



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Muganda v Brookside Dairy Limited & 2 others (Petition
E002 of 2025) [2025] KEELRC 2245 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2245 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E002 OF 2025**

JK GAKERI, J

JULY 29, 2025

**IN THE MATTER OF CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES**

**10, 19, 20(1), 22(1), 23(1), 28, 29, 31, 39, 41, 49,
50, 162(2), 258, 259(1)(B) OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF SECTIONS 41, 44, 45, 49 OF THE
EMPLOYMENT ACT NO. 11 OF 2007**

AND

**IN THE MATTER OF SECTIONS 4 AND 6 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT, CHAPTER 7L OF
THE LAWS OF KENYA**

BETWEEN

TITUS OWINO MUGANDA PETITIONER

AND

BROOKSIDE DAIRY LIMITED 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD
RESPONDENT**



JUDGMENT

1. The Petitioner filed the instant Petition on 11th November, 2024 alleging violation of constitutional rights, breaches of the *Employment Act* and provisions of the *Fair Administrative Action Act*.
2. He alleged that his right to human dignity, freedom and security, fair hearing and fair labour practices were violated by the respondents and that he was maliciously prosecuted.
3. The Petition dated 23rd October, 2024 was subsequently amended on 7th March, 2025 to introduce a 4th respondent, the Petitioner's supervisor and add a further violation that the Petitioner was not charged within 24 hours as well as reliefs.
4. Unlike the original Supporting Affidavit which had only one date on the occurrences, the Amended Affidavit was more detailed and captured the concatenation of events.
5. It is the Petitioner's case that his paybill was 971504 and the time allowed for paybill payments after delivery was 3 days and cheque payments 7 – 14 days and some customers paid to his Mpesa number or the paybill.
6. The Petitioner avers that on 12th August, 2023 he made Order Number 2308130236 valued at Kshs.578,959.37 and collected on the same day, and left the market on 16th August, 2023 having reconciled the sum of Kshs.283,352 with a balance of Kshs.289,752.67, and was summoned by the supervisor on 17th August, 2023 for Order Number 2308130236 made on 12th August, 2023 and the Petitioner notified him of a systems issue and took another Order but the system showed a balance of Kshs.289,821 on 20th August, 2023, while his own balance was kshs.5,786.
7. That on 21st August, 2023, he was treated with cruelty and hostility, the truck had been allocated to another employee.
8. That the County Manager accused him of stealing Kshs.289,821.62, and the 1st respondent and agents locked him in a milk store, without food or water until 7:00pm when he was booked at the police station at 7:00pm and the police detained him and was charged on 23rd August, 2023 as an afterthought.
9. The Petitioner avers that the sum of Kshs.289, 821.67 allegedly missing was paid from 14th to 19th August, 2023, the criminal case was dismissed and a visit to the respondents 6 months after the charge confirmed that payments were made.
10. The Petitioner prays for various declarations and general damages thereon, general damages for malicious prosecution and violation the *Employment Act*, terminal dues, salary in lieu of notice, salary for August and September 2023, gratuity, certificate of service and costs.

Respondent's case

11. The Replying Affidavit of M/s Ann Kariuki, the 1st Respondent's Human Resource Manager states that the 4th respondent was its employee and the amended Petition did not raise any constitutional issue and ought to be denied under the doctrine of ripeness and constitutional avoidance.
12. The 1st respondent denies the Petitioner's allegations and avers that the Petitioner was accorded a fair procedure prior to dismissal.



13. It is the 1st respondent's case that on 13th August, 2023 the Petitioner left the Kisumu Depot with goods valued Kshs.447,685.56 and on 19th failed to account for Kshs.289,821.67 and sought time to check and was cleared to go home at 1920hours but had not cleared with the accounts department, was off duty on 20th August and reported on 21st August, 2023 and had a meeting with the Sales Manager, Depot Manager, the security supervisor on the unaccounted for cash and the Petitioner offered no explanation but recorded an internal statement at 1537hours and the matter was reported to the police.
14. The respondent's case is that as of 15th August, 2023, the Petitioner had a previous overnight worth Kshs.283,967 and he counter signed the same and debts were cleared sequentially and Order number 2308130236 related to the goods removed from the Depot on 13th August, 2023 valued at Kshs.447,685.56 and he did not account for goods worth 289,821 and the sum of Kshs.283,967.00 received from 14th to 19th August, 2023 was utilized to offset the arrears of Kshs.283,962 subsisting prior to 13th August, 2023 and the sum of Kshs.289,821.67 remained outstanding.
15. The respondent denies having confined the Petitioner at any point and admits having filed a complaint at Obunga police station at 1845hours and the police arrested the Petitioner at 1906hours and booked under OB/36/21/8/2023 at 1930hours, charged on 23rd August, 2023 and the 1st respondent had reasonable and probable cause to report the complaint and the police did the rest.
16. The affiant deposes that the Petitioner neither responded to the Notice Show Cause nor attend the disciplinary hearing and was summarily dismissed on 11th September, 2023 on account of defrauding the 1st respondent and his final dues were computed.

