



**Ng'eno v East African Breweries PLC (Cause E874 of 2023)
[2025] KEELRC 2188 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2188 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E874 OF 2023**

**L NDOLO, J
JULY 24, 2025**

BETWEEN

BERNARD NG'ENO CLAIMANT

AND

EAST AFRICAN BREWERIES PLC RESPONDENT

JUDGMENT

Introduction

1. Bernard Ng'eno, the Claimant in this case, was an employee of East African Breweries, PLC having been employed in the year 2011, as a Sales Representative, and rising through the ranks to the position of Divisional Sales Manager-Mountain. Ng'eno brought this claim, following his dismissal on 7th November 2023, on allegations of complicity in fraudulent activities and dereliction of duty.
2. The claim is documented by a Memorandum of Claim dated 30th October 2023 and amended on 28th February 2024. The Respondent, East African Breweries PLC, defends itself by a Statement of Response dated 15th May 2024.
3. The matter went to full trial where the Claimant testified on his own behalf, with the Respondent calling its Human Resources Director, Annette Ngugi. Thereafter, the parties filed written submissions.

The Claimant's Case

4. The Claimant was initially employed by the Respondent in the year 2011, in the position of Sales Representative. He rose through the ranks to the position of Divisional Sales Manager-Mountain, reporting to the Commercial Director.



5. The Claimant claims to have had a clean employment record. He states that on 21st September 2023, he was summoned to a three-minute meeting with the Human Resources Director and the Commercial Director. At this meeting, the Claimant was informed of a decision to suspend him from work, to pave way for investigations into allegations of irregular transactions. He was issued with a letter to that effect.
6. The Claimant complains that the suspension letter did not have any timelines nor the specifics of the allegations. The Claimant was required to surrender his work mobile phone, laptop, tablet, credit card and access key card.
7. The Claimant states that after the meeting with the two Directors, they sent him to meet representatives of the Respondent's Business Integrity, Legal and Security Departments. According to the two Directors, the three officers were to explain the Claimant why he was being placed on suspension.
8. The three officers however questioned the Claimant regarding an event dubbed 'Embu Sevens Activation' held in the Mount Kenya Division, headed by the Claimant. The Claimant was instructed to record a statement on what he knew about the event and he duly complied.
9. On 15th October 2023, the Claimant received a text message from the Respondent's Senior Human Resources Business Partner, advising him to present himself at the Respondent's establishment on 16th October 2023.
10. When he presented himself on 16th October 2023, the Claimant was issued with a show cause notice listing ten (10) allegations. The Claimant terms the allegations as baseless and a witch-hunt. He complains that he did not receive any explanation as to the basis of the allegations or the outcome of the investigations.
11. The Claimant responded to the show cause notice on the same day. On the allegations relating to misappropriation of funds, the Claimant stated that proposal for events were organised through the Distributor Management System (DMS) maintained by the Respondent. He stressed that he was not the author of the proposals or requisition for such events.
12. The Claimant further stated that upon approval of a proposal for an event, requisition for funding would be made to the Finance Department, by the respective Area Manager. He added that he was just one of six or more approvers, who included the Finance Director and the Commercial Director.
13. On the allegation relating to photos allegedly pulled from the internet, the Claimant explained that it was not his duty to audit photos shared with respect to activities within his Division.
14. He further stated that his job description did not require him to attend all promotional or marketing events. He added that his job did not require him to carry out forensic investigations on reports presented to him by Area Managers or other employees reporting to him.
15. The Claimant pointed out that the allegations of misappropriation of funds were raised over a year after the events had taken place and internal and external audits undertaken, without any anomalies being flagged.
16. The Claimant further explained that movement of stock for promotional purposes or sales was initiated by the distributors, supported by the Respondent's representative, Area Business Development Manager and Route to Consumer Manager. He therefore asserted that he could not be faulted based on data generated by other persons, in relation to the 'Embu Sevens' Activation.



