



**Ngao v Dpl Festive Ltd (Cause 113 of 2018)  
[2025] KEELRC 2366 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2366 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 113 OF 2018**

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

**BETWEEN**

**MUTUKU NGAO ..... CLAIMANT**

**AND**

**DPL FESTIVE LTD ..... RESPONDENT**

**JUDGMENT**

1. At all material times, the Claimant was an employee of the Respondent until 29th August 2017, when the Respondent summarily dismissed him from employment. Charging that the dismissal was unlawful and unfair, he commenced this suit by a Memorandum of Claim dated 2nd February 2018, seeking remedies, primarily of a compensatory nature.
2. The Respondent resisted the Claimant's claim through a Memorandum of Defence, dated 21<sup>st</sup> September 2018. They denied the Claimant's cause of action against them and his entitlement to the reliefs sought.

**The Claimant's Case**

3. At the hearing, the Claimant urged the Court to adopt his witness statement filed herein as his evidence in chief, and the documents that were filed contemporaneously therewith as his documentary evidence. He contended that he first entered employment with the Respondent in May 2016 as a driver, earning a salary of Kshs 26,300 per month.
4. On the 29th of August 2017, he was tasked with delivering bread in Mwala, Machakos. On his return journey, he carried a bag of avocados, tomatoes, and carrots for a women's group to deliver in Nairobi. He did so under the instructions of Mr. Nzuke, the Company Route Manager, who was his immediate supervisor.



5. On his return journey, he met the Respondent's Transport Manager, who accused him of transporting unauthorised goods in the Respondent's vehicle. The Manager then instructed him to hand over the vehicle to another driver. He then travelled in the Supervisor's vehicle to the office of the Respondent's Human Resource Manager.
6. At the office, the Human Resources Manager accused him of transporting unauthorised goods in the Respondent's motor vehicle. He clarified that he acted under the instructions of the Supervisor. The Supervisor did not refute this explanation; however, he declined to provide a statement.
7. Subsequently, the Transport Manager took him to the Industrial Police station, where he was accused of misusing the company vehicles by carrying unauthorised goods and damaging the suspension spring and tyres in the process. He was arrested and detained in the police cells for two days. After the two days, he was released on cash bail. Eventually, no criminal charges were preferred against him.
8. After being released from police custody, he reported back for duty only to be served with a dismissal letter dated 2nd September 2017. The letter accused him of causing damage to the Respondent's motor vehicle, damage which was assessed at Kshs. 50,000. It was indicated that the amount would be deducted from his terminal dues. Apparently, the letter was written while he was still in police custody, as he was released on September 12, 2017.
9. At the time of separation, he had 28 earned but unutilized leave days. The Respondent didn't pay him in lieu. The Respondent was making statutory deductions from his salary, but would not remit the same to the relevant Authorities [NSSF and NHIF].
10. The dismissal was not preceded by any warning letter or show-cause letter. He was therefore not allowed to respond to the accusations against him. The Respondent refused to pay him his last salary of KShs. 26,330.
11. Cross-examined by Counsel for the Respondent, the Claimant testified that he served the Respondent for two years.
12. He admitted that he was aware of the regulations of the Respondent Company, which required him not to ferry unauthorised goods or persons. Furthermore, on 29 August 2017, he was found carrying unauthorised goods in the vehicle he was driving.
13. He reiterated that he ferried the goods upon instructions from his supervisor.

### **The Respondent's Case**

14. The Respondent presented their Human Resources Manager, Lilian Oyatsi, and Mr. Joshua Minoti, the Transport Manager, who testified on their behalf. She testified that the Claimant was employed in May 2016 as a driver, a position he held until 2<sup>nd</sup> September 2017, when he was summarily dismissed after he was found culpable for gross misconduct of using the Respondent's vehicle for his gain by ferrying unauthorised goods.
15. At the time of joining the Respondent's workforce, the Claimant was issued with an appointment letter and the Rules and Regulations. Per clause 3 of the Regulations. The Respondent's vehicles were to be used for official purposes only. Drivers weren't allowed to transport unauthorised goods or persons in the Company vehicles.
16. The witness testified further that on 29<sup>th</sup> August 2017, the Respondent's Transport Manager conducted a random inspection of the motor vehicle that the Claimant was driving and found therein unauthorised goods.