4th Respondent's Response

17. Mr. Samuel Okich Omondi deponed that he was wrongly joined in the proceedings. He adopted the contents of the Replying Affidavit sworn by Anne Kariuki.
18. It was his averment that the Petitioner was accorded a fair procedure prior to the dismissal from employment and the complaint to the police was based on reasonable and probable evidence that the Petitioner had committed a criminal act worth investigations and was made in good faith and the Petitioner's arraignment and prosecution was conducted by the police.
19. Finally, the affiant deponed that the Amended Petition disclosed no violations of the Constitution and lacked particularity.

Petitioner's submissions

20. Concerning competency of the respondent's response, counsel placed reliance on the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules, 2013 and the sentiments of the court in Humphrey Makokha Nyongesa & another V Communications Authority of Kenya & 2 others [2020] eKLR, National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & another [2002] 2EA 503 and Kennedy Mwari Micheni V Settlement Fund Trustee & 2 others [2018] eKLR, to submit that the respondent's ought to have filed a Replying Affidavit or Grounds of Opposition to rebut the Petitioner's claims together with securely sealed exhibits as per the 3rd Schedule of the Oaths and Statutory Declarations Act.
21. Relatedly, counsel submitted that the witness statement of one Anne Kariuki had no authority attached to it for purposes of admission as a witness statement to urge that the Petition was unopposed.



22. As to whether the Petitioner's constitutional rights were violated by the respondents, counsel submitted that the Petitioner's detention by the 1st respondent was inhumane and degrading and the respondents admitted that he was arrested inside a Godown at 1900hrs.
23. Counsel submitted that since the Petitioner's employment was terminated without a disciplinary hearing, his rights under the provisions of Articles 41, 47 and 50 of the Constitution of Kenya 2010 were violated.
24. That the historical debt only emerges from the respondent's filings and was not proved or demonstrated how action was being taken to recover the same.
25. Counsel, further, submitted that the Petitioner was prosecuted without cause in breach of Article 50 of the Constitution of Kenya. Reliance was placed on the decisions in Walter Ogal Anuro V Teachers Service Commission [2013] eKLR and Judicial Service Commission V Mbalu Mutava & another [2015] eKLR on substantive and procedural fairness in termination of employment.
26. Counsel submitted that the Petitioner was not arraigned in court within 24 hours, citing the sentiments of the court in Republic V Inspector General of Police & another Ex Parte Abdi Noor Mohamed [2019] eKLR.
27. As concerns malicious prosecution, reliance was placed on Murunga V A/G [1979] on the requirements, to submit that the respondents were aware that payment had been received as reflected on the Accountant's reconciliation report dated 22nd August, 2023 and the 1st and 4th respondents withheld the information from the court during prosecution.
28. Counsel relied on the Court of Appeal decision in Peter Waweru V Republic & 2 Others [2023] KECA for the proposition that initiating or continuing a prosecution in the absence of probable cause where exonerating evidence is known constituted malicious prosecution as was the decision in Kagane & other V AG [1969] EA 643, on the effect of failure to disclose material facts to the police or the prosecution to urge the court to find that the criminal case was malicious and unjustifiable.
29. It was submitted that the documents availed by the Petitioner such as Order and dispatch Paybill remittances, accountant's reconciliation and others remained uncontroverted.
30. Finally, on reliefs, counsel cited the decisions in GMV V Bank of England Kenya Ltd [2015] eKLR, Simiyu V Attorney General [2024] KEHC, Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd [2014] eKLR and Miguna Miguna V Attorney General [2018] eKLR, to urge that the claimant was entitled to a total of Kshs.21,180,427.

Respondents submissions

31. In their submissions, the 1st and 4th respondents submitted on the doctrine of ripeness and constitutional avoidance relying on the sentiments of Mativo J (as he then was) in KKB V SCM [2022] KEHC 289 (KLR).

counsel urged the court to dismiss the Petition.

32. On unfair termination of employment, the 1st and 4th respondents submitted that the Petitioner failed to account for goods worth Kshs.289,753.67 under Order number 2308130236 for goods worth Kshs.447,685.56.
33. That the Petitioner had not returned to the 1st respondent's premises after he was arrested and charged in court and had neither denied the contents of the dismissal letter nor disowned the telephone calls



made trying to reach him. Counsel cited the sentiments of the court in Charles Fundi Njiru V Board of Management Baricho High School [2020] KEELRC 35 (KLR) on the effect of non-attendance of a disciplinary hearing, to urge that the Petitioner failed to discharge the burden of proof under Section 47(5) of the *Employment Act*, for having failed to respond to the notice to show cause or attend the hearing.