17. With respect to allegations related to motor vehicle accidents on 26th July 2023 and 21st August 2023, the Claimant explained that he had made the necessary reports to the Respondent, the Lessor of the motor vehicle and the Police. He added that he had availed police abstracts issued at Ongata Rongai Police station.
18. On the question of failing to incur costs as the most senior employee, the Claimant explained that he was not at the stated events where expenditure was incurred or that he was there for different reasons not as part of the Respondent's teams.
19. Regarding the official phone assigned to him, the Claimant explained that he lost the phone, together with his belongings, upon which he made a report to the Information Technology Department, which replaced his SIM Card. He also supplied a police abstract on this loss.
20. By his letter dated 19th October 2023, the Claimant took issue with the disciplinary procedure commenced against him; stating that it was not clear what the investigations were focussed on, that the Respondent had revealed the allegations contained in the show cause letter to his juniors and customers, before the outcome of the disciplinary hearing, despite the Claimant being assured that he was presumed innocent until proved otherwise. The Claimant complains that this prejudiced him and the outcome of the investigations.
21. Vide letter dated 26th October 2023, the Claimant was invited to attend a disciplinary hearing on 1st November 2023 at 9.00 am. He requested to be furnished with the investigation report relied on in crafting the allegations as well as evidence, including witness statements, to enable him prepare for the hearing.
22. According to the Claimant, his request was not responded to. He accuses the Respondent of discriminating against him, by singling him out of other approvers.
23. The Claimant avers that the disciplinary hearing scheduled for 1st November 2023 did not take off, because he was taken ill. Upon his request, the hearing was rescheduled to 6th November 2023.
24. The disciplinary panel was composed of the Respondent's Group Human Resource Director-Temitope Akinsanya, Legal Director-Nadida Rowlands, Supply Chain Director-Haiko Cremer and Group Marketing Director-Anne Joy Muhoro.
25. According to the Claimant, the disciplinary panel acted as the complainant, accuser and judge at the same time. He states that before the hearing took off, he requested to be furnished with the materials relied on in crafting the allegations against him, including the investigation report emanating from the internal investigations mentioned in the show cause notice.
26. The Claimant avers that his request was not acceded to; he therefore accuses the Respondent of withholding critical material from him, thus subjecting him to an unfair disciplinary process.
27. At the hearing, the Claimant reiterated his response to the show cause notice, in addition to calling a witness who testified through a phone call.
28. The Claimant was summarily dismissed by letter dated 7th November 2023, citing four allegations. He avers that the allegations were unfounded and invalid.
29. The Claimant appealed against the dismissal by letter dated 11th November 2023 but his appeal was declined.
30. The Claimant's case is that his dismissal was wrongful and unfair. He adds that he was not paid his terminal dues. He therefore claims the following:



- a. Payment in lieu of notice.....Kshs. 838,199.00
- b. 12 months' salary in compensation.....10,058,388.00
- c. Accrued leave pay.....1,183,581.32
- d. Salary and allowances for 7 days in December 2023.....571,637.00
- e. Quarter 1 variable pay.....190,546.00
- f. General damages for discrimination
- g. Costs plus interest

The Respondent's Case

31. In its Statement of Response dated 15th May 2024, the Respondent admits that the Claimant was its employee, having been employed at the entry level of Sales Representative. At the time of separation, the Claimant held the position of Divisional Sales Manager-Mountain.
32. The Respondent states that the Claimant's tenure was marred with acts of gross misconduct, which eventually led to his dismissal from employment.
33. The Respondent sets out the circumstances surrounding the Claimant's dismissal as follows:
 - a. On 21st September 2023, the Respondent received complaints regarding irregular transactions involving the Claimant, relating to misuse of free issue stock and organisation, as well as approval and endorsement of fictitious events. This led to the Claimant being placed on paid suspension from 21st September 2023, to allow for investigations;
 - b. Upon carrying out investigations, it was established that the Claimant was involved in the misappropriation of company assets, misrepresentation and breach of trust, violation of company policies and loss of company funds or opportunities. The Claimant was therefore issued with a show cause notice dated 16th October;
 - c. The show cause notice issued to the Claimant set out detailed facts supporting each allegation, as well as the evidence in support of each fact. The allegations, facts and evidence were annexed to the show cause notice.
 - d. In the show cause notice, the Claimant was charged with five (5) offences as follows:
 - i. Collusion in fraudulent events and falsification of business records. The Claimant is said to have sought for funding for 'Isiolo Fest' event at North Gate Resort, which was approved, and the activity was handed to the Claimant to execute. The said event did not take place. Nonetheless, the Claimant approved the Measurement and Evaluation (M&E) Report, despite glaring red flags. The Claimant was accused of acting fraudulently, being grossly negligent and failing to exercise any supervision, review, controls and oversight as expected of him;
 - ii. Collusion in fraudulent events and falsification of business records in connection with 'Embu Sevens Activation' where there was misappropriation and theft of promotional stock, meant for retail outlets. The Claimant is said to have approved a false M&E Report, without checking and verifying its content, with the knowledge that it had false and fictitious information. The Claimant was accused of being grossly negligent and fraudulent, by deliberately deceiving the Respondent;



