



REPUBLIC OF KENYA



KENYA LAW
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**Mbogo v Harley's Limited (Cause 4 of 2017)
[2025] KEELRC 2147 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 4 OF 2017**

**JW KELI, J
JULY 18, 2025**

BETWEEN

FRANCIS KINYUA MBOGO CLAIMANT

AND

HARLEY'S LIMITED RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated 5th January 2017, amended on 10th March 2023, the claimant sued the respondent, his ex-employer seeking the following Orders:-
 - a) A declaration that the Claimant as terminated was declared redundant.
 - b) A declaration that the Respondent's dismissal of the Claimant from employment was unprocedural and improper and the Claimant is entitled to payment of his terminal dues compensatory damages as pleaded.
 - c) An order for payment of the Claimant's terminal dues and compensatory damages totalling to Kshs. 205,368/=.
 - d) The Respondent be ordered to issue a certificate of service to the Claimant.
 - e) An order for the Respondent to pay costs of this suit plus interest thereon.
2. The claimant in support of the claim filed his list of witnesses dated 5th January 2017; undated witness statement; and list of documents dated 5th January 2017 with the bundle of documents attached.
3. The Respondent entered appearance through the law firm of Kimani & Michuki Advocates and filed a memorandum of reply dated 30th January 2017, denying the allegations in the memorandum of claim. In support of the response, the respondent filed a list of witnesses dated 20th December 2019; witness statement of Prabjit Chana of even date; and a list of documents dated 15th January 2021.



Hearing and evidence

4. The claimant's case was heard on the 5th March 2025. The claimant testified on oath, adopted his undated witness statement filed with the claim and produced his documents under the list of the same date. He was cross-examined by the advocate for the respondent, Gakunga. He was called as his witness Justus Muimi (CW2) who testified on oath, adopted his witness statement dated 5th January 2017 as his evidence in chief, and was cross-examined by counsel for the respondent.
5. The respondent's case was heard on even date with RW1 as Parbjit Chana. She testified on oath, adopted her witness statement dated 20th December 2019 and produced documents under list dated 15th January 2025 by the Respondent as the respondent's evidence in chief. She was cross-examined by counsel for the claimant, Ms. Muhanda. On close of the case parties took directions on filing of written submissions.

The Claimant's case in summary

6. The Claimant herein was engaged by the Respondent on the 4th of January, 2016 as a warehouse supervisor on casual basis which was later confirmed into permanent employment on the 5th day of July 2016 at a monthly salary of Kshs 17,114/=. The Claimant avers that he faithfully carried out his duties as a warehouse assistant despite the fact that the Respondent constantly and publicly hauled unjustified insults at him, until 16th August, 2016 when the Respondent informed him and his colleagues working in the warehouse that certain drugs by the name Isoptin SR tablets were missing. They were instructed to search for the drugs within the warehouse. It is the Claimant's case that he and his colleagues were confused as to how the management had discovered that the said drugs were missing in view of the fact that no stock taking had been carried out and neither had a complaint been launched on any missing drugs. Upon undertaking the search, the Claimant together with the others were unable to find the said drugs and accordingly informed the Respondent.
7. The Respondent immediately summoned officers from Parklands police station who entered into its premises and arrested the Claimant alongside 3 others in the warehouse, and remanded them at Parklands police station for one night. The Claimant was released on a Kshs. 5,000/- police bail pending investigation. Immediately after his release by the police, the Claimant was informed by the Respondent that he had been suspended from work to pave way for investigations. He continued reporting to the police station until 29th August 2016, when the Claimant was informed that the investigations were complete and he had been found innocent of the accusations made against him.
8. The Claimant and his colleagues returned to work at the Respondent's premises, but were each issued with a termination letter by the Human Resource officer. On attempting to get to the bottom of the matter, the Claimant was informed that there was no work for them. It is the Claimant's position that the Respondent failed to comply with lawful procedure while terminating his employment, for the reason that the Respondent failed to give him an opportunity to be heard, failed to give a valid reason why his employment was being terminated, and failed to follow due process prior to his termination from employment.
9. The Claimant's claim is for damages for wrongful/unfair termination on redundancy equivalent to 12 months' salary Kshs 205,368/-.

Respondent's case in brief

10. The Respondent admitted that it employed the Claimant as a warehouse assistant within the Respondent's warehouse team. The Respondent's business, being that of fast moving medical



products under the care of various employees, requires that all employees fulfil their duties diligently, with utmost care and honesty. Due to the nature of its business and products, the Respondent conducts routine audits and stock taking to ensure that all products are fit for human consumption and accounted for. An audit was conducted by the Internal Stock Audit team as per the assigned schedule at the material time, and it was discovered that stock worth more than Ksh. 1 Million of a drug called ISOPTIN was missing.