34. Counsel urged that the Petitioner acknowledged the sum of Kshs.283,962 as overnight on 16th August, 2023 and had taken delivery of another batch on 13th August, 2023, equally failed to account for Kshs.289,821.67 and the sum of Kshs.283,967.00 received between 14th and 19th August, 2023 offset the sum of Kshs.283,967 which predated Order number 2308130236 and the loss of product had been demonstrated and the 1st respondent was entitled to summarily dismiss the Petitioner from employment.
35. Reliance was placed on the Court of Appeal decision in Attorney General & another V Crispinus Ngayo Musundi [2017] eKLR on instances in which an employer may dismiss an employee, to urge that the Petitioner's dismissal from employment was justified.
36. Concerning the reliefs prayed, for counsel submitted that the prayers for damages, compensation and salary in lieu of notice had no basis, the prayer for terminal dues lacked particulars the prayer for unpaid salary for August and September had no period, the claim for gratuity lacked specifics, the amount ought to have been pleaded, and the Petitioner was a member of a pension scheme and NSSF.
37. Concerning the allegation of malicious prosecution and detention, counsel submitted that the Petitioner had not provided the date and the persons involved in the detention or avail a witness (s) to reinforce his allegations as he bore the burden of proof.
38. On malicious prosecution, counsel submitted that the Petitioner had not fulfilled the test in Murunga V Attorney General [1979] KLR 138 on the elements of malicious prosecution.
39. Reliance was also place on the sentiments of the Court of Appeal in National Oil Corporation V John Mwangi Kagenyu & 2 others [2019] eKLR to urge that the respondents reported the complaint to the police, who did the rest.
40. Also cited were the decisions in Nzoia Sugar Co. Ltd V Fungututi [1988] KLR 399 on an acquittal in a criminal case and in the instant case the acquittal was on a technicality, Susan Mutheu Muia V Joseph Makau Mutua [2018] eKLR on malice being that of the prosecutor not the complainant and Attorney General & 2 others V Joseph Marangu [2018] eKLR on the malice of a body corporate, to urge that the 1st respondent did not act maliciously.

Analysis and determination

41. Before delving into other issues, it is important to dispose of the issue of ripeness and constitutional avoidance raised by the respondent.
42. Whereas the court is in agreement that the violations of the Constitutions alleged by the Petitioner could have been litigated under an ordinary claim, it is also satisfied that it has the requisite jurisdiction to hear and determine the instant Petition.
43. Evidence availed by the parties reveal that the Petitioner joined the 1st respondent as a Salesman effective 14th March, 2007 at a cross salary of Kshs.12,200 per month 3 months' probation and 21 working days annual leave.
44. Strangely, the payslip dated 13th March, 2007 had different figures as salary and allowances.



45. It is common ground that the Petitioner would raise an Order for goods, receive the same and sell them to customers in his sector and account for the value of the goods collected and had a driver, one Mr. Richard Chepkwony who drove the 1st respondent's truck registration number KBB 559M.
46. The Petitioner admitted having picked Order number 2308130236 on 13th August, proceeded on the Sori market route from 14th August, 2023 and returned to the Sales Dept at 9:30 am on 16th August, 2023 having sold all the products.
47. Relatedly, evidence availed by the 1st respondent revealed that on 16th August, 2023 the Petitioner had acknowledged an overnight of Kshs.283,967.00 or 283,962 which the 1st respondent avers related to a previous order which the Petitioner did not deny and admitted that on 12th August, 2023 he made Order number 2308130236 and collected good valued at Kshs.578,959.37 and on 16th August, 2023 the balance of Kshs.289,753.67 was outstanding and receipts from 14th to 19th August, 2023 amounted to Kshs.283,967.00 which the 1st respondent alleged was used to settle the earlier Order whose overnight was Kshs.283,967.00.
48. Both parties were in agreement that the sum of Kshs.283,967.00 was received from 14th to 19th August, 2023, but disagree on how the amount was applied.
49. According to the Petitioner, the sum related to Order number 2308130236 and thus cleared the total amount outstanding while the 1st respondent's case was that the amount was used to reconcile an earlier night out of a similar sum and the sum of Kshs.289,821.67 due on Order number 2308130236 remained unpaid.
50. Notably, by letter date 26th May, 2023, the Petitioner's supervisor Mr. Eric Oricho had written to him demanding an explanation on outstanding overnights by 1st June, 2023.
51. In his response dated on 25th May, 2023, the Petitioner indicated that he had been on leave and requested for another seven (7) days to enable him clear outstanding overnights of Kshs.310,000.00, he alleged to have encountered some delays.
52. The Petitioner's internal statement acknowledges that on 16th August, 2023 there was an overnight of Kshs.289,891.67 on Order number 2308130236 and asked for time to clear the same, was summoned on 17th August, 2023 by the County Manager Mr. Samuel Okich and by 20th the balance of Kshs.289,821 was still pending and the situation remained the same and in a written document of even date signed at 1537hours the Petitioner sought time to search for payment details, from the field.
53. The supervisor's statement dated 21st August 2023 collaborated the Petitioner's position that the sum was outstanding.
It is evident that no time was given to the Petitioner.
54. Significantly, in his internal statement dated 21st August, 2023, the Petitioner admitted that Order number 238130416 valued at Kshs.569,358.48 was under his name and had the sum of Kshs.289,821.67 missing and he requested for time to ascertain the position in the field and took responsibility.
55. Could the Petitioner have been confusing Order 2308130416 and Order 2308130236 or was it by design? While the former had an overnight of Kshs.283,467.67 the latter had an overnight of Kshs.289,821.67 by 21st August, 2023 and the sum of Kshs.283,967.00 received from 14th to 19th August, 2023 was applied to the former Order.