- iii. Fraudulent reporting and concealment of road accidents. The Claimant was accused of presenting two police abstracts on 27th July 2023 and 21st August 2023 relating to accidents which were not authored by him;
 - iv. Violation of global travel and expenses policy for September 2022. The Claimant was accused of multiple instances of irregular approvals of expenses and bypassing of company protocols, by approving his own expenses and irregular and exaggerated expenses;
 - v. Fraudulent misrepresentation and misappropriation of company assets. The Claimant is said to have failed to report loss of a company phone and to submit a police abstract, as required by the Respondent's policies, thus denying the Respondent an opportunity to report to its insurer and obtain a replacement. This failure also denied the Respondent an opportunity to secure its data.
- e. Upon receipt of the show cause notice, the Claimant responded by his letter dated 19th October 2023. According to the Respondent, the Claimant's response failed to address the specific allegations, facts and evidence against him. Instead, the Claimant is said to have chosen to raise complaints touching on tribal profiling, breach of company procedures during investigations, the tone, approach and fairness of the disciplinary process;
 - f. Having failed to offer substantive response to the allegations set out in the show cause notice, the Claimant was, by letter dated 25th October 2023, invited to attend a disciplinary hearing on 1st November 2023;
 - g. By a subsequent email dated 27th October 2023, the Claimant requested for a copy of the investigation report and statements recorded in the course of the investigations;
 - h. According to the Respondent, the show cause notice issued to the Claimant included a comprehensive appendix containing all the allegations, supporting facts and evidence necessary for the Claimant to adequately address the allegations against him, thereby obviating the need for him to be issued with a copy of the investigation report, which is said to have been confidential. The Respondent avers that at no point during the disciplinary process, did the Claimant complain that the material given to him was insufficient for him to mount a credible defence;
 - i. By a letter dated 30th October 2023, the Respondent responded to the Claimant's concerns regarding defamation and the fairness of the disciplinary process, indicating that those concerns would be treated as a grievance and would be handled concurrently with the disciplinary issues. The Respondent further notified the Claimant that the information he had requested for in his email of 27th October 2023 had already been supplied in the show cause notice and the annexed evidence;
 - j. By an email of 31st October 2023, the Claimant requested for re-scheduling of the disciplinary hearing on account of his being unwell, a request that was duly granted. The hearing was therefore rescheduled to 6th November 2023;
 - k. On 6th November 2023, the Claimant was heard on both the grievance which he had raised as well as in response to the allegations set out in the show cause notice;



- l. By a letter dated 7th November 2023, the Claimant was notified of the outcome of his grievance; that upon considering the grievances advanced by him, it was established that:
 - i. No evidence of tribal profiling was found;
 - ii. The Respondent's procedures, as applied, did not breach confidentiality;
 - iii. The tone and approach of the disciplinary process were in line with standard practices and necessary in light of the seriousness of the allegations.
 - m. By a separate letter also dated 7th November 2023, the Claimant was notified of the outcome of the disciplinary hearing, being that he was found liable for gross misconduct on the first, second, fourth and fifth offences. The Claimant was summarily dismissed with effect from 7th November 2023;
 - n. In both the summary dismissal letter and the grievance decision letter, the Claimant was notified of his right of appeal against those decisions;
 - o. By letter dated 10th November 2023, the Claimant lodged an appeal against the grievance decision and urged the Respondent to review the disciplinary process and the Claimant's allegations of defamation and discrimination;
 - p. By a separate letter of even date, the Claimant lodged an appeal against the Respondent's decision to summarily dismiss him from employment;
 - q. The Respondent acknowledged receipt of the appeal letters and by its return letter dated 17th November 2023, notified the Claimant that the two appeals would be considered simultaneously. The Respondent invited the Claimant to submit a statement in support of his appeals;
 - r. On 27th November 2023, the Respondent notified the Claimant that both the decision on his grievance and his summary dismissal had been upheld on appeal;
 - s. Subsequent to the Claimant's dismissal, the Respondent communicated to him severally, asking him to complete the necessary clearance process, to facilitate payment of his terminal dues. The Claimant was paid his full terminal dues in March 2024, upon clearing with the Respondent.
34. The Respondent defends the Claimant's dismissal as justifiable, lawful and fair and asks the Court to dismiss the entire claim.