11. The Respondent through its Warehouse Operations Manager, on 16th August 2016, called a meeting to address the issue of the missing drugs which were stored on the 5th Floor at the Respondent's warehouse. The meeting was attended by the Warehouse Operations Manager, the Warehouse Manager, the Human Resource Officer, the Claimant, the 5th Floor Manager and two (2) other 5th floor staff. During the meeting, it became clear that the drugs could not be accounted for since the Claimant and the other staff could not provide any explanation for the loss. On checking the ledgers and records on the floor, it was established that the records were not updated, the product ledgers were incomplete and the Claimant had not checked any of them as required by the Warehouse System Procedures.
12. As is standard practice for the Respondent and as required by the Respondent's Insurance Cover Provider, the Respondent reported the suspected theft to Parklands Police Station and its security provider, Securex Agencies Limited. The staff meeting was adjourned to 30th August 2016 to give the Claimant and his colleagues an opportunity to recollect their thoughts and prepare adequate responses.
13. On 18th August 2016, a Suspension Letter was issued to the Claimant to pave way for investigations. A thorough audit was carried out by the Operations Manager and the Warehouse Manager which revealed that there were several missing drugs, namely: Duphaston tabs -118 packets missing; Duphalac suspension -120 packets missing; Kladic 250mg - 42 packets missing; and Kladic 500g 14s - 229 packets missing.
14. On 30th August 2016, the scheduled meeting was held and the Claimant and his colleagues were given a further opportunity to be heard. The Claimant and his colleagues again failed and/or refused to provide any explanation for the lack of sufficient records, poor record keeping and missing products. It became clear to the Respondent that the Claimant was part of a syndicate that actively defrauded the Respondent and/or performed his duties negligently by failing to ensure that all products and goods under his care were accounted for and not misappropriated. The Respondent states that they were left with no option but to terminate the employment of the Claimant and his colleagues to mitigate their losses. According to them, it would have been completely unfair to the Respondent and its employees to retain the Claimant and his colleagues as any further loss would have crippled the company leading to massive job losses.
15. The Respondent concluded by stating that the Claimant was responsible for the loss of goods worth more than Kenya Shillings One Million (Kshs. 1 Million) and was accorded a fair hearing before the lawful and fair termination.

Determination

Issues for determination

16. The claimant did not file written submissions. The respondent filed written submissions and identified the following issues-
 - a. Whether the termination of the claimant's employment was unfair and unlawful.



- b. Whether the claimant is entitled to the reliefs sought.
17. The court having considered the case and prayers sought found adopted the issues in the submissions by the respondent plus prayer 1 of the claim thus the issues are-
- a. Whether the claimant's employment termination amounted to redundancy
 - b. Whether the termination of the claimant's employment was unfair and unlawful
 - c. Whether the claimant is entitled to the reliefs sought.

Whether the claimant's employment termination amounted to redundancy

18. The claimant pleaded in witness statement adopted as evidence in chief that the respondent reported him and others to the police for missing pharmaceutical drugs in its warehouse, they were arrested, remanded and released on police bond. He was informed by the police he was innocent after investigation hence no charges were preferred. On return he was issued with a termination letter by the respondent stating his services were no longer needed. He was also verbally informed that there was no work for him to do.
19. Conversely, the respondent in witness statement of RW1 contended that after the theft incident it was left with no option but to terminate the services of the claimant and his colleagues following the unexplained colossal loss. That the claimant was responsible for loss of goods worth 1 million and was accorded a fair hearing before the termination.
20. The court perused the termination of employment letter issued to the claimant. The letter was dated 30th August 2016 and simply stated- 'Take note that the management wishes to inform you that your services will not be required from 30th August 2016'
21. Redundancy is defined in the *Employment Act* as- "redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;"
22. The court finds that the instant termination was not redundancy as the employee was not innocent. He was facing theft allegations. Though the letter of termination did not state why his services were no longer needed, it was logical to conclude the termination was informed by the alleged theft, the employer having reported the incident to the police, the claimant arrested and issued with police bail. The claimant was not allowed back to work on release by the police. During the hearing the claimant confirmed he was issued with a suspension letter on the missing drugs upon being released by the police. He confirmed he signed the suspension letter and the reason was pending investigation. The claimant denied there was a meeting on 30th August 2016. During cross-examination the claimant was referred to the document dated 30th August 2016 at page 12 of the respondent's documents titled – meeting – investigations of missing stocks from 5th floor. In the letter it was stated that 'the members shall in consent sign their termination of employment letters as agreed after being given an opportunity to offer explanations' In redundancy cases the employee is not at fault. This was not a case of redundancy.