56. Noteworthy under paragraph 15 of the Amended Supporting Affidavit sworn on 7th March, 2025, the Petitioner admitted that he opted to take another order before he had “fully reconciled” the products which clearly suggests that he had an unreconciled Order prior to Order number 2308130236.
57. Although the Petitioner’s Supporting Affidavit makes no reference to the previous Order and addresses Order 2308130236 exclusively, his internal statement makes reference to Order 2308130416 which could only have been prior to Order 230813 0236 as no other Order was executed by the Petitioner thereafter and according to the Petitioner the sum of Kshs.283,967 received prior to 21st August, 2023 related to the last Order number 2308130236 which left out Order 2308130416 pending.
58. The challenge of disentangling the Orders and payments is compounded by the payments overlap when there has been a pending balance and unless the payments are separated based on the quantity sold and date, using the date of payment is patently problematic unless it is system generated.
59. This is because even if the payment was received between 14th and 16th August, 2023 it is unclear as to whether it related to Order number 2308130416 or Order 2308130236 both acknowledged by the parties and the documents mention both albeit peripherally.
60. The totality of the evidence on record is that the Petitioner had at least two (2) night outs by 16th August, 2023. Second, payment of Kshs.283,967.00 was received between 14th August, 2023 and 19th August, 2023, which reduced the amount outstanding by a similar amount, but did not liquidate the Petitioner’s night outs in their entirety and as adverted to elsewhere in this judgment, the Petitioner neither denied nor explain how he dealt with previous night outs, including those that formed the subject matter of the notice to show cause dated 26th May, 2023.
61. Having found as above, I will now proceed to examine whether terminating of the Petitioner’s employment in the circumstances was fair or lawful.
62. While the Petitioner maintained that termination of his employment was unfair the 1st and 4th respondents contended that the termination of employment was fair as there had been loss of products owing to the Petitioner’s carelessness and improper performance of his work and suspicion of having committed a criminal offence against or to the detriment of the 1st respondent as the employer.
63. It is settled law that for a termination of employment to pass the fairness test, it must be demonstrated that the employer had a valid and fair reason to do so and the termination must have been conducted in accordance with a fair procedure. Importantly, the reason(s) must relate to the employee’s conduct capacity or compatibility or operational requirements of the employer.
64. The provisions of Section 41, 43, 44, 45, 46 and 47(5) of the *Employment Act* provide the architecture of termination of employment and any termination of employment conducted otherwise than in accordance with these provisions is unfair.
65. Put in the alternative and as aptly captured by Ndolo J in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR, there must have been a substantive justification for the termination of employment and procedural fairness.
66. As elaborated by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR, a termination of employment may be substantively and procedurally unfair or either substantively or procedurally unfair within the meaning of Section 45 of the *Employment Act*.
67. In the instant case, and as adverted to elsewhere in this judgment, documentary evidence on record reveals that the Petitioner had two outstanding night outs by 16th August, 2023 and an amount of Kshs.283,967 was received between 14th and 19th August, 2023 was applied to reconcile the previous



Order, valued at Kshs.283,962.00, a fact the Petitioner adverted to in his Amended Replying Affidavit and which was supported by documents on record, whose contents the Petitioner did not contest.

68. Thus, the Petitioner's averment that the sum of Kshs.283,962.00 cleared the night out, the sum of Kshs.289,821.67 is not borne by facts, as the sum remained outstanding as at 21st August, 2023, a fact the Petitioner admitted in his statement dated 21st August, 2023, and by which he sought time to look for payment details from customers. By the same statement, the Petitioner admitted that the Order was in his name.
69. From the record, there is nothing to indicate that the Petitioner availed any details and/or information on payments and/or clearance of the outstanding night out of Kshs.289,821.67.
70. This is clearly discernible from the fact that the Petitioner neither responded to the notice to show cause nor attend the disciplinary hearing or report to his place of work thereafter and if he reported back, he provided neither the date nor the person he dealt with or the outcome of the visit.