Findings and Determination

35. There are three (3) issues for determination in this case:
- a. Whether the Claimant's dismissal was lawful and fair;
 - b. Whether the Claimant has proved a claim of discrimination;
 - c. Whether the Claimant is entitled to the remedies sought.



The Dismissal

36. The Claimant was dismissed by letter dated 7th November 2023, stating inter alia:

“Dear Bernard,

Subject: Summary Dismissal From Employment-Breach of Employment Contract, Company Policy and Employment Laws

Following a thorough consideration of your responses and submissions during the entire disciplinary process, the Company has reached the conclusion that you are liable for gross misconduct and disciplinary action as follows:

Findings from the Disciplinary Hearing:

1. Offense: Collusion in Fraudulent Events and Falsification of Business Records

Specific Breach: Fraudulent endorsement and organization of the Isiolo Fest event at North Gate Resort

1. You agree that Isiolo Fest is a divisional activity, requested by you as the Divisional Sales Manager. In essence, you are the general manager for the division and the ultimate head of the division
2. Therefore, it follows that you bear the greatest responsibility to ensure that divisional activities are sound business ventures and ensure that the Company derives benefits from the same
3. You agree that your role was to seek funding for Isiolo Fest as your divisional activity. This funding was approved by the approvers and the activity was handed over to you and your team to execute in favour of the business
4. However, you did not provide any evidence that you or your team members were involved in the planning, execution and post-event review of the activity. There is no evidence that Isiolo Fest happened at Northgate or at all
5. The entire Isiolo Fest transaction was unprocedural and should have raised serious red flags to you as the Head of the Division of the area where the event was allegedly taking place. You should have noted this when approving the Measurement and Evaluation (M&E) report as follows:
 1. lack of a sponsorship contract between the Company and Isiolo Fest organisers setting out what sponsorship benefits would accrue to the company
 2. use of credit notes to supply sponsorship services, yet credit notes are only used in relation to the supply of products
 3. lack of evidence of a company-branded event like pictures, videos, social media content or anything



physical to prove to you that indeed the event happened

4. use of a distributor from a distant territory to execute this event, without a clear business justification
6. All those were red flags and it is deemed that you knew or ought to have known that this event was fictitious, fraudulent or never happened as asserted
7. Therefore the act of you approving the M&E for Isiolo Fest is evidence that you may have been fraudulent or grossly negligent and you failed to undertake your role of supervision, review, offering controls and oversight
8. Your actions or omissions allowed this fictitious event to proceed, and the company was defrauded as money was siphoned from the company for a non-existent event. Your actions or lack thereof render you complicit or grossly negligent and prejudiced the company.

Personal Liability: Your actions are strong evidence of gross negligence and/or deliberate intention to deceive and mislead the company that the activity was legitimate and properly executed reflecting either gross negligence or fraud on your part

Impact: The company was defrauded, as Isiolo Fest was a fictitious event. Your actions have severely compromised the internal controls and governance mechanisms, violated the Company's Code of Business Conduct, and breached Section 44(4) of the *Employment Act*, 2007

2. Offense: Collusion in Fraudulent Events and Falsification of Business Records

Specific Breach: Embu Sevens Activation – Misappropriation and theft of promotional stocks meant for retail outlets in collusion with others at large

1. You approved a false M&E report, without carefully checking or verifying the contents of the same or with the knowledge that it had or may have had false or fictitious information
2. As the Head of the Division and the ultimate event owner, you knew that your approval was critical to give comfort to the business and other approvers that the M&E report and its contents were legitimate and verified. You are the first line of defence for the business on such matters and you have a crucial lead approver role
3. The M&E report that you approved indicates 31,612 cases of assorted beer cans were sold during this event, unlocking 6,317 free promotional beer cans. This depletion number is equivalent to the total country's daily depletions of bottled beer. It has been established that these sales are grossly exaggerated. It is



noteworthy that during the hearing, you did not produce any credible evidence to support these sales and instead sought to disassociate yourself from the data that formed the basis of your M&E submission ostensibly on the basis that it was keyed in the Distributor Management System (DMS) by a distributor Super User. Despite approving this audacious depletion number, you did not call a witness to support the same