Whether the termination of the claimant's employment was unfair and unlawful

23. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—



- (a) that the reason for the termination is valid
- (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

On the reasons/substantive fairness

24. Section 43 of the *Employment Act* provides for proof of reasons for termination as follows:-

‘43. Proof of reason for termination

- (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.”

25. The respondent did not disclose the reason for the termination in letter of dismissal dated 30th August 2016 as found above. It did emerge from the hearing that there was a case of missing pharmaceutical drugs of which the respondent believed the claimant with others was responsible. A suspension from duty letter dated 18th august 2016 was produced in which it was stated was pending investigations by the police. The police abstract was produced being a report of loss of pharmaceutical goods and was stamped 29th august 2016.

26. The respondent relied on a document dated 30th august 2016 which was said to be minutes. The court was of the opinion the alleged meeting was not a disciplinary proceedings as envisaged under section 41 of the *Employment Act* as it was stated that the meeting was held to conclude investigations. The claimant does not appear to have been warned that this was a disciplinary hearing and informed of right to appear with a shop floor union representative or a fellow employee of choice. Indeed it is stated in the document that the claimant and others were to be given opportunity to be heard before termination.

27. The claimant confirmed that under his contract could be terminated for negligence summarily (paragraph d of the contract C-exhibit 1). The investigations letter document dated 30th august 2016 stated there was negligence by the warehouse workers who included the claimant as there was no clear record of movement of the drugs. During cross-examination, the claimant was asked as follows:- ‘you were a warehouse assistant and confirmed missing drugs and regardless of the clearance by the police there was a reason for the action by Respondent. The claimant answer was- yes’’. During re-examination the claimant told the court there was overall warehouse manager who had the key to the warehouse. That the claimant was the assistant and there were other people in the warehouse.

28. The court finds that on a balance of probability the documents before the court and the oral testimony of the claimant at cross-examination disclosed that the Respondent had a reasonable basis to suspect that the claimant and his colleagues working in the warehouse were responsible for the missing drugs



of which it reported the case to the police. The court is guided by the decision *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR;

“an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken. In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it later turns out that it, in fact, did not.” The same was upheld by the Court of Appeal in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR as follows: -

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.” Quoting an extract from *Halsbury’s Laws of England*, the appellate court went further to comment as follows: - “...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach the range of reasonable responses testing that in many cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view and another quite reasonably take another, the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, but if the dismissal falls outside the band, it is unfair.” (emphasis given on the relevant test).” The court applying the foregoing jurisprudence held that a justified reason for the termination was disclosed from the documents before the court.

Procedural fairness.

29. Procedural fairness in termination of employment is as stated in section 41 of the *Employment Act* wit – ‘41. Notification and hearing before termination on grounds of misconduct (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.” The court agree with the decision cited by the respondent in *Matsesho v Newton* (2022) e KLR. The court held that the document on a letter dated 30th august 2016 was not minutes of a disciplinary hearing. At best it was an investigation report. The said document stated that termination letter would issue after hearing of the affected employees.



The court finds that the process under section 41 was not undertaken before the issuance of the termination letter. That process protects the right of the employee who is called by the employer for a meeting, informed of right to be accompanied by shop floor union representative or a fellow employee of choice at the place the employer will explain the reasons it contemplates to terminate the employment and then the employee is allowed chance to offer his defence/explanations. The foregoing did not happen. The court holds that the termination was thus procedurally unfair.

Whether the claimant was entitled to reliefs sought

30. The claimant sought for the following reliefs:-
- a) A declaration that the Claimant as terminated was declared redundant.- The court returned in the negative
 - b) A declaration that the Respondent's dismissal of the Claimant from employment was unprocedural and improper and the Claimant is entitled to payment of his terminal dues compensatory damages as pleaded.- The court held that there existed justified reason for the termination but the termination was unfair for lack of procedural fairness,
 - c) An order for payment of the Claimant's terminal dues and compensatory damages totalling to Kshs 205,368/=.
31. The court having found the termination unfair for lack of procedural fairness and awards one month notice pay thus Kshs. 17,114.
32. The Respondent be ordered to issue a certificate of service to the Claimant.- the same ought to issue under section 51 of the *Employment Act* .

Conclusion

33. The claim is allowed. The termination is held to have been procedurally unfair. Judgment is entered for the claimant against the respondent as follows-
- a. Notice pay of 1 month salary of Kshs. 17, 114 with interest at court rates from date of filing suit.
 - b. Certificate of service to issue under section 51 of the *Employment Act*.
 - c. Costs of the suit
34. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Claimant: Ms. Omwoma h/b Ms. Muhanda

Respondent: absent