Section 43 of the *Employment Act* provides:

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
71. Courts have construed Section 43(2) of the *Employment Act* to mean that all that the employer is required to demonstrate on a preponderance of probabilities is that it had reasonable and sufficient grounds for the genuine belief that it had a reason to terminate the contract of employment and that whereas the test is that of a reasonable employer in similar circumstances, it is also partly subjective. See in this regard *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR, *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* [2019] eKLR as well as the sentiments of Lord Denning in *British Leyland (UK) Ltd V Swift* [1981] 1 RLR 91 on the range or band of reasonable responses.
 72. The summary dismissal identified reason for termination of the Petitioner's employment as failure to reconcile journal number 373758 relating to Order number 2308130236 dated 12th August, 2023 and refusal to explain the same even after being accorded an opportunity to do so. The 1st respondent appeared not to have had any other option.
 73. For foregoing reasons, the court is satisfied that the 1st respondent had a substantive justification to terminate the Petitioner's employment.
 74. As regards procedure, the attendant procedural requirements are set out in Section 41 of the *Employment Act* and have been summarised as reasons or grounds of termination of the contract, explanation of the reasons in a language understood by the employee in the presence of a fellow employee of the employee's choice or shopfloor representative, right to make representations at the hearing and considerations of those representations by the disciplinary committee. See *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR.
 75. In this case documentary evidence reveals that the 1st respondent's email dated 21/8/23 dispatched a notice to show cause to the Petitioner. The letter made no reference to the duration accorded to the Petitioner to respond or give an account of the outstanding night out but required him to show cause.



76. The Petitioner neither responded to the notice to show cause nor deny having received it.
77. Documentary evidence further revealed that the 1st respondent vide letter dated 4th September, 2023 invited the Petitioner to attend a disciplinary hearing on 7th September, 2023 at 8:30am at the 1st Respondent's Boardroom in Ruiru and was informed of the charge as well as his right to be accompanied by a witness of his choice.
78. The Petitioner did not attend the hearing even after he was accorded another chance on 9th September, 2023. A summary dismissal letter followed on 11th September, 2023. It is not lost to the court that the 1st respondent reported the matter to the police on the same day and the Petitioner was arrested on even date.
79. Having failed, refused or neglected to explain what could have happened to the unreconciled amount, the 1st respondent cannot be faulted for having involved the police who were duty bound to investigate the matter and hand over the same to the Office of the Director of Public Prosecutions, if in their opinion, a criminal offence had been committed.
80. In addition, the Petitioner had not provided any update after 16th August, 2023 a total of 3 working days.
81. Be that as it may, the court is wondering why even after the Petitioner had requested for time to look for payment details and find out whether all customers were covered, the 1st respondent refused to grant the Petitioner the opportunity to do so.
82. Having been their employee for over 16 years and having risen to the level he had, it behooved the 1st respondent to accommodate the Petitioner in this instance to find out why his customers had not remitted the funds.
83. In any event the Petitioner's seven (7) days commitment to pay the overnight fully had not lapsed by 21st August, 2023.
84. This duration was important as it was an agreement between the Petitioner and the supervisor, a fact the supervisor admitted vide letter dated 26th May, 2023.
85. The requested time would also have enabled him obtain the documents and avail evidence of the customers involved and the amount due from each.
86. Although pendency of criminal proceedings is not a bar to internal disciplinary proceedings, the 1st respondent ought, in the courts view, to have accorded the Petitioner time to search for the answers for the missing cash. See in this regard *Judicial Service Commission V Gladys Boss Shollei & another* [2014] eKLR, *Republic V Wigglesworth* [1984] 1984 Canlii 2275, *Geoffrey Kiragu Njogu V Public Service Commission & others* [2015] eKLR and *Attorney General & another V Andrew Maina Githinji & another* [2016] eKLR.
87. The failure and refusal by the 1st respondent to accord the Petitioner some time to explain the transactions in question denied the Petitioner the opportunity to avail evidence in his response to the notice to show cause and during the hearing and implicated his right to fair hearing which is an imperative in the termination of an employment contract.
88. In the court's view, the refusal by the 1st respondent to accord the Petitioner time to ascertain what may have occasioned non-remittance of payment for goods delivered to the customers hindered the Petitioners the right to fair hearing. This is because he may have required some information from the 1st respondent as he endeavoured to respond to the notice to show case or for purposes of the hearing.