4. You abdicated your role and duty of care to the business by failing to query the data that was submitted to support the sales during the event. This enabled fraudulent activity that should have been detected and/or stopped by you as Divisional Sales Manager, charged with leading the division and ensuring that activities are legitimate
5. Consequently, you approved a false M&E without verifying the data and without care of whether the information therein was or was not potentially false and fictitious
6. Three out of four outlets included in the approved M&E report have denied participation in the Embu Sevens event or receiving any of the free promotional stocks which confirms the point above. You failed to disprove this assertion by the outlets and therefore this means that:
 1. Order No CSMK040017124 for Magunas Dallas, amounting to KES 9,044,544 was fictitiously made without the knowledge or consent of Magunas Dallas and it unlocked free promotional stocks which you stole or misappropriated by yourself or in collusion with others at large
 2. Order No CSMK040017118 for Lenash Wines & Spirits, Embu Stage, amounting to KES 2,665,828 was fictitiously made without the knowledge or consent of Lenash Wines & Spirits, Embu Stage, and it unlocked free promotional stocks which you stole or misappropriated by yourself or in collusion with others at large
 3. Order No CSMK040017105 for Joskimow Wines & Spirits amounting to KES 7,338,000 was fictitiously made without the knowledge or consent of Joskimow Wines & Spirits and it unlocked free promotional stocks which you stole or misappropriated by yourself or in collusion with others at large

Personal Liability: Your actions are strong evidence of gross negligence and/or deliberate intention to deceive and mislead the company that the activity



was legitimate and properly executed reflecting either gross negligence or fraud on your part

Impact: Similar to the first offense, the company was defrauded and free issue stocks were diverted from the company to persons who had no right to receive the same. The outlets/consumers who were legitimately entitled to the free promotional stocks were deprived of this benefit. There is a significant loss of trust, breach of the Company's policies and substantial financial loss, indicating a severe compromise in the integrity of executing trade activities.

3. Offense: Fraudulent Reporting and Concealment of Road Accidents
Specific Breach: Presenting two police abstracts in your name that were not authored by yourself

1. You confirmed during the hearing that the police abstracts that you presented to the Company dated 27 July 2023 and 21 August 2023 were not signed by you
2. You gave unsubstantiated evidence during the hearing that the documents were applied on your behalf by your two brothers. While this was corroborated by the phone evidence of Constable Laban Kiplangat we have no means of verifying this
3. Therefore, while there are serious issues raised here, we formally abandon this issue on grounds of lack of conclusive evidence at this stage
4. However, we note that the motor vehicle claims that you made remain under independent investigation by the insurance company and these documents are part of the evidence under examination. Therefore, the Company reserves the right to revert back to you on this issue. But for purposes of these current disciplinary proceedings this matter is abandoned

4. Offense: Violation of Global Travel and Expenses Policy (September 2022)
Specific Breach: Multiple Instances of Irregular Expense Approvals and bypassing of company protocols regarding expense approvals

1. Clause 8.8.5 of the Diogeo Global Travel and Expense Policy provides that: All business meal expenses should be accompanied by the names of all attendees and relevant receipts. The most senior employee present should be the one incurring and accounting for the costs, so that they are approved by their line manager. Self approval of expenses is strictly prohibited
2. While you agree you were present at the venues in question save for one, you strongly denied participating in the expenses that were later approved by yourself



3. Therefore, you want us to believe that you were in the same place with your team, you did not participate in the entertainment or left early in some instances, and then later they sent the expenses to you and you deemed it fit to approve the same
 4. You failed to explain how you could approve accommodation for Nicholas Kilungu for KES 45,270 at Aba Hotel for one night on 1 September 2020. This amount is grossly exaggerated and it is irregular
 5. There is an indication that the expenses you approved may have been erroneous, misused, excessive and irregular, but the evidence on this is not conclusive and we return the matter back as unsubstantiated at this point in time
5. Offense: Fraudulent Misrepresentation and Misappropriation of Company assets

Specific Breach: Failure to report loss of company phone, failure to present police abstract for loss of phone leading to the loss of opportunity by the company to report the matter to insurance and get compensation. Failure to secure company data

