G4S Kenya Ltd v Mutinda & another (Employment and Labour Relations Appeal E018 & E019 of 2023 (Consolidated)) [2025] KEELRC 2047 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2047 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS
APPEAL E018 & E019 OF 2023 (CONSOLIDATED)

JW KELI, J

JULY 4, 2025

BETWEEN

G4S KENYA LTD ..... APPELLANT

AND

WILFRED MBWERI MUTINDA ..... RESPONDENT

AS CONSOLIDATED WITH

EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2023

BETWEEN

G4S KENYA LTD ..... APPELLANT

AND

STANLEY MWAMBA OGONGO ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. S.A. Opande (PM) delivered at Nairobi on the 30th day of January, 2023 in MCELRC No. 1850 of 2019)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. S.A. Opande [PM] delivered at Nairobi on the 30th day of January, 2023 in MCELRC No. 1850 of 2019 between the parties filed a memorandum of appeal dated the 27th of February, 2023 seeking the following orders:-

    a. The appeal be allowed.

b. The judgment of the Chief Magistrate's Commercial Courts at Milimani [Honourable S.A Opande] delivered on 30th January 2023 be set aside and substituted therefore with an order dismissing the suit against the appellant with costs.

c. The costs of this appeal be awarded to the appellant

Grounds Of The Appeal

2. Based on the law and the evidence before the court the Learned Magistrate erred in failing to hold that there were fair and valid reasons to terminate the respondent's employment for the following reasons:

   i. The appellant adduced evidence to show that it dismissed the respondent after establishing that the respondent:

   ii. Was trained on the Cash In Transit [CIT] Operations Manual and operation of the deposita machine;

   iii. Admitted that the deposita machine was properly functioning;

   iv. Failed to account for cash totalling to Kshs. 3,144,200.00 belonging to a client, Barclays Bank Kenya, which was in his possession contrary to Cash Operating Procedures; and

   v. Was given an opportunity to be heard.

3. Having failed to consider the matters set out above, the Learned Magistrate erred in making an award for compensation for unlawful termination.

4. Without prejudice to the foregoing, even where compensation was payable, the award of 12 months' pay as compensation for unlawful termination is in any event inordinately high and excessive in the circumstances of this case.

5. The trial court erred in awarding the respondent one month's salary in lieu of notice in the circumstances.

Background To The Appeal

6. The Respondent filed a claim against the Appellant vide a memorandum of claim dated the 4th of October 2019 seeking the following orders:-

   a] A declaration that the Claimant's suspension from duty and summary dismissal amounted to a violation of the Claimant's rights under section 5[2] and [3] [b] of the *Employment Act* 2007, Article 27[5] and Article 41[1]of the *Constitution* of Kenya.

   b] A declaration that the Claimant suffered unfair, wrongful and unlawful dismissal from employment.

   c] The Respondent be ordered to pay the Claimant the following sums:

      i. One month's salary in lieu of notice.....26,395.53

      ii. Compensation for wrongful and unfair dismissal from employment calculated at 12 months gross salary being 316,746.36

      iii. Salary for the remaining period of contract from August 2019 to Retirement in August 2039.....6,334,927.20

iv. Interest on [i], [ii] and [iii] above from the date of filing the suit until payment in full at court rates

d] An order that the Respondent do issue the Claimant with a certificate of service and references befitting his status.

e] The Respondent be ordered to pay the Costs of the claim and interest.

[Pages 3-13 of the ROA dated 27th February 2023].

7. The Respondent also filed his verifying affidavit, list of witnesses, witness statement and list and bundle of documents all dated the 4th of October 2019. He also filed the witness statement of one Mwita Makenge Maroa dated 17th December 2019, and Simon Kagoya Gicheru dated 24th August 2020. [See pages 14-81 of ROA].

8. The claim was opposed by the Appellant who entered appearance and filed a statement of response dated the 31st of January 2020 [pages 82-88 of ROA]. They also filed a witness statement of James Nyaga dated the 2nd of March 2021, witness statement of Collins Luvai dated the 21st of February 2020, and bundle of documents dated 20th February 2020 [pages 89-232 of ROA].

9. The Respondent filed a Reply to Statement of Response dated 21st February 2019 [pages 233-235 of ROA].

10. The Claimant/Respondent's case was heard on the 19th of October 2021, with the Claimant testifying in the case as PW3 relying on his witness statement. He produced his documents, and was cross-examined by counsel for the Respondent/Appellant Mr. Odiero [pages 4-9 of Supplementary ROA dated 18th March 2025]. Three other witnesses testified on behalf of the Claimant as PW1, PW2 and PW4 on the same day and on the 10th of January 2022, adopting their filed witness statements. They were also cross-examined by counsel for the Respondent/Appellant Mr. Odiero [pages 10-21 of Supplementary ROA].

11. The Respondent/Appellant's case was heard on 2nd March 2022, when two witness for the Respondent testified as DW1 and DW2, relying on their witness statements. DW1 produced the Appellant's documents. The two witnesses were cross-examined by counsel for the Claimant/Respondent Mr. Thiongo [pages 21-27 of Supplementary ROA].