89. This in the court's view, is the only procedural mis-step the 1st respondent may be blamed for.
90. Puzzlingly, the Petitioner neither responded to the notice to show cause nor attend the disciplinary hearing, initially slated for 4th September, 2023 and a second opportunity on 9th September as clearly set out in the letter of dismissal from employment.
91. Any response to the notice to show cause could have shown his position on the matter. He could have challenged the accusation, seek for time to explain or request for documents or other evidence as he may have wished.
92. Similarly, a response would have reinforced his case against the 1st respondent. Failure to attend the hearing created the impression that the Petitioner was an employee who had nothing to do with his employer or nothing to explain to the disciplinary committee, whether to exculpate him or otherwise.
93. The letter of summary dismissal is clear that the 1st respondent's General Manager, Human Resource and Administration, one Grace Manugo had had a telephone conversation with the Petitioner who had promised to attend the hearing but did not attend without any explanation.
94. On non-attendance of the disciplinary hearing, the court is guided by the decision of the Court of Appeal in *Regent Management Ltd V Wilberfore Ojiambo Oundo* [2018] eKLR where the court expressed displeasure with the respondent's refusal to attend a hearing on account of the appellant's failure to avail the documents requested for.
95. Whatever grievance the Petitioner may have had against the 1st or 4th respondent, he ought to have attended the disciplinary hearing to present his case.
96. In fact, the Petitioner's Amended Supporting Affidavit makes no reference to the notice to show cause, invitation for a disciplinary hearing or non-attendance. It only acknowledges receipt of the letter of summary dismissal.
97. From the evidence on record, it is discernible that the Petitioner received all the notices sent him, was contacted on his cellphone but refused to attend the meeting without any explanation.
98. In the circumstances, the 1st respondent's inference that the Petitioner was involved in fraudulent activities to defraud it was not implausible.
99. In determining whether termination of employment was unfair, the court is required to arrive at the conclusion that "in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee" in consonance with the provisions of Section 45(4)(b) of the *Employment Act*. In arriving at the foregoing finding, the court is required to consider the requirements of Section 45(5) of the *Employment Act*, Principal among which is the procedure adopted by the employer, including handling of the appeal against the decision, if any.
100. The 1st respondent's letter of summary dismissal made no reference to a right of appeal, compliance with statutory provisions, including issue of certificate of service, conduct and capability of the employee, previous practice of employer in dealing with such circumstances and existence of warning letter to the employee.
101. In this case, the 1st respondent availed no evidence of a previous warning against the Petitioner, denied him the right to appeal, did not issue a Certificate of Service and most significantly, as adverted to elsewhere in this judgment, the 1st respondent refused to accord the Petitioner time to explain the outstanding night out even though the seven (7) days commitment had not lapsed by 21st August, 2023.



102. Having taken account the parameters set out in Section 45(5) of the *Employment Act* which is mandatory, including the Petitioner's refusal to respond to the notice to show cause and attend the disciplinary hearing, which is discreditable, the court is satisfied that termination of the Petitioner's employment by the 1st respondent was unfair.
103. The other pertinent issue is whether the 1st and 4th respondent's detained, confined or unlawfully or falsely imprisoned the Petitioner.
104. In his Amended Supporting Affidavit sworn on 7th March, 2023, the Petitioner deponed that the 1st respondent through its agents, (who were unnamed or identified), unlawfully locked him on the milk store from morning till evening where he was booked at the police station at 7:00pm.
105. The 1st and 4th respondents denied having detained or locked the Petitioner anywhere.
106. Puzzlingly, paragraph 18 of the Petitioner's Amended Supporting Affidavit had neither a date of the alleged detention nor particulars of the 1st respondent's agents, and in particular, whether they were employees or police or strangers including who locked the store, after taking the Petitioner there and what he did when the milk store was locked in an endeavour to secure his freedom or express his indignation.
107. Details of any calls made, or messages sent to verify the alleged detention or imprisonment would have shown that the Petitioner was in a secluded milk store alone trying to secure his freedom.
108. The Halsbury's Laws of England, 4th Edition at page 606 defines false imprisonment as:
- “ Any restraint of liberty of the person for however short time, by the use of or threats of force or by confinement is an imprisonment. To compel a person to remain in a given place is an imprisonment...
- The gist of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus lies on the defendant of proving a justification”.
109. Similarly, in *Daniel Waweru Njoroge & 17 others V Attorney General* [2015] eKLR the court stated:
- “ The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:
- The unlawful restraint of another; against their will; and without legal justification.
- Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying 'reasonable person' standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention...”
110. Contrary to the Petitioner's counsel's allegation that the respondents admitted that the Petitioner was arrested in a Godown at 1900hours constituted evidence of the detention, the Petitioner never alleged that he was arrested in a Godown. His affidavit is specific that it was a milk store with no water or food from morning till evening.



111. The fact that the Petitioner was still at his place of work at 7:00pm does not constitute evidence of false imprisonment and in any event the Petitioner is unsure of the date and could tell who took him to the milk store, locked the only door or entrance and refused to give him water or food. The Petitioner did not allege that the unnamed respondent's agents threatened him.
112. In the court's view, the want of specific and verifiable evidence of the alleged false imprisonment of the Petitioner renders his allegation hollow and thus unproven.
113. The unavailability of a date, time, names of persons and what they did in effecting the alleged false imprisonment and what the Petitioner did conspicuously betrays the Petitioner's allegation of having been falsely imprisoned.
114. Notably, the Petitioner recorded his internal statement at 4:05pm and did not mention that he did so while in confinement under threat and could not leave the venue.
The court finds that allegation unsubstantiated.
115. In sum, the Petitioner alleged that he was falsely imprisoned by the respondent but mentioned the tort as a footnote and without availing any scintilla of supportive evidence.
116. Concerning malicious prosecution, the Petitioner deposed that the charge was an afterthought because he did not admit the alleged stealing by servant and in any case according to the Petitioner, the police were aware that the outstanding overnight had been paid and the case was subsequently dismissed.
117. The 1st and 4th respondents' case is that they reported the matter to the police who conducted their investigation and recommended prosecution of the Petitioner after arresting him on 21st August, 2023 and booked him at Obunga Police Station under OB 36/21/08/2023 at 1930hrs.
118. According to the respondents the complaint was made in good faith and without malice or ill will and subsequent activities were not attributable to them.
119. The principles that govern a person the tort of malicious prosecution are well settled. In *Mbowa V East Meno District Administration* [1972] EA 352 Court of Appeal stated:

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in



the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action..."