17. The Transport Manager reported the incident to the Respondent's Human Resources Manager, who asked the Claimant to show cause why disciplinary measures could not be taken against him. The
18. The witness further testified that on or about the 11<sup>th</sup> February 2017, the Claimant was off duty with the permission of the Human Resource Manager. The Claimant responded to the allegations levelled against him.
19. She further stated that in his statement, the Claimant admitted that he had been using the Respondent's motor vehicles to ferry unauthorised goods. He further revealed that he was aware that carrying goods in such a manner was against company policy. He admitted further that he was ferrying the goods for his own personal gain.
20. The Transport Manager and the Claimant's Supervisor also gave their incident reports, both of which pointed to the Claimant's culpability for gross misconduct.
21. After the Claimant's admission, the Respondent lodged a complaint with the police, who then arrested the Claimant on 29<sup>th</sup> August 2017.
22. She asserted that the Respondent prepared an invitation letter for a disciplinary hearing. However, since the Claimant was being taken through the criminal process, the Respondent was unable to serve the same on him. The same thing happened to the show-cause letter that the Respondent prepared to be served on the Claimant.
23. The Respondent decided to dismiss the Claimant summarily. However, the dismissal letter could not be served on him until 12<sup>th</sup> September 2017, when he returned to the Respondent's premises.
24. The letter notified the Claimant of the terminal benefits owing to him and further, as per clause 19[1] [b] of the *Employment Act*, that the costs of repairing the vehicle that were assessed at KShs. Fifty thousand would be deducted from the dues. The costs were more than the terminal dues; as such, the Claimant wasn't paid anything.
25. The Transport Manager [RW2] adopted his witness statement herein filed as his evidence in chief.
26. Cross-examined by Counsel for the Claimant, the witness stated that he gave a statement to the Human Resource Manager over the incident. He also recorded a statement with the police.
27. He confirmed that the Respondent still employed the Route Manager.
28. Pressed further, he testified that there was a disciplinary hearing that was conducted against the Claimant on 4<sup>th</sup> September 2017. The Human Resources Manager kept the minutes thereof.

### **Analysis and Determination**

29. After careful consideration of the pleadings, evidence on record and submissions by Counsel, the issues for determination are;
  - i. Whether the summary dismissal against the claimant was unfair.
  - ii. Whether the Claimant is entitled to the prayers sought.

### **Whether the summary dismissal against the claimant was unfair.**

30. There is no contest that at all material times, the Claimant was employed by the Respondent, and that he was summarily dismissed from employment. Additionally, there isn't a dispute that the dismissal



flowed from the Claimant's conduct of ferrying goods in the Respondent's vehicle. The ferrying was, thus, not for the benefit of the Respondent.

31. Section 44 of the *Employment Act*, 2007 stipulates when summary dismissal can occur, thus:

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to by a statutory provision or contract term.

(2) .....

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employer has, by his conduct, indicated that he has fundamentally breached his obligation arising under the contract of service.”

32. Whether or not the conduct by the Claimant fundamentally breached his obligations arising under the contract, I shall delve into shortly.

33. Section 43 of the *Employment Act* places an obligation upon the employer to prove the reason or reasons for the termination. Where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

34. Section 44 provides for actions and inactions of an employee that may amount to gross misconduct to justify a summary dismissal of the employee. However, it is essential to note that the list is not exhaustive. An employer can dismiss an employee summarily on a ground outside the catalogue for as long as the same has the characteristic, such as I will demonstrate shortly, hereinafter.

35. It is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44[4] of the *Employment Act*, 2007. An employee's misconduct does not inherently justify a summary dismissal unless it is “so grave” that it intimates the employee's abandonment of the intention to remain in employment. In *Laws v- London Chronicle Limited* [1959] 2 ALL L.R 285, the English Court of Appeal stated;

“Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justified, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.”

36. The Claimant, in his evidence under cross-examination, explicitly admitted that at the material time, he was found ferrying unauthorised goods in the Respondent's motor vehicle, knowing that it was contrary to the Respondent's Regulations. In my view, an employee who deliberately and knowingly violates his employer's Regulations and Rules, fundamentally breaches the terms of his contract. He explicitly signals that he no longer desires to be bound by the terms of his employment. Any reasonable employer can, in the circumstances, have a valid ground to dismiss him summarily.

37. The admitted infraction, in my view, amounts to not working as expected on the part of the Claimant, a violation which constitutes gross misconduct under section 44[4] of the *Employment Act*.

38. In light of the foregoing, I find that the Respondent has discharged their legal burden under Section 43 of the Act [proving the reason for dismissal] and Section 45 [that the reason was valid and fair]. The termination was substantively justified.



39. Section 41 of the *Employment Act* provides for a procedure that an employer contemplating terminating an employee's employment or summarily dismissing an employee must follow. There is now firm jurisprudence that the procedure is mandatory. Any default in adhering to the procedure will undoubtedly render the termination or dismissal unfair. Procedural fairness encompasses three components, first, notification, the employer contemplating the dismissal or termination must inform the employee of the intention and the grounds prompting the same, second, the hearing, the employee must be accorded a sufficient opportunity to make a representation on the grounds, and third, the consideration component, the employer shall consider the representation[s] made by the employee before making the decision.
40. Section 45 (1) and (2) of the *Employment Act* states: -
- (1) No Employer shall terminate the Employment of an Employee unfairly
  - (2) A termination of employment by the employer is unfair if the employer fails to prove:
    - (a) that the reason for termination is valid
    - (b) that the reason for termination is a fair reason
      - (i) related to the employee's conduct, capacity or compatibility; or
      - (ii) based on the operational requirement of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.”
41. On fairness test in termination of employment by an employer, the Court aptly captured it in *Walter Ogal Anuro v Teachers Service Commission* (2013) that, “For termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination, while procedural fairness addresses the procedure adopted by the employer in effecting the termination”
42. There is no doubt in my mind that the Respondent did not present any evidence to demonstrate adherence to the procedure outlined in section 41 of the Act. Consequently, I am persuaded by the Claimant that a lack of procedural fairness affected her dismissal.
43. In the upshot, I conclude that the dismissal was procedurally unfair.

#### **On the reliefs sought.**

44. The claimant seeks compensation for unfair dismissal. Section 49[1][c] of the *Employment Act* grants the Court the authority to award compensatory relief to an employee who has successfully challenged their employer's decision to terminate their employment or dismiss them summarily as unfair and/or wrongful. However, the authority is discretionary and depends on the circumstances of each case.
45. I have carefully examined how the summary dismissal was carried out, the fact that the Claimant contributed to the dismissal, and that the liability against the Respondent arises solely from a failure to adhere to the principles of procedural fairness. I therefore hold that he is entitled to relief, but only to the extent of three months' gross salary, amounting to KShs. 78, 990.
46. The Claimant argued that he was not paid his salary for August 2017. While acknowledging that they did not pay him, the Respondent claimed that, as stated in the summary dismissal letter, the amount was used to offset the damage he caused to the motor vehicle.



47. The decision to use the salary for the purpose aforesaid was, in my view, arbitrary. One that affronted the protection accorded to employee salaries and wages under the *Employment Act*. The letter didn't demonstrate how the KShs. 50,000 was arrived at—the evidence of their witnesses, too.
48. In the case of *Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited* [2014] eKLR, the court held:
- “Section 18 (4) of the *Employment Act* demands that even in cases of summary dismissal, the Employee shall be paid all monies, allowances and benefits due to him up to the date of his dismissal. There is no longer any legal support for employers to deduct from employees' wages or withhold the employees' wages as a disciplinary imposition.”
49. At best, the Respondent would sue for the damage caused or counterclaim in this matter for the damage. They did not do so.
50. I find that the Claimant is entitled to the withheld salary.
51. The Claimant claimed one month's salary in lieu of notice. Having found that the summary dismissal was substantively fair, I decline to make an award under this head.
52. The Claimant also argued that he had 28 unused leave days at the time of separation. The Respondent did not controvert this claim. Annual leave is a statutory right for employees, and employers are obligated to either facilitate the leave or compensate for any unused leave. Given the facts of this case, I find it appropriate to award the Claimant compensation of KShs. 24,574.60 for the unutilized leave days.
53. I have carefully considered the other reliefs sought by the Claimant and the evidence presented by him. The evidence did not support these claims in any way, leaving them as reliefs that were merely thrown to the Court. They are declined.
54. In the upshot, judgment is hereby entered for the Claimant in the following terms;
- a. A declaration that the summary dismissal against him was procedurally unfair.
  - b. Salary for August 2017, KShs. 26 330.40.
  - c. Compensation for earned but untaken leave days, KShs. 24,574.60.
  - d. Compensation pursuant to the provisions of section 49 [1][b], three months' gross salary, KShs. 78,990.
  - e. Costs of this suit.
  - f. Interest at court rates on the sums awarded from the date of this judgment till full payment.

**READ, SIGNED AND DELIVERED ON 31<sup>ST</sup> JULY 2025.**

**OCHARO KEBIRA**

**JUDGE**