12. The parties took directions on filing of written submissions after the hearing. The parties complied.

13. The Trial Magistrate Court delivered its judgment on the 30th of January 2023 partly allowing the Claimant's claim to the tune of Kshs. 343,141.89 comprised of one month's pay in lieu of notice, and 12 months' salary as compensation for unfair dismissal [Judgment at pages 344-351 of ROA].

14. The parties agreed that the judgment in this appeal would apply to *Appeal No. E019 of 2023*.

Determination

15. The appeal was canvassed by way of written submissions. Both parties filed.

16. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co*. [1968] EA 123 that:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in

mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Further in on principles for appeal decisions in *Mbogo v Shah* [1968] EA Page 93 De Lestang VP [As He Then Was] Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

18. In their submissions dated the 29th of April 2025, the Appellant identified two issues for determination, namely:-

    i. Whether the Appellant proved that it had fair and valid reasons to terminate the respondent's employment; and

    ii. Whether the respondents are entitled to the awards made by the trial court.

19. The Respondent also identified two issues for determination in his submissions dated the 16th of May 2025, namely:

    i. Whether the learned magistrate erred in law and in fact in finding that the respondent had been unlawfully and unfairly terminated; and

    ii. Whether the learned magistrate erred by allowing the prayers on notice pay and compensation of 12 months' salary for unfair dismissal.

20. The court having perused the grounds of appeal and taken into consideration the issues submitted by the parties, was of the considered opinion that the issues placed by the parties before the appellate court for determination were:-

    a. Whether the trial court erred in its finding on fairness of the termination.

    b. Whether the reliefs awarded to the two respondents were merited.

Whether the trial court erred in its finding on fairness of the termination

21. 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 of employment 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.

22. The burden of proof in employment cases is as stated in section 47[5] of the *Employment Act* as follows:-

" 47

[5] For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

Substantive Fairness

23. Section 43 provides for proof of reasons for termination of employment 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."

It is on the basis of the foregoing legal framework the court proceeded to re-evaluate the evidence before the lower court to reach own conclusion on the substantive fairness, which relates to the fairness of the reason[s] for the termination of the employment.

24. The appellant issued the respondent[Wilfred Mbweri Mutinda] with a letter of summary dismissal dated 30th July 2019 which stated as follows:-

" G4S Kenya Limited

.....

Tuesday, 30 July 2019

Wilfred Mbweri Mutinda

P/No 24022

Cashier

Nairobi.

Dear Wilfred,

Re: Summary Dismissal

> With reference to the disciplinary hearing held on 16th July 2019. It was established that on 06th Ju 2019 while assigned duties to offload a Deposita Machine at Agha Khan Hospital, you failed to account for cash totalling to Kshs 3,144,200 belonging to Barclays bank Kenya which was in your possession contrary to Cash Operating Procedures.
>
> You're above action amount to gross misconduct. This letter therefore serves to advise that you have been dismissed from the services of the company as per Section 44 of the Employment Act 2007 with effect from the date of this letter.
>
> You are therefore required to hand in all the company property in your possession to enable you access your dues. Your terminal dues will be computed as follows-:
>
> Days worked up to 30th July 2019;
>
> Leave earned if any but not taken up to 30th July 2019;
>
> Your terminal dues net of statutory taxes and any monies you maybe owing the company will be processed upon clearance. In order to facilitate quick processing, you are requested to complete the attached clearance form and return to us
>
> You have a right to appeal within 14 days.

Yours Sincerely,

For: G4S [K] Limited

Sheilah Chebet Ketter

HR Officer Cash & Courier”

[Page65 Of The Record Of Appeal]

25. The Respondent in Appeal E019 OF 2023, Stanley Mwamba Ogongo, received a similar summary dismissal letter which stated as follows-

> " G4S Kenya Limited
>
> ....
>
> Tuesday, 30 July 2019
>
> Stanley Ogongo P/No 24075 Radio Operator
>
> Dear Stanley,

Re: Summary Dismissal

With reference to the disciplinary hearing held on 17th July 2019. It was established that on 13th June 2019 while assigned duties to offload a Deposita Machine at Agha Khan Hospital;

You failed to account for cash totalling to Kshs. 2,009,000 belonging to Barclays bank Kenya which was in your possession.

You failed to perform your roles as a Crew Commander

You're above action amount to gross misconduct. This letter therefore serves to advise that you have been dismissed from the services of the company as per Section 44 of the Employment Act 2007 with effect from the date of this letter.

You are therefore required to hand in all the company property in your possession to enable us process your dues. Your terminal dues will be computed as follows-:

Days worked and overtime up to 30th July 2019;

Leave earned if any but not taken up to 30th July 2019;

Less any monies owed to the company

Your final dues shall be subject to all statutory deductions, any loans owed to the company and cost of lost company property in your possession, if any.

You have a right to appeal within 14 days.