120. See also in this regard sentiments of Trainer J. in *Gitau V Attorney General* [1990] KLR 13, *Stephen Gachau Githaiga & another V Attorney General* [2015] eKLR and *James Karuga Kiiru V Joseph Mwamburi & 2 others* [2001] eKLR.

121. In the instant case, it is common ground that the 1st respondent reported the matter to the police on the evening of 21st August, 2023 thereby setting the law in motion. The 1st element of malicious prosecution is proven.

122. As regards the presence of reasonable and probable cause, in *Civil Appeal No. 89 of 2002, Services Ltd V Charles Obongo Angujo* [2005] eKLR, the High Court observed as follows:

"It is clear from the above that for a claim of false arrest or false imprisonment to succeed there must be a report which was false and actuated by malice. The arrest should be attributed to the defendant either because he was arrested on that false report or that the police arrested on the basis of his false report".

123. The Petitioner did not allege that the 1st respondent's complaint to the police on 21st August, 2023 was false.

124. Equally, the Petitioner's own statement recorded on the same day at 15:37pm acknowledged that there was a difference of Kshs.289,821.67 as the total value of the dispatch was Kshs.569,358.48 on the 6th day after the entire consignment had been sold, and he had personally requested for time to verify.

As observed in *James Karuga Kiiru v Joseph Mwamburi* (supra)

"To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is and the burden of proving that the prosecutor did not act honestly or reasonably is on the person prosecuted".

125. Similarly, in *Stephen Gachau Githaiga & another V Attorney General* (supra) it was held that:

"The third element which must be proved by a plaintiff – absence of reasonable and probable cause to commence or continue with prosecution – further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceedings in question, the proceedings must be taken to have been properly instituted, regardless of the fact that it ultimately terminates in favour of the accused".

126. In the instant case, having admitted that there was an outstanding night out for which he required time to ascertain on 21st August, 2023, and offered no reason why the amount had not been paid in transactions based on cash on delivery, the Petitioner could turn round and contend that the respondents had no reasonable and probable cause to file a complaint with the police.



127. In *Kagane & others V Attorney General* [1969] EAL R 643, it was held that reasonable and probable cause is an honest belief in the guilt of the accused based on evidence which suggests the commission of crime.
128. Although the Petitioner sued the National Police Service and the Office of Director of Public Prosecutions, he did not adduce any evidence to prove that any of the officers involved decided to charge and prosecute him for the offence of stealing by servant without any reasonable and probable cause bearing in mind that the police arrested the Petitioner, conducted their own investigations and recommended prosecution, a proposal the office of the Director of Public Prosecutions affirmed, which would suggest that at least two persons applied their knowledge and experience on the facts and arrived at a similar decision. No dishonesty or unreasonableness was demonstrated.
- It is also clear that the Petitioner was acquitted on a technicality.
129. In sum, the court finds that the Petitioner failed to demonstrate that the police and the prosecution had no reasonable and probable cause too, to institute or continue with criminal proceedings.
130. As regards the requirement of malice, the law requires the Petitioner or the party suing for malicious prosecution to demonstrate that the prosecution was actuated by malice. An acquittal is not sufficient and even assuming that the 1st or 4th respondent were malicious, in filing of the complaint, the Petitioner did not demonstrate that there was any collusion between them and the 2nd or 3rd respondents or both as the 2nd and 3rd respondents arrested and prosecuted the Petitioner respectively.
131. The two offices acted independently in making the decision and in neither case was malicious intent proved or shown to have been the driving force.
132. The foregoing is fortified by the sentiments of the Court of Appeal in *Nzoia Sugar Co. Ltd V Fungututi* (supra) that:
- “Acquittal on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company”.
133. Regrettably, the Petitioner failed to demonstrate that his supervisor or any other person acted maliciously.
134. In its humble view, the court is not persuaded that either the Petitioner’s supervisor or any other person acted maliciously and none has been proved to have acted as such.
135. Finally, it is common ground that the criminal proceedings ended in the Petitioner’s favour as he was acquitted under Section 215 of the Criminal Procedure Act.
136. Clearly, the allegation of malicious prosecution was unsubstantiated and nothing turns on it.
137. The alleged violation of the Petitioner’s right to human dignity and degrading treatment by 1st, 2nd and 3rd respondents was not demonstrated as no evidence was adduced to how and when it took place.
138. On the alleged violation of the Petitioner’s right to fair administrative action by the 1st respondent, the alleged violations could only have been committed by the 1st respondent as an employer and having found that the termination of the Petitioner’s employment was unfair on account of the 1st respondent’s failure to comply with all requirements of law and contract of employment, the *Employment Act* provides an appropriate remedy.



