



**Otieno v Butali Sugar Mills Limited (Employment and Labour Relations
Claim E026 of 2022) [2023] KEELRC 1619 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1619 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM E026 OF 2022**

**JW KELI, J
JUNE 29, 2023**

BETWEEN

FELIX OTIENO CLAIMANT

AND

BUTALI SUGAR MILLS LIMITED RESPONDENT

JUDGMENT

1. The claimant upon termination of his employment by the respondent vide memorandum of claim dated 20th September 2022 and filed in court on the 27th September 2022 sought the following reliefs against the respondent:-
 - a. A declaration that the termination and /or dismissal of the claimant's contract of employment was substantively unfair and unlawful.
 - b. Damages equivalent to salary for a period of twelve (12) months at the rate of (154,348x12)=Kshs. 1,852,176/-
 - c. Special damages in the nature of legal fees of Kshs 200,000/- being the costs of defending the criminal matter
 - d. General damages for malicious prosecution
 - e. General and exemplary damages for psychological torture, mental anguish and trauma
 - f. Cost of the demand letter Kshs. 10,000/-
 - g. Costs of the suit
 - h. Interest on both (b)-(f) herein
 - i. Any other relief(s) the Honorable court may deem just and fit to grant.



2. The claimant in addition on even date filed his verifying affidavit to the claim sworn on the 22nd September 2022, list of witnesses, his witness statement, his list of documents all of even date and the bundle of documents.
3. The claim was opposed by the respondent who entered appearance through the lawfirm of L.G Menezes and company advocates on the 13th October 2022 and on the 17th October 2022 filed statement of response to the claim, respondent's list of witnesses, respondent's witness statement by Daniel Kiyondi and the respondent's list of documents all pleadings being dated 13th October 2022. The respondents also filed the bundle of documents on even date.

Hearing

The claimant's case

4. The claimant's case was heard on the 17th January 2023 where Felix Otieno testified on oath(CW), adopted his written witness statement dated 22nd September 2022 as his evidence in chief, and produced his documents as exhibits C-1 to 11 as per list of documents. The claimant was cross-examined by counsel for the respondent, Mr. Fundi.

The respondent's case

5. The Respondent's case was heard on the 21st March 2023 where its witness Daniel Kiyondi (DW) testified on oath as the respondent's witness of fact and adopted his written witness statement dated 13th October 2022 as defence evidence in chief, and produced defence documents as exhibits D-1-26 as per list of documents . DW was cross-examined by counsel for the Claimant, Otieno h/b Masika.

Claimant's case in summary

6. The claimant was a former employee of the respondent(a supermarket) designated as a transport and logistics assistant from 3rd April 2013 to 22nd August 2022 when allegedly the respondent for unfounded, unsubstantiated, unfair and malicious reasons unlawfully terminated his contract. That he was accused of disappearance of Motor Vehicle Tractor xxxx which led to his dismissal even though there was documentary evidence showing that the said motor vehicle tractor was present in the respondent's yard as at the period it was alleged to be missing. The claimant alleged he had been previously charged and discharged for disappearance of another Motor Vehicle Tractor xxxx after which he received the notice to show cause on the Motor Vehicle tractor xxxx. His case was he had served over 9 years without any disciplinary issue.

The respondent's case

7. The respondent's case was that its investigations established a clear case of theft under the [Penal code](#), wrongdoing and negligence on the part of the claimant which resulted in the respondent losing two tractors worth million shillings. The claimant was accorded opportunity of hearing on the allegations and on the conclusion of the disciplinary process the allegations of wrong doing and negligence were established leading to the termination of the contract. That they reported the missing Tractor xxxx to the police and had no control of the Director of Public Prosecutions decision to withdraw the charges and the said process was separate and distinct from their internal processes. That the claimant was paid terminal dues on separation.



Written submissions

8. The court gave directions for filing of written submissions after the hearing. The parties complied. The claimant's written submissions were drawn by Chanzu Victor & Company Advocates and dated 30th March 2023. The respondent's written submissions were drawn by L.G Menezes & Co. Advocates and dated 24th March 2023.

Determination

Issues for determination.

9. The claimant in their written submissions identified the following issues for determination: -
- a. Whether the claimant was an employee of the respondent.
 - b. Whether the claimant was unlawfully terminated
 - c. Whether the claimant was subjected to unlawful and malicious prosecution
 - d. Whether the claimant is entitled to reliefs sought.
10. The Respondent in their written submissions identified the following issues for determination:-
- a. Whether the termination of employment of the claimant was wrongful, unfair and unlawful in the circumstances
 - b. Whether the claimant is entitled to reliefs sought.
11. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the question of whether the claimant was a former employee of the respondent was not in dispute and thus the issues to be addressed in the determination of the dispute were as follows:-
- a. Whether the claimant was subjected to unlawful and malicious prosecution and if so whether the respondent was liable
 - b. Whether the termination of employment of the claimant by the respondent as lawful and fair
 - c. Whether the claimant was entitled to reliefs sought

Issue 1 Whether the claimant was subjected to unlawful and malicious prosecution and if so whether the respondent was liable

12. The claimant sought general damages for malicious prosecution. The claimant was arrested on allegations of disappearance of Motor Vehicle Registration No. xxxx wherein he sought legal representation. He was arraigned on 15th July 2022 and released on bail and he was suspended for 21 days (suspension letter C-exhibit 5 and letter by OCS Kabras Police station dated 16th July 2022 C-Exhibit 13, and charge sheet C-exhibit 12). The claimant submits that DW admitted during cross-examination that the claimant was not an accused person in the matter of disappearance of Motor Vehicle Registration No. xxxx but a state witness. That there was first a show cause with respect to Motor Vehicle Registration No. xxxx but the claimant was finally subjected to disciplinary process and dismissed in relation to Motor Vehicle Registration No. xxxx. That the suspension letter was with respect to Motor Vehicle Registration No. xxxx that the Director of Public Prosecutions had cleared



the claimant. That out of the 7 employees arrested it was only the claimant subjected to disciplinary process and his employment terminated despite being cleared by the Director of Public Prosecutions.

13. The claimant relied on the decision of justice Rika in *Naqvi Syed Omar v Paramount Bank Limited* (2015) eKLR where the judge awarded damages for malicious prosecution the Director of Public Prosecutions having granted advice in favour of the claimant. The judge awarded the Kshs.2,500,000/- as general damages for malicious prosecution. The claimant submitted that the claim he stole a tractor ruined his employment chances.

Response

14. The respondent submits that that on learning of the missing tractor Motor Vehicle Registration No. xxxx it was duty bound to report the loss to the police which it did so as to enable investigations. That it was in the course of the investigations the claimant was arrested and arraigned in court. The respondent had no say in the investigation and its duty was to cooperate.
15. That on request of the police it suspended the claimant for the investigations to go on without interference. The respondent's investigations established a clear case of theft as defined under the Penal Code and of wrong doing and negligence on the part of the claimant that resulted to the claimant losing 2 tractors worthy millions. In the statement of DW paragraph 15 it was stated the claimant signed the gate pass in relation to tractor Motor Vehicle Registration No. xxxx which tractor was in reality tractor Motor Vehicle Registration No. xxxx and whose number plates had been switched, that this was gross negligence by the claimant and or complicit as he failed to carry out the necessary and requisite verification expected of him. The claimant was heard before the termination of his employment.

Decision

16. This court was highly doubtful that it had jurisdiction to decide on a case of malicious prosecution against an employer. The court holds the position that the prosecution of criminal cases is the sole mandate of the Director of Public Prosecutions under article 157 (6) of the *Constitution* which states as follows:-'157 (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may— (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed; (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)'' The Director of Public Prosecutions thus takes full responsibility over whether or not to prosecute any criminal case against the citizen or any other person in Kenya. There was evidence that the said tractor Motor Vehicle Registration No. xxxx was missing and the respondent led evidence that it was the claimant who issued the gate pass for Motor Vehicle Registration No. xxxx which tractor was in reality tractor Motor Vehicle Registration No. xxxx and the number plates had been switched. The court finds that the employer had a right to complain to the police for investigations to help it trace the missing tractor and the claimant was obvious a person of interest considering his job. The court noted the suspension of the claimant and others was requested for by the police vide letter dated 16th July 2022(D-exhibit 13). The court having found that the role of prosecution lies with the Director of Public Prosecutions then it is only the said office which can answer a case of malicious prosecution. The court holds that it has no jurisdiction to handle malicious prosecution cases against the office of the Director of Prosecutions and that the case of malicious prosecution is mistakenly brought against the respondent before the court. The court declines to uphold the decision in *Naqvi Syed Omar v Paramount Bank Limited* (2015) eKLR.



Issue 2 Whether the termination of employment of the claimant by the respondent was lawful and fair

17. The court in determination of the issue was guided by the provisions of section 45 of the *Employment Act* which states:- ‘Unfair termination 45(1) No employer shall terminate the employment of an employee unfairly. (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 employee’s 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.’”

Substantive fairness- validity of the reason

Claimant’s case

18. On the validity of the reasons for the termination of the employment, the claimant submits that the termination was unfair as the Motor Vehicle Registration No. xxxx alleged to be unaccounted since April 2021 was not missing in the period and continued to be fuelled as per evidence before court. The claimant was suspended for 21 days on basis of Motor Vehicle Registration No. xxxx, investigations and charges followed but the reasons for the dismissal were unrelated. That the internal report indicated Motor Vehicle Registration No. xxxx was present (D-Exhibit 19 at page 38). That the tractor Motor Vehicle Registration No. xxxx was present on the 2nd June 2021 and was fuelled by different drivers and attendants.
19. The claimant submits that contrary to the contents of the dismissal letter stating he admitted to have received the insurance sticker of Unit No. xxxx yet failed to report the unit was missing was not true. That DW to the court during cross-examination the claimant never admitted to have had the insurance sticker and this was corroborated by the minutes of the proceedings that the sticker was actually found in the drawer of another employee Aggrey (page 16 paragraph 2 of the respondent’s paginated document). The claimant submits that the reasons for the termination were not justified.

Respondent’s case

20. The termination of employment letter (D-exhibit 9) dated 22nd August 2022 gave the reason for the termination as follows:- ‘Reference is made to the show case letter issued to you on the 5th August 2022. Further you were invited for a disciplinary committee hearing at the BSML conference room on 16th August 2022 where the committee noted there was a high level of negligence of your duties as a fleet and logistic assistant where in the course of your duties given that you generated the fleet master register yet failed to notice that xxxx was unaccounted for since April 2021. Further on your own admission you acknowledged having received the insurance sticker of the said unit for the year 2022 yet you failed to report it was missing in the yard. This a grave omission on your part which amounts to gross misconduct and therefore contrary to section 44 subsection 4(c)&g of the *Employment Act*’”
21. DW confirmed the foregoing as the reasons for the termination of the employment of the claimant and produced the minutes of the disciplinary proceedings (D-Exhibit 7). The respondent submits that the role of the court is establish whether the decision to dismiss the employee falls within the band of reasonable responses which a reasonable employer might have adopted in the circumstances and submits that the test was described by Lord Denning in *British Ryland UK Limited v Swift*(1981)I.R.L.R 91 ‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable



employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...”The respondent submits that the role of the court is limited to making a wider inquiry as to whether the test was met by the employer and not substitute its decision with that of the employer.

Decision on substantive fairness

22. The burden of proof of the validity of reasons for termination lies with the employer under section 43 of the Employment Act which reads:- ‘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.’”
23. In the instant case the dismissal letter (D-exhibit 1) disclosed the reason for the termination to be negligence as follows:-‘negligence of your duties as a fleet and logistic assistant where in the course of your duties given that you generated the fleet master register yet failed to notice that xxxx was unaccounted for since April 2021. Further on your own admission you acknowledged having received the insurance sticker of the said unit for the year 2022 yet you failed to report it was missing in the yard. This a grave omission on your part which amounts to gross misconduct and therefore contrary to section 44 subsection 4(c)&g of the Employment Act’.
24. The claimant denied that the unit MV xxxx was missing from April 2021 and relied on the internal audit report page 38 which indicated the vehicle was being fuelled in the period. The claimant denied having had received the insurance sticker of the MV xxxx and submitted that this was corroborated by the minutes which stated the sticker of the MV was found in the drawer of Aggrey (*supra*)
25. During the hearing the claimant admitted he was issued with show cause letter dated 5th August 2022 (page 4 of the respondent’s bundle) and confirmed having responded to the same, admitted he was invited to the disciplinary hearing, confirmed the criminal proceedings were not filed in court and confirmed there was no evidence he was discharged from the criminal case for lack of evidence. DW, Daniel Kiyondi, was the head of finance of the respondent. During cross-examination DW confirmed that after the disciplinary hearing the committee recommended the claimant be given normal termination. DW confirmed that the reason for the termination was failure to account for MV xxxx since April 2021, DW confirmed that at page 38 of their documents that MV xxxx was being fuelled at 2nd June 2021, confirmed there was no report to the police of MV xxxx missing, confirmed that the insurance sticker for MV xxxx was found in the drawer of Aggrey, confirmed that that in the next line the minutes the claimant took responsibility over the insurance sticker, admitted that the claimant in his statement did not indicate specifically he had the sticker of MV xxxx, confirmed that at line no 18 of page 60 of their document was MV xxxx, confirmed that MV xxxx was missing from April 2021 as it went off tracking system and from the audit report it was indicated it was being fuelled without being used. On whether the drivers were investigated DW stated that none of them was in employment, confirmed that the claimant was given a normal termination not summary dismissal, confirmed that the claimant was not an accused person under the charge sheet (page 22 of respondent’s documents), that it was the claimant who was responsible for the tracking radar and did not report the missing MV xxxx and further stated the report did not specifically blame the claimant. DW stated that it was the claimant who was handled the insurance stickers and the same was found in drawer of a person who reported to the claimant and he ought to have known.



26. The court made the following findings on the issue:- That the show cause letter of 5th August 2022 referred to the issue of missing MV xxxx from April 2021 yet the fleet status indicated it was parked and continued to be fuelled a finding supported by the internal report (page 38-39 of the respondent's documents), that the said MV xxxx was off the tracking radar in the period yet the claimant released a report indicating it was parked, the claimant in his response admitted to having received the insurance stickers in his response though he attributed some of the insurance stickers to Aggrey who kept them. At page 14 (respondent's documents) of the minutes the claimant was asked about the insurance sticker having been issued to him and he did not deny the same. On the missing tractor, the claimant told the disciplinary committee that the report on the fleet was done by the transport manager, that he retrieved it from a folder and shared it with the person who had requested for the same. The court also took notice of the fact that there was another case of missing Motor Vehicle Registration No. xxxx wherein the claimant was also a person of interest though he alleged that he was discharged but no evidence before the court.
27. The court having heard the witnesses and evaluated the reasons given by the employer of negligence leading to loss of MV xxxx and the failure to install the insurance sticker on the missing tractor, finds that those were valid and justified reasons meeting the threshold under section 43 of the Employment Act being that:- ‘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’. The court finds that the claimant was negligent in his work and this led to the missing MV xxxx which went off the tracking radar, which the claimant, from minutes of the disciplinary proceedings indicate was under him (page 16 of the respondent's documents) where he stated : ‘as for the tracking system we have them off line every other day but that does not make them disappear...’ The court further found the claimant released a report indicating the motor vehicle was parked. He ought to have authenticated the contents of the report on retrieving it as alleged before sending it out of the department. The court finds that the claimant was negligent in his duties and the termination decision met the reasonable test as held by Lord Denning in *British Ryland UK Limited v Swift* (1981) I.R.L.R 91 to be ‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view...’ The court holds that the reason for the termination of the employment of the claimant was justified in the circumstances and that the employer employee trust had broken down justifying the separation. The court is guided by the Court of Appeal decision in Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR where the court observed:-‘The learned Judge herein took umbrage under the fact that Wasike was acquitted of the criminal charge. With respect, that was the wrong approach and perpetuated the criminal standard of proof error. The outcome of the criminal case should have had no effect whatsoever on the learned Judge's approach since the two processes are separate and distinct, with different rules to engagement and standards of proof. This Court has said as much in a number of cases. In Nelson Mwangi Kibe v Attorney General [2003] eKLR, for instance, the employee had complained that having been acquitted on a charge of theft, he ought not to have been dismissed for negligence but this Court dealt with the issue in this manner; ‘... the appellant in failing to alert the cashier or assistant to lock the door had neglected the duty he had been employed to perform. Notwithstanding the acquittal in the criminal trial, an award of punishment, including dismissal as had happened, may still be imposed to discipline him. ... the dismissal was not founded on the criminal culpability of the appellant. It was based on his being liable for neglect of duty.’ Likewise the court holds that in the instance case the reasons validity test is not founded in criminal culpability of the claimant in the loss



of the tractors but on neglect of duty based on the standard of proof of balance of probabilities taking into account the circumstances under which the employer acted. In the upshot the court finds the reasons for the termination were valid and justified for neglect of duty.

Procedural fairness

28. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The procedural fairness for gross misconduct is as defined under section 41(2) of the *Employment Act* to wit:- ‘41(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.’”
29. It was not disputed there were disciplinary proceedings before the termination of employment of the claimant. The respondent produced the show cause letter dated 5th August 2022, response by the claimant dated 6th August 2022, invitation to the disciplinary hearing, minutes of the disciplinary hearing and Coram sheet of the disciplinary hearing of 16th August 2022(D-exhibits 3 to 8 respectively).
30. The claimant faults the termination process for reasons:- That the decision was predetermined as the respondent made a decision and informed the claimant same day of disciplinary hearing, that the committee found the claimant had no previous record, that claimant never admitted having received the insurance sticker for the unit as admitted by DW hence the process was a mere formality and that the claimant was denied the right to have a representative of his choice who he submits was locked out of the hearing.

Response

31. The respondent submits that it complied with the legal process under section 41 of the *Employment Act* and relied on the decision in *Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Limited* (2015)eKLR where the court found the respondent had complied with procedural fairness as follows:- ‘25. From the record, the Claimant was issued with a show cause memo on 7th February, 2011 to which he responded on 9th February 2011 on which date he also made a written statement to the Investigating Officer. 26. By letter dated 9th June 2011, the Claimant was invited to appear before the Respondent’s Corporate Disciplinary Committee on 23rd June 2011. His right to be accompanied by a union representative was highlighted. In his testimony before the Court, the Claimant confirmed having appeared before the Disciplinary Committee in the company of a union official. There was no evidence of the Claimant taking issue with either the composition of the Disciplinary Committee or the manner in which the disciplinary proceedings were conducted.’”

Decision on procedural fairness

32. The court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR observed on procedural fairness :-‘13. There can be no doubt that the 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 ...’”(emphasis given)



33. Section 41 of the *employment Act* provides for the procedure for fair termination as follows:- ‘41. (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.’”
34. On the allegation by the claimant on the decision being made same day hence mere formality the court finds that law does not give timelines for decision making and no fault can be attributed to the decision having been made the same day of the disciplinary hearing. On the 2nd issue of claimant having been denied the right to have a representative of his choice and the submissions that his representative was locked out of the hearing. The court found no such pleading in the statement of the claimant. Parties are bound by their pleadings and must disclose entire case for defense purpose. At the hearing the claimant simply stated he had no witness and denied Ezekiel reflected in the minutes having been his witness. The letter of invitation to the said disciplinary hearing dated 11th August 2022 stated:- ‘ Further you are allowed /required to have another employee of your choice or a union representative present during your hearing as provided for in the *Employment Act* Section 41 (1) where applicable’”(d-Exhibit 6). At page 14 of the respondent’s documents were the minutes of the disciplinary proceedings and the claimant never stated he was denied representation. At page 17 there was record of one Wangwe who appeared to have mitigated the case for the claimant though he denied that was his witness.
35. The court holds that the employer is only obliged to give opportunity to the claimant to appear with their employee of choice or union representative and that the employer cannot force an employee to be represented. The claimant was given the opportunity and reminded of his right to representation. There was no evidence of the claimant having raised issue of representation during the disciplinary hearing. There was no pleading that his representative was locked out. The submissions that the claimant’s witness was locked out of the hearing was evidence from the Bar hence irrelevant and of no consequence.
36. The court is persuaded and upholds decision in *Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Limited* (2015)eKLR to find the respondent complied with the procedural fairness law where the court stated as follows:- ‘25. From the record, the Claimant was issued with a show cause memo on 7th February, 2011 to which he responded on 9th February 2011 on which date he also made a written statement to the Investigating Officer. 26. By letter dated 9th June 2011, the Claimant was invited to appear before the Respondent’s Corporate Disciplinary Committee on 23rd June 2011. His right to be accompanied by a union representative was highlighted. In his testimony before the Court, the Claimant confirmed having appeared before the Disciplinary Committee in the company of a union official. There was no evidence of the Claimant taking issue with either the composition of the Disciplinary Committee or the manner in which the disciplinary proceedings were conducted.’”
37. In the upshot the court holds there was procedural fairness in the termination process of the claimant’s employment contract.

Issue 3-Whether the claimant is entitled to reliefs sought.

38. The court holds the termination was lawful and fair as above. The Respondent treated the termination as normal and the claimant was paid his terminal dues(C-exhibits 3 being payslip of August 2022) where salary was paid, notice pay, basic pay and gratuity and leave earnings. The claimant had no claim on terminal dues. The court find that all other reliefs are not available as the claim failed.



Conclusion and disposition

39. The court holds the termination was lawful and fair and the claimant was paid his terminal dues and issued with certificate of costs. The court is guided by the Court of Appeal in its decision in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR where it observed in allowing the appeal :- ‘Where, as here, an employer has reasonable cause to take disciplinary action against an employee and does so with scrupulous adherence to due process and fair, equitable treatment of the employee; and even imposes a normal termination with pay in lieu of notice when it could easily have summarily dismissed the employee reasonably suspected of attempted theft with ample evidence thereof availed, it cannot be right that orders such as issued in the instant case be given. Much as courts are right to be solicitous of the interests of the employee, they must remain fora where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway.’
40. The court holds that the entire claim had no merit. The claim dated 20th September 2022 is dismissed with costs to the respondent.
41. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH JUNE 2023.

JEMIMAH KELL,

JUDGE.

In The Presence Of:-

Court Assistant : Lucy Macheso

For Claimant : ms. masika

For Respondent:- absent