1. You claim that your phone was lost on 3 February 2023
 2. You did not report the loss or present the abstract to the company until 19. October 2023 when responding to the NTSC letter
 3. Therefore, you denied the Company the opportunity to report the matter to insurance and get a replacement to your phone
 4. You also denied the Company the right to block your phone and remotely wipe the same to secure company data in breach of our Data Protection Policy
 5. You presented evidence that you reported the matter to IT. However, this WhatsApp message dated 30th January 2023 (before the said loss) is only a request for Sim Swap and does not highlight loss of a phone. This does not count as credible evidence and this allegation is upheld
6. You were not remorseful about your breach of process Personal Liability: Your actions are strong evidence of wanton breach and disregard of company policy
- Impact: The company lost an opportunity to get insurance replacement and to secure its data. Your actions are a breach of company policy

Overall Conclusion:

The company has suffered loss and damage by your actions and/or omissions. This has eroded the trust the Company had in you as business leader. The patterns and evidence indicate gross negligence, and disregard for company



policy and we have reasonable cause to believe that you had intent to defraud the Company, and violate our Code of Business Conduct, Company policies and Section 44(4) of the Employment Act, 2007.

Consequences:

Considering the above findings and the gravity of the violations, the Company has resolved to summarily dismiss you, effective 7 November 2023

Terminal Dues:

1. Salary until 7 November 2023
2. Pay for accrued leave days until 7 November 2023
3. Deductions for any dues owed to the Company

Next Steps:

Please return all company properties and complete the clearance process. Your final dues will be paid following the standard payroll process

Right to Appeal:

Should you wish to appeal this decision, submit your appeal in writing to the Managing Director (copied to the Human Resources Director) within three (3) working days, stating your grounds

Please acknowledge receipt of this letter by signing below and return it promptly

Yours faithfully,

For East African Breweries PLC

(signed)

Temitope Akinsanya

Group Human Resources Director”

37. The show cause notice issued to the Claimant on 16th October 2023, levelled five (5) charges against him; ranging from collusion in fraudulent events and falsification of business records, fraudulent reporting and concealment of road accidents, violation of global travel and expenses policy, to fraudulent misrepresentation and misappropriation of company assets.
38. It would appear however that the offences relating to fraudulent reporting and concealment of road accidents and violation of global travel and expenses policy were dropped midstream, leaving three surviving charges being; collusion in fraudulent events and falsification of business records with regard to ‘Isiolo Fest’ and ‘Embu Sevens’ Events and fraudulent misrepresentation and misappropriation of company assets.
39. With respect to ‘Isiolo Fest’, the Claimant was accused of gross negligence or fraud, by approving a Measurement and Evaluation report that was not supported by proper documentation.



40. With regard to ‘Embu Sevens’ the specific breach was cited as ‘misappropriation and theft of promotional stocks.’ The Claimant was specifically accused of approving a false Measurement and Evaluation report without verifying the legitimacy of its contents.
41. Regarding the charge of fraudulent misrepresentation and misappropriation of company assets, the Claimant was faulted for alleged failure to report loss of a company phone issued to him, thus denying the Respondent an opportunity to claim compensation from its insurer and secure its data.
42. In his response to the show cause notice and at the subsequent personal hearing proceedings, the Claimant denied all the charges levelled against him. With reference to the accusations around the ‘Isiolo Fest’ and ‘Embu Sevens’ events, the Claimant denied any wrongdoing; stressing that he was not the sole approver of company expenditure related to sponsorship or market activation. He stated that in approving the impugned Monitoring and Evaluation reports, he relied on data posted in the Respondent’s online system, pointing out that it was not humanly possible for him or even his team to be present at every event sponsored by the Respondent.
43. The Claimant’s defence to the charge of fraudulent misrepresentation and misappropriation of company assets, was that he in fact reported the loss of the mobile phone in question, to the Police and to the Respondent’s Information Technology Department.
44. The charges levelled against the Claimant were serious and could lead to summary dismissal, if proved. But the question must now be asked if they were actually proved to the standard established by law.
45. In adjudicating claims of unlawful dismissal such as the present one, the Court sets out to ask two twin questions; first, if the employer had a valid reason for executing the dismissal and second, if due process was observed in the dismissal transaction.
46. Regarding the validity of reason, Section 43 of the *Employment Act* sets the following standard:
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- (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.
47. This Court is fully aware of the ‘reasonable responses test’ by which a disciplinary action, taken by an employer against an employee, is to be measured. This benchmark requires the Court to avoid the temptation to substitute the employer’s decision with its own.
48. Put another way, the Court does not ask what action it would have taken had it been in the employer’s position. All the Court does is to weigh the employer’s decision against what a reasonable employer would have done in the circumstances of the case.
49. The Court must also resist any attempt by the parties to turn the proceedings before it into a take two disciplinary hearing. In other words, the parties must deploy all their arms at the shop floor. This is why Section 43 of the *Employment Act* must always be read alongside Section 41 which provides a blueprint for internal disciplinary proceedings.



50. In his written submissions dated 1st April 2025, the Claimant referred to the decision in Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR) where the Court of Appeal stated as follows:

“There can be doubt that the [Employment] Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

...to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees”

51. The provisions of Section 41 were summarised by my brother, Radido J in Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR the following terms:

“The ingredients of procedural fairness...within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

52. It is on record that disciplinary proceedings were taken out against the Claimant pursuant to an investigation commissioned by the Respondent. In drawing this conclusion, I reject the Respondent’s feeble submission that the investigation report was not relevant in the disciplinary proceedings. It is also on record that the Claimant asked for the investigation report right at the inception of the disciplinary proceedings but his request was denied.

53. In its decision in Rebecca Ann Maina and 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR this Court held that:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”



54. In its decision in *Ol Pajeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR the Court of Appeal affirmed that an audit report relied upon by the employer to take disciplinary action against the employee, was a necessary document for purposes of preparation of the employee's defence.
55. In *Jonathan Chepkwony v George Makateto, Acting Chief Executive Officer, Export Processing Zone Authority (EPZA) & 2 others* [2021] eKLR it was held that an employee's right to a fair disciplinary process includes the right to be informed of the allegations against them, and to be supplied with the necessary information to prepare their defence.
56. In the instant case, the Claimant was denied the investigation report as well as witness statements that nailed him. In my view, this denial, under the pretext of unsubstantiated confidentiality considerations, was a gross violation of mandatory procedural fairness requirements; so gross that the entire disciplinary process was compromised. As a result, the Respondent failed to establish valid reasons for dismissing the Claimant.
57. There is one more thing to say about the Respondent's conduct in this matter and it is this; after the Claimant's exit from employment, the Respondent obtained a letter dated 21st November 2023, from Kenyatta University, stating that the Claimant's studies at the University had been discontinued in the year 2012.
58. In a bizarre twist, the Respondent's Human Resources Director, Annette Ngugi told the Court that she had no idea how the letter had come into the Respondent's possession. In the absence of any explanation from the Respondent regarding this letter and its purpose, the only inference to make is that the Respondent was actuated by malice against the Claimant. This firms up my finding that the Claimant's dismissal was unlawful and unfair.

Discrimination?

59. The Claimant bases his claim of discrimination on his assertion that he was singled out and unfairly targeted for dismissal, while his colleagues were let to go scot-free. For a claim of discrimination to succeed, the alleging party must establish at least one of the grounds set out in Article 27(4) of *the Constitution* or Section 5(3) of the *Employment Act*. These grounds include; race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion or conscience.
60. The Claimant did not establish any of the listed grounds and this claim must therefore fail.

Remedies

61. Pursuant to the foregoing findings and conclusions, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have considered the Claimant's long service and the finding that he did not contribute to the dismissal.
62. I have further considered the Respondent's refusal to avail the Claimant an opportunity to see the investigation report and witness statements relied upon to make the decision to dismiss him. I have also taken into account the Respondent's action of procuring a prejudicial letter regarding the Claimant's studies at Kenyatta University, without availing him the right of reply.
63. I further award the Claimant one (1) month's salary in lieu of notice.
64. No evidence was adduced to support the claim for Quarter 1 variable pay, which therefore fails and is dismissed.



- 65. The claims for accrued leave pay and salary for seven days in December 2023 were abandoned in the course of trial.
- 66. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 12 months' salary in compensation.....Kshs. 10,058,300
 - b. 1 month's salary in lieu of notice.....838,199
 - Total.....10,896,787
- 67. This amount will attract interest at court rates from the date of judgment until payment in full.
- 68. The Claimant will have the costs of the case.
- 69. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JULY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Muli for the Claimant

Mr. Nyaburi for the Respondent