139. It is trite law that the *Constitution* of Kenya 2010 removed the power to charge and prosecute suspects from the Office of the Attorney General to an independent office of the Director of Public Prosecutions (here-in after ODPP), which makes all decisions on charging of suspects and prosecution.
140. However, the National Police Service retains the powers to arrest and investigate alleged criminal offences and may or may not recommend prosecutions and where the National Police Service does so, the decision of the ODPP must be await and no presentation of suspects can take place until after a decision to that effect is made by ODPP. This may occasion some delay, which is exclusively attributable to the current dispensation.
141. Courts have held that in the event of a delay, and the issue is raised, it is for the court to determine whether the reason for the delay meets the legal threshold and proceed accordingly.
142. In this case, it is discernible that the Petitioner was arrested on the evening of 21st August, 2023 and charged on Wednesday 23rd August, 2023 more than 24 hours after his arrest.
143. However, the Petitioner availed the no evidence of having raised the issue before trial court for the court to determine whether his constitutional rights were violated or not and whether the criminal proceedings would continue. It may have led to an acquittal if the court was satisfied that no reasonable explanation had been availed by the police or the ODPP.
144. As the issue was not raised before the trial court and this is not an appeal of the criminal case, the court is unable to make that determination.
145. Finally, as regards the reliefs sought, the court proceeds as follows:

Declarations and general damages

146. Having found as above, the declarations and general damages prayed for unlawful imprisonment, inhuman and degrading punishment right to fair administrative action, arraignment within 24 hours and malicious prosecution are declined.
147. The only declaration that the court finds merited is that termination of the Petitioner's employment by the respondent was unfair but no general damages flow there from as will become clearer later in this judgment.

Terminal dues

148. As correctly submitted by the 1st and 4th respondents' counsel, a claim for terminal dues is a claim for a special damages. This is because terminal dues encompasses salary till the date of termination of employment, outstanding leave days, overtime pay if any, bonuses where payable, off days and others as per the employment contract.
149. The Petitioner's Amended Petition made no reference to these claims and the Amended Supporting Affidavit was loudly reticent on the amounts claimed under each head and a justification.
As framed, the Orders sought are prayed for in a vacuum.
150. The absence of particulars renders the claim unproven and it is declined.
151. However, if the Petitioner had pending leave days, the 1st respondent was contractually bound to compute and pay the same. The Petitioner has not proved any for an Order to issue salary for August and September.



152. It requires no belabouring that under Section 17(1) of the *Employment Act*, an employer is bound to pay all salaries and wages earned and payable to the employee as per the contract of employment and in the prescribed mode.
153. It is clear that the Petitioner was an employee of the respondent until 11th September, 2023. Thus the salary for the month of August 2023 and 11 days of September was earned and the 1st respondent ought to pay the Petitioner, less any liabilities he may have had.
154. The salary was his legal right and his debts, if any, a legal obligation to the 1st respondent.
The claim is merited.
The salary is only payable if not already paid.
Salary in lieu of notice
155. Having found as above, the prayer for one (1) months salary in lieu of notice is merited.
156. Strangely, neither the Petitioner's Amended Petition nor the Supporting Affidavit state or indicate what the Petitioner's salary was on the date of termination of employment.
157. The court is left wondering why the two (2) copies of pays lips are dated March 2007 yet the date of employment was not in contention.
One month's salary awarded.
Gratuity
158. The Petitioner's contract of employment dated 13th March, 2007 executed by the Petitioner on 14th March, 2007 made no provision of gratuity, which is only payable if contractually agreed upon by the parties to the contract of employment or in the case of a Collective Bargaining Agreement, with the union.
159. The claim for gratuity lacks a contractual justification and it is dismissed.

Compensation for unfair termination

160. Having found that termination of the Petitioner's employment by the 1st respondent was unfair, the Petitioner is entitled to compensation pursuant to the provisions of Section 49(1)(c) of the *Employment Act*.
161. Taking into account the fact that the Petitioner substantially contributed to the summary dismissal by his conduct, had served the 1st respondent diligently for 16 years, did not express his wish to remain in employment or indicate how long he wished to serve the respondent, was a member of the 1st respondent's pension scheme and did not appeal the 1st respondent's decision to terminate his employment, the equivalent of two (2) month's salary is fair.
162. Without a copy of pay slip for 2023, it is difficult for the court to indicate the actual amount payable to the claimant.

Certificate of service

163. The Petitioner is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.
164. In conclusion, judgment is entered in favour of the Petitioner against the 1st respondent in the following terms:



- a. Declaration that termination of the Petitioners employment was unfair.
- b. One (1) month's salary in lieu of notice.
- c. Salary for August 2023 and 11 days of September 2023, if not already paid.
- d. Equivalent of two months gross salary.
- e. Certificate of service.
- f. 50% of the costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH 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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE

