employment was substantively justifiable and guided by the provisions of Section 44(1) of the *Employment Act* which permits an employer to terminate an employee's employment summarily without notice as the respondent did in this case, the prayer for pay in lieu of notice is devoid of merit and it is declined.
- iii. Salary arrears
- From the evidence on record, it is unclear as to when the arrears accrued. Other than identifying it as one of the prayers, the claimant's written witness statement dated 12<sup>th</sup> February, 2025 was silent on when salary was not paid for 3 months.
- In the absence of relevant particulars, the claim remained unsubstantiated and it is declined.
- iv. Leave
- Analogous to the prayer for salary arrears, the claim for leave lacked supportive particulars.
- A claim for leave days must set out the number of the unutilized leave days and when they accrued.
- The prayer as framed lacked essential details and the claimant tendered no oral evidence as to when leave accrued or the number of unutilized leave days.
- The claim is declined.
- v. Gratuity
- Although the claim lacked particulars owing to the non-availability of a copy of the Collective Bargaining Agreement (CBA) between the respondent and the Kenya Electrical Trade Allied Workers Union, the respondent admitted that the parties had a subsisting CBA.
- More significantly, the conditions of the claimant's employment effective 1<sup>st</sup> January, 2020 were explicit that the full details of the terms of service were set out in the CBA.
- It is trite law that once a CBA is executed by the parties and registered by the Employment and Labour Relations Court, its terms are incorporated into the contracts of employment of all unionisable employees and the parties are bound by its terms by dint of Section 59(5) of the *Labour Relations Act*.
- Consequently, gratuity shall be addressed in accordance with the terms and conditions of the CBA.
- vi. 12 months salary



Having found that termination of the claimant's employment by the respondent was unfair, the claimant is entitled to compensation by dint of Section 49(1)(c) of the Employment Act, having regard to the provisions of Section 45(4) of the Act.

Considering that the claimant had worked for the respondent for about 15 years which is long, and appealed the respondent's decision and hoped to remain in employment until retirement and having further considered that the claimant had been subjected to a previous disciplinary matter, a warning issued, and had several notices to show cause and substantially contributed to the termination of his employment, the equivalent of two (2) months gross salary is fair Kshs.172,810.00

vii. Exemplary damages

113. The circumstances in which a court may award exemplary or punitive damages were set out by Lord Devlin in *Rookes V Bernard* [1964] AC 1129 as follows:

- i. in cases of oppressive, arbitrary or unconstitutional action by servants of the government;
- ii. cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
- iii. where exemplary damages are expressly authorized by statute.

114. See *Godfrey Julius Ndumba Mbogori & another V Nairobi City County* [2018] eKLR. The claimant tendered no evidence to prove entitlement to exemplary damages.

The claim is declined.

115. In the upshot, judgment is entered in favour of the claimant against the respondent in the following terms.

- a. Declaration that termination of employment was unfair.
- b. Equivalent of two (2) months salary Kshs.172,810.00
- c. Gratuity as per the terms of the CBA.
- d. Interest at court rates from date hereof till payment in full.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 31<sup>ST</sup> DAY OF JULY, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