Yours Sincerely,

For: G4S [K] Limited

Sheilah Chebet Ketter

HR Officer Cash & Courier"[page 39 of the Record of appeal in E019 OF 2023]

26. The court concluded that the respondents were dismissed for similar charges but for incidents occurring on different dates.

27. The respondents in their witness statements adopted as evidence in chief and supported by statements of their colleagues gave account of the incident leading to the dismissal to submit they were unfairly terminated.

28. The trial court in finding unfair termination made the following findings:-

"I have considered and evaluated the evidence and the rival submissions. What comes out is that the claimants failed to call the customer and have he customer witness while they sealed the bags. The dismissal of the claimants is based on suspicion that the bags were not sealed and hence money was lost from the point of retrieval and their way to the office.

According to the respondent, money was stolen at the point when the bag was retrieved and before the bags were delivered. On the bag retrieval, the respondent claims that the client ought to have been present as per the operation manual. There is no evidence that the claimants were privy to the operation manual. The claimants denied having been shown the operation manual for cash in transit. Their evidence was corroborated by their witness who claimed they had no knowledge of CIT operation manual.

I would trust them when they say they were not aware that the client had to be present during retrieval of the bag.

Secondly, the respondent claims that the CCTV camera has a slid counter and the sealing of the bags at the depositor machine area is not visible. One then wonders what cameras would be doing at such a sensitive area if crucial footage cannot be obtained. Now assuming that the sealing was not done properly and that money was stolen in transit from the depositor machine to the cash center. 2,000,000/= is a huge sum of money that is not money that can just be hidden on one's body and go unnoticed. This court has not been told whether the tracking devices on the motor vehicle reflects that the CIT vehicle or the escort car diverted from the way to the office. The question is where was this money hidden by the time the claimants arrived at the office.

It was the evidence of the claimant that remain unrebutted that they were not present when the bags were opened and those who opened them were neither called during disciplinary hearings or before the court. The same apply to CCTV cameras allegedly set during containing of the money or opening of the bags. I find the reasons for termination of the claimants not having been genuinely believed to exist. There were officers who were protected and the claimants turned out to be sacrificial lambs.

I find the claimants termination unfair and unlawful. On the terminal dues, I will allow the prayers on notice pay and compensation of 12 months salary for unfair dismissal."

The appellant 's submissions on reasons for the termination

29. The appellant submitted that on the reasons for termination, Section 43[1] of the *Employment Act*, 2007 provides that an employer is required to prove the reasons for the termination and only where it fails to do so, is the termination deemed to have been unfair within the meaning of section 45 of the *Employment Act*. In considering those reasons, section 43[2] provides that the reasons for termination 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 [emphasis ours]. Section 45 of the same *Act* provides that a termination is unfair if the employer fails to prove that the reason was valid and fair related to the employee's conduct, capacity and compatibility or based on the operational requirements of the employer.

On the dismissal of Wilfred Mbweri Mutinda:-

30. The appellant submitted that the respondent was notified of one ground of dishonesty and negligence of duty leading to the loss of Kshs. 3,144,200/- collected from Aga Khan Hospital on 6th June 2019 while on CIT duties. The appellant's team lead who was in charge of supervising customer consignments once the crew commanders returned from their collection assignments noticed that there was a variance in the printout from the docking machine as the sum of Kshs. 3,855,350/- was the one that was processed yet the team was required to process Kshs. 6,999,500/- [page 113 to 114 ROA]. The team lead thereafter raised alarm with the appellant's Risk Officer who confirmed the variance. At the disciplinary hearing, Mr Mutinda was unwilling to participate in the process, outrightly refusing to answer questions that were posed to him regarding the incident [page 105 to 106 of ROA]. The Privy Council in *Gibbs v Rea* [1998] AC 786 when dealing with an instance where the defendant elected not to give any evidence held that:

> " It was of course open to the defendants to elect to give no evidence and simply contend that the case against them was not proved. But that course carried with it the risk that should

it transpire there was some evidence tending to establish the plaintiff's case, albeit slender evidence. their silence in circumstances in which they would be expected to answer might convert that evidence into proof."

Further, the court in *R v Inland Revenue Commissioners, Ex p TC Coombs & Co* [1991] 2 AC 283, 300 held that:

> " In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case."

Given Mr Mutinda's failure to take part in the disciplinary process and present his defence, the appellant considered various factors and circumstantial evidence that led it to reasonably conclude that the respondent had failed to follow CIT procedures during the process of offloading the deposita machine and was therefore likely involved in the loss of the customer's money. The Transportation Management System [TMS] report confirmed that different Aga Khan cashiers had from 4th June 2019 to 6th June 2019 deposited a total of Kshs. 6,999,550/- [page 194 to 197 ROA]

31. The appellant contended as with regards Mutinda, that in handling the assignment, the investigator established that:

    i. Contrary to clause 7.12 of the CIT Manual [page 144 RA 1], no customer was present when the respondent was offloading the machine and sealing the deposita bag. There was also no sign off by the customer on the offloading of the deposita machine.

    ii. Contrary to clause 7.11 of the CIT Manual [page 143 ROA], the sealing of the deposita bag was done in the absence of the customer or their agent.

    iii. The CCTV footage at the customer's premises while showing that the respondent and his colleague were in the process of sealing the deposita bags, could not confirm if the bags were sealed appropriately as the crew did not show the sealed deposita bags.

32. That having failed to offload the deposita machine in the presence of the customer or present evidence to eradicate doubt of his involvement in the loss of the sums in question, the appellant had a reasonable hypothesis in the evidence it had, to enable it draw useful inferences from Mr Mutinda's failure to rebut it.

33. The appellant contended as regards Stanley Ongongo- Mr Ogongo was notified of one charge of dishonesty and negligence of duty leading to the loss of Kshs. 2,009,000/- collected from Aga Khan Hospital on 13th June 2019. 29. The appellant commenced investigations into the incident where Mr Ogongo recorded a statement on 20th June 2019 where he admitted that he was assigned to Aga Khan Hospital on 13th June 2019 but insisted that he followed the due process set by the appellant for such assignment. Mr Ogongo also alleged that his role was to pick and drop the money and stated that he was not required to count it at the point of collection [page 37 to 38 ROA]. During the disciplinary hearing, Mr Ogongo admitted that after opening the deposita machine, he received a receipt which indicated that the total amount was Kshs. 7,663,650/-. He also confirmed that the bag was sealed by the driver. The driver who accompanied the respondent, Mr Kagoya, further confirmed that the receipt normally shows the total amount that is in the bag [page 172 ROA]. Having admitted that the weight of the deposita bag was different from the time that they picked it from Aga Khan Hospital to when the bag

was delivered to the cash office, Mr Ogongo was complicit by failing to report the issue or requesting that investigations be conducted to establish what happened to the money. [page 172 ROA].

34. The appellant contended that during the investigations, it was established that:-

    a. Contrary to clauses 7.10 and 7.11 of the CIT Manual [page 117 ROA2], Mr Ogongo allowed the driver to offload and seal the deposita bag when the procedures restricted such duties to Mr Ogongo as a crew commander.

    b. Contrary to clause 7.11 of the CIT Manual [page 117 ROA2] and the CIT deposita golden rules for safety of cash movement [page 151 ROA2], Mr Ogongo and the assigned driver offloaded the money in the absence of the customer or the customer's agent.

    c. Contrary to clause 7.12 of the CIT Manual [page 118 ROA2], there was no sign off by the customer to confirm that the deposita bag was collected and sealed properly.

    d. Contrary to clause 7.15 of the CIT Manual [page 118 ROA2], the driver and not Mr Ogongo carried the deposita machine to the vehicle. e. Upon arriving at the cash centre, the CCTV footage did not capture anything suspicious when the cash was being processed.

    f. The TMS report confirmed that the deposita machine was functional and that the amount that Mr Ogongo and the driver removed from the deposita machine on 13th June 2019 was Kshs. 7,663,650.00 and not Kshs. 5,654,650.00 which was the sum that Mr. Ogongo and his colleague submitted to the cash centre [page 178 ROA2].

35. The appellant submitted that the respondent was therefore negligent in the performance of his duties by allowing the driver to conduct the offloading contrary to the deposita golden rules which provides that failure to comply with any of the rules will result in dismissal. By failing to account for the missing sum of Kshs. 2,099,000.00 went despite having confirmed that deposita bag seemed smaller, an inference of the respondent's involvement of the loss can be made.

36. In his judgment, the learned magistrate held that: "there is no evidence that the claimants were privy to the operation manual. The claimants denied having been shown the operation manual for cash in transit. Their evidence was corroborated by their witness who claimed they had no knowledge of CIT operation manual. I would trust them and say that they were not aware that the client had to be present during the retrieval of the bag." The appellant submits that this is incorrect for the following reasons: -

    a. The respondents underwent trainings on Cash in Transit operations that were conducted by the appellant. Copies of the certificates of attendance and a list signed by the respondents confirming the areas that they were trained on are at page 97 to 98 ROA1 and 88 to 90 ROA2. b. At page 6 of the supplementary records, Mr. Ogongo accepted that they had received training on Cash In Transit [CIT] procedures and other subjects. At page 15 of the same record, Mr. Mutinda confirmed that they were trained on how to load and off load the deposita machine. c. On the question of whether the respondents had been trained on CIT operations, the answer is in the affirmative. Their failure to follow the procedures set down, therefore was due to negligent discharge of duty and not a lack of knowledge of the procedures.

    b. Both respondents had worked in the Cash In Transit crews and cannot be heard to say that they were not aware of the CIT operations procedure.

    c. The appellant further submitted that the Learned Magistrate also fell in error by holding that as the respondents were not present when the bags were opened and that those who opened the bags were neither called during the disciplinary hearing or before the court, the respondents' evidence remained unrebutted. During the investigations, the investigator interviewed various

individuals that handled the money at the cash centre. Part of the individuals interviewed was Ms Judith Etemesi who was the team lead in the Cash Centre. Ms Etemesi recorded a statement in which she confirmed that her role was to supervise the consignments for processing and confirming and dispatching work to and from the processing floor [page 112 to 114 of ROA]. That before Ms Etemesi opened the deposita bag to confirm the sums that were collected from the customer, only Mr Mr. Mutinda and the driver who accompanied him had come into contact with the contents of the deposita bag. In Mr. Mutinda's case, the driver who accompanied him also confirmed that the two of them had breached protocol as they made an unauthorised stop and allowed Mr. Mutinda to alight thereby breaching the requirement to proceed to the appellant's head office for de-crewing as mandated by clause 1.1 of the CIT manual [page 169 ROA1]. The failure to de-crew created an unexplained gap in the chain of custody of the money before it was delivered to the cash centre. The driver also confirmed that he had left Mr. Mutinda alone for about 5 minutes while picking another consignment at Ruaka [page 105 ROA1]. Whatever happened during this time was also unexplained. In Mr. Ogongo's case, the appellant's witness, Mr Luvai testified that the investigation report confirmed that the CCTV footage at the cash centre showed that there was nothing suspicious at the cashier's floor when the cash was processed nor was there sign of tampering or withdrawal of money captured [paragraph 7 of Collins Luvai's witness statement at page 63 ROA2 and page 170 ROA2]. The learned magistrate also failed to appreciate Mr Ogongo's own admission that the weight of the bag was actually different from the time that they collected the deposita bag from Aga Khan meaning that the money went missing when the deposita bag was in their possession and it was upon them to explain what happened to it [page 172 ROA2]. The learned magistrate was of the opinion that Kshs 2,000,000 is a huge sum of money that cannot just be hidden on one's body and go unnoticed. He observed that the court was not told whether the tracking devices on the vehicles reflected any diversion. Both respondents were the last people to come into contact with the money. As to what transpired between the time when they collected the money to when they delivered it to the appellant's cash office, these were matters that were particularly within the respondents' knowledge and under section 111[1] of the *Evidence Act*, they were the only people that could but did not explain. A prima facie case was established to require the respondents to give a reasonable explanation as to what happened.

38. The appellant submitted that when the totality of the evidence was considered by the appellant, it became apparent that the respondents failed to prove their innocence, and having failed to do so, an adverse inference must be drawn that they were the people responsible for the loss of the money as no other reasonable hypothesis can be drawn. The court in *Robert Kenga & another v Ocean Sports Resort* [2015] eKLR held that:

> "the standard of proving the reason for termination was a subjective test. It is all about what the employer personally and genuinely makes out of the conduct of the employee. Even if another employer would not have dismissed the claimants for their conduct, it does not matter here. What matters is that the employer in this case considered the conduct of the claimants as gross misconduct, which could not be tolerated in his business operations." [emphasis added]

39. That based on the foregoing, the appellant was able to show that it genuinely believed that there were reasonable and sufficient grounds to terminate the respondents' employment. The Court of Appeal in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR upheld the use of the reasonableness test and held that if a reasonable employer

might have reasonably dismissed an employee, the dismissal was fair. The appellant submits that it had valid cause to terminate the respondents' employment and urges this court to set aside the learned magistrate's finding that no valid and fair reason existed to warrant the termination of the respondents' employment.

Respondent's submissions on reasons

40. While Commenting on the interplay between sections 43 and 47[5] of the *Employment Act*, the Court of Appeal in *Muthaiga Country Club v Kudheiha Workers* [2017] eKLR said the following:

> " The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47[5] of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43[1] and 47[5] of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment." That it is an undisputed fact that the reason as to why PW1, Mr. Stanley Mwamba Ogongo was terminated is indicated in the summary dismissal letter dated 30th July 2019 as [Page 39 of the Record of Appeal of *ELRCA/E019/2023*], "On 13th June 2019 while assigned duties to offload a Deposita machine at Agha Khan Hospital you failed to account for cash totaling to Kshs. 2,009,000 belonging to Barclays bank Kenya which was in your possession and you failed to perform your roles as a Crew Commander." Equally, the reason as to why PW3, Mr. Wilfred Mbweri Mutinda was terminated is indicated in the summary dismissal letter dated 30th July 2019 as [Page 65 of the Record of Appeal of *ELRCA/E018/2023*], "On 6th June 2019 while assigned duties to offload a Deposita machine at Agha Khan Hospital you failed to account for cash totaling to Kshs. 3,144,200 belonging to Barclays bank Kenya which was in your possession contrary to cash operating procedures."

41. The reasons outlined hereinabove were summarized and appreciated by the Trial Court which indicated that the dismissal was based on suspicion that the bags were not sealed and hence money was lost from the point of retrieval and on their way to the office. [Page 349 of the Record of Appeal of *ELRCA/E018/2023*]. It was PW 1's, PW 2's, PW 3's and PW 4's testimony that they had proceeded to offload the deposita machine pursuant to the directive that was issued from the Respondent's control room. It was also their testimony that they had not been comprehensively trained on the subjects of the depositor system which was a mere demonstration at the parade [Page 6, 11 and 15 of the Supplementary Record of Appeal].This position is collaborated by the recommendations of the investigation report [Page 101 of the Record of Appeal of *ELRCA/E018/2023* and Page 170 of the Record of Appeal of ELRCA/E019/2023], which recommended that the crew and cash centre operations team to be trained on the deposita handling process by operations. That this is a position that was acknowledged and appreciated by the Trial Court in its Judgment [Page 349 of the Record of Appeal of *ELRCA/E018/2023*]. 45. That the Appellant herein did not produce any evidence to prove that the Respondents and their colleagues had been trained on the deposit system's operations. Further, both DW 1 and DW 2 could not tell the court why the investigation report recommended that the crew be trained, if at all, they had already been trained, as alleged by the Appellant. PW 1 and PW 3 testified before the court that they had sealed the bag and were issued with a clearance print out for the assignment [Page 35 of the Record of Appeal of *ELRCA/E019/2023* & Page 48 and 50 of the Record of Appeal of *ELRCA/E018/2023*]. This position was collaborated by DW 1 and DW 2 who confirmed to the Court that in respect to *MCELRC No. 1850 of 2019*, the investigation report indicated that Elsa Achieng and Judith Etemesi who were the vault officer and cashier respectively had

checked and confirmed the integrity of the bag and seal Page 100 of the Record of Appeal of *ELRCA/E018/2023*]. Further, DW 1 and DW 2 confirmed that there no alarm was raised by the said officials. With respect to *MCELRC No. E746 of 2020*, DW 1 and DW 2 also confirmed to the Court that the investigation report indicated that Griffins Sidai and Angela Musau who were the vault officer and cashier respectively had checked and confirmed the integrity of the bag and seal [Page 169 of the Record of Appeal of *ELRCA/E019/2023*]. Further, DW 1 and DW 2 confirmed that no alarm was raised by the said officials. Additionally, DW 1 and DW 2 confirmed to the Court that indeed the matters had been reported with the DCI, investigation had been conducted and nothing was found that linked the claimants to the alleged theft of funds and as a consequence, no charges have been preferred against the Claimant to date [Page 25 and 27 of the Supplementary Record of Appeal]. The allegation that the said funds could have been stolen on the way is false and misleading for the reason that during cross-examination, DW 1 and DW 2 confirmed to the court that the Appellant engaged 3 armed police officers who would escort the Respondents and their colleagues from Aga Khan Hospital up to the cash centre at the headquarters. The said police officers would not leave the driver and crew commander alone [Page 23 of the Supplementary Record of Appeal]. In fact, in the vehicle in which the money was placed, there was one police officer and in case of anything suspicious, he would have raised an alarm which alarm was never raised. Further, it was PW 1's and PW3's testimony that at no point do they come into contact with the money. This position was confirmed by DW 1 and DW 2 who testified to the court that indeed the Respondents were not present when the money was being counted. However, the said room is installed with CCTV cameras which they confirmed that had not been produced and filed with the Court and thus the court has no way of telling what transpired once the bag had been opened [Page 17 of the Supplementary Record of Appeal]. The said bags were opened in the absence of the Respondents who were then dismissed as the sacrificial lambs. This issue was equally noted by the Trial Court in its Judgment [Page 350 of the Record of Appeal of *ELRCA/E018/2023*].

42. That it is pertinent to note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession would be deemed that such evidence is averse to such party. During cross-examination, DW 1 confirmed to the court that based on the TMS reports on the health status of the deposita machine there was a repetition of several entries that had already been recorded as demonstrated hereinabove. DW 1 and DW 2 attributed the said double entries to a printing error and went further to confirm that the said report had been transferred and printed from the desktop and not the source being the machine. Thus creating the possibility of being edited. They also confirmed that the Appellant herein had not produced a certificate of production of electronic evidence and as such the court cannot determine whether the said report had been edited. In the circumstances, the respondents submitted that the veracity of the contents of the said report cannot be ascertained. The reliance by the Appellant on the allegation that the depositor bag at the cash centre appeared to be less heavy than it was while at Aga Khan Hospital is baseless, lacks foundation and the same cannot be regarded as concrete proof of theft. The Appellant had not weighed the bag when it was dispensed by the machine thus he therefore cannot allege that it was less heavy simply because from the look at the CCTV it was being carried by one person. It is common knowledge that CCTV footage is never used to measure the weight of any matter. That the Respondents herein discharged their burden by demonstrating indeed that the termination was unfair as there was no iota of evidence to proof that indeed they stole the alleged funds.

43. The respondents further submitted that it is at that juncture that the burden then shifted to the Appellant who failed to prove that indeed the Respondents stole the money whereas evidence clearly pointed out to a possible malfunction of the machine. There was also the possibility that the money disappeared in the office of the cashiers noting that the CCTV in cashiers' office were never produced as evidence. There is no evidence produced by the Appellant linking the Respondents with the theft

of the said funds. In fact, it is of utmost importance to note that both DW 1 and DW 2 admitted during cross-examination that indeed there was no evidence that linked the Respondents to the theft and that the same was purely based on suspicion only. That even the investigations conducted by the Appellant clearly indicates that the bags were sealed, there was no foul play or any form of interference by the Respondents. Needless to add, the Respondents were under the watch of armed police officers deployed by the Appellant during the entire journey. The court in the case of *Richard Otieno Ondoo v United Millers Limited* [2021] eKLR in finding that the employer had failed to demonstrate valid reason for dismissing the employee held as follows:

> " The Respondent's reasons for terminating the Claimant is lost packing bags as stated in the termination letter. The said loss, the court was told, was discovered from discrepancies in registers used by the Respondent. No register or record for that matter was produced in evidence to proof the alleged losses or the discrepancies alluded to. The court concludes that the termination of the Claimant was procedurally and substantively unfair".

Similarly, the Court of appeal in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR in upholding the decision of the trial court that the employer had not proven a valid and fair reason had the following to say:

> " The report confirmed that the appellant had indeed lost approximately Kshs. 10,000,000/- for the year 2008-09 in review. That report did not, as already stated, apportion any blame or wrong doing on the respondent in the loss but it did recommend more through audit. The respondent thereafter carried out another audit through Messrs. Price Water Coopers 'PWC' which gave its report dated 20th July 2010. Their report also found no substantive evidence to implicate the respondent for having made or entered any suspicious entries in the appellant's financial records. It did however conclude that his actions or non-actions point to, at best, a failure to discharge his duties to the level expected and at worst, point to possible negligence. In essence, both reports found the respondent was not fraudulent or part of any fraud/scheme that led to the loss. The reports however pointed to weak internal supervisory controls within the accounts office. It is instructive to note that the respondent had over the years complained regarding weak supervisory controls due to understaffing and could not operate optimally followed by inadequate segregation of duties. He had also pleaded for introduction of modern accounting systems to no avail. All these factors were given due consideration by the learned trial Judge who expressed himself thus...."

44. That in considering whether the reason advanced by the appellant is a valid reason to warrant summary dismissal, the respondents submitted that this court should examine the reasonableness of that reason. In finding that the employee's summary dismissal in that case was unlawful, the court in the case of *Samwel Onderi Choi v Absolute Security Limited* [2021] eKLR held as follows at paragraph 97 to 104:

> " Section 44 [4] of the *Employment Act*, lists misconducts that may amount to gross misconduct so as to warrant a summary dismissal, whether an employer is justified in dismissing on any of these grounds requires an assessment of the context of the alleged misconduct. The respondent's counsel submitted that looking at the conduct of the claimant that led to the dismissal, one should come to a conclusion that, the conduct falls within the circle of those conducts that can warrant a summary dismissal. Counsel urged Court to consider the impact of the claimant's conduct on the business of the employer. He contended the respondent's witness duly established by his evidence that the respondent lost a client as a consequence. Having chosen to rely on an alleged consequence on its business,

to establish that the misconduct was of a degree immense enough to justify a dismissal, the respondent was bound to prove that indeed its service to the client was terminated. The respondent did not place before me any document to prove that the relationship between it and the client occurred. In fact, the termination letter disabuses this submission and the oral testimony by the respondent, that it suffered a termination of services to its client. The termination letter only talks of an ultimatum having been issued by the client. Considering the context of the alleged misconduct [being late for 40 minutes], namely that the delay was occasioned by the fact that the claimant was not facilitated to his new station, that I believe his evidence that he lost time trying to locate the new station, that there were no prove of earlier incidents of lateness on his part, and that his supervisor was not presented to give evidence to establish he had given the claimant any instructions and that there was that arrangement between him and the claimant that RW1 purported to testify on, I am not convinced that the conduct can be categorized as gross misconduct as contemplated in section 44 [4]. Imperative to state that, regarding the happenings on the alleged date of the offending conduct of the claimant, the respondent's witness largely presented hearsay before me. In the upshot I find that the alleged misconduct was not of a degree that would amount to gross misconduct, with a consequence of attracting the "capital punishment" of an employment relationship -summary dismissal. The summary dismissal was not substantively fair".

45. The Court in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR found that the Respondent had failed to demonstrate that there was a valid ground to justify the termination of the claimant. To that end, the court found that the termination of the claimant was unfair under subsection 43[1] of the *Employment Act*. That there being no material that has been submitted before this court e.g. by way of CCTV footage in the cashiers' office which was available at the Appellant's client's premises and/or call a witness from the said premises, the Appellant cannot be said to have demonstrated a valid reason.

Decision

46. The court is guided by landmark decisions on its role in appeal *Selle v Automated Motor Boat Association* and *Mbogo v Shah*[*supra*].Section 43 and 47 of the *Employment Act* places the burden to prove reason of termination once the employee had laid basis for unfair dismissal on the employer. On appeal the court is to re-evaluate the evidence before trial court and reach its own decision. The appellant's case is based on non-compliance with cash in transit procedures at collection stage for lack of presence of customer/client when offloading the machine and when sealing of the deposita bags and this was basis of suspicion against Mutinda. The appellant stated that the CCTV could not confirm whether the sealing was proper. The court like the trial court wondered what was the basis of the CCTV if it could not establish what happened in the room. According to the respondent, money was stolen at the point when the bag was retrieved and before the bags were delivered. On the bag retrieval, the respondent claims that the client ought to have been present as per the operation manual. There is no evidence that the claimants were privy to the operation manual. The claimants denied having been shown the operation manual for cash in transit. Their evidence was corroborated by their witness who claimed they had no knowledge of CIT operation manual. The trial court stated:-

> "I would trust them when they say they were not aware that the client had to be present during retrieval of the bag."

The appellant submitted that the respondents were trained and relied on certificate at page 97 and 98 in E018 OF 2023 ROA. The certificate as titled Eviper crews refresher training . At page 98 [ROA1] was

the topics trained on. I checked the subtopics and there were no words cash in transit anywhere. DW1 at cross-examination confirmed the topic of deposition system was not covered. He also confirmed the respondents were not given the operational manual. It is thus not possible to doubt the finding of the trial court based on such certificate. In the investigation report at page 101 of ROA1 one of the recommendation was

> "crews and cash center operation team to be trained on depsoita handling process by operations."

I find this was an acknowledgment of training gap by the appellant. The court further found that the amount of money was substantial, the vehicle was tracked and escorted by police, and there was suspicion based on look of eye to say the bags weight at picking was different from the delivery. The bags were not weighed. Further the trial court and investigation report confirmed procedures at delivery were followed and no suspicion of tempering with bags was noted. The officers who were in charge of the vault and the cashiers confirmed the seals were intact when the bags were dropped [page 100 of ROA]. The CCTV at counting of the money was not produced nor were the cahiers who counted the money in absence of the respondent called as witnesses at the hearing. The cashiers did not also record statements as to the counting of the money[page 100 ROA1 of the report]. The threshold for the suspicion of the crime had to have basis. The police escorting the vehicles did not record statements yet being independent service providers they would have shed light on what happened. Why did the investigators not question them? The court from the foregoing drew adverse inference that the reasons why the CCTV on counting of the cash by cashiers was not produced and the failure to interview the police escort was because there was no evidence linking the respondents to the loss of the money. The court noted that at the hearing before the lower court the integrity of the receipts was in question. At cross-examination of DW1, he was referred to health status of the deposition machine. It was noted there was error on dated and he admitted there was a possibility of editing. He told the court the machine was taken for service to the computer where it was printed. There was no certificate of computer print out. DW1 told the court that they got a statement from Agakhan but the same was not produced in court. He said that Mutinda and Mwamba were not present when the money was counted, that the money was stolen in office which had CCTV cameras but the same was not produce din court[see proceedings at pages 24-25 of the supplementary ROA1]. For the foregoing analysis I find that the appellant did not demonstrate a reasonable basis to suspect the respondents of stealing as stated in the letters of dismissal. The non –cooperation by Mutinda at the hearing, basically refusing to volunteer details and insisting the panel to be guided by the investigation report cannot be used against him as the employer had the burden to prove the reason it was contemplating to terminate him[see section 41 of the *Employment Act*].

47. In *Mbogo v Shah* [1968] EA Page 93 De Lestang VP [As He Then Was] Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

On re-evaluation of the evidence before the trial court , giving benefit of having neither seen or heard the witnesses, i was not satisfied that the decision of the trial court was clearing wrong or that the magistrate misdirected himself or considered irrelevant matter so as to interfere with the discretion of the trial court. These were long serving employees without record of disciplinary issues. I find no basis

to interfere with the decision of the trial court. There was no doubt that disciplinary hearing was held and having found no valid reason the process becomes irrelevant.

Whether the reliefs sought were merited.

48. The trial court awarded 1 month's notice and the maximum award of 12 months. The appellant suggested lesser compensation of 2 months salary and relied on the decision in *Kenya Hotels and Allied workers Union v Desert Rose* [2022]eKLR where the court on finding unlawful and unfair termination awarded compensation the equivalent of 2 months salary. The court noted that in the said case the claimant had only worked for 2 years and had been terminated by way of redundancy. The case of *Butt v Khan* [1977] 1KAR Law JA stated that;

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low."

Both respondents had served for a period of 17 years both having been engaged in 2002 and served without evidence of prior disciplinary record. They were accused for serious allegations without basis which creates doubt in the mind of the court on their capacity to secure a similar job. The reason for termination was not established nor was there established case of the claimants having contributed to the termination. The court applying the factors under section 49[4] of the *Employment Act* finds no basis to interfere with the exercise of the discretion of the trial court to award the maximum compensation under section 49 and notice pay under section 35 of the *Employment Act*[see *Butt v Khan*].

49. In conclusion the appeal is held to be without merit and is dismissed with costs to the respondent. The decision applied to determine *Appeal No. E019 of 2023*.

50. It is so ordered.

51. Stay of 30 days.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant –Mwendwa

Respondent: Ms. Kyeva h/b Thiongo