

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

ELRC CAUSE NO. E018 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

URSULA

ATIENO

OJENGE.....CLAIMANT

VERSUS

MABATI ROLLING MILLS LTD.....

RESPONDENT

JUDGMENT

The Claimant commenced the instant suit on 24th March 2025 vide a statement of claim dated 17th March 2025 alleging unlawful termination of employment by the respondent.

The Claimant prayed for: -

- (i) Declaration that termination of employment was unlawful, unprocedural, unjustified and unfair.*
- (ii) Payment of Kshs 99,907.60 being unexplained deduction.*
- (iii) Kshs. 1,358,688.00 being 12 months gross salary compensation.*

- (iv) *General damages for illegal, unlawful and unauthorized use of the Claimant's name after dismissal.*
- (v) *Certificate of service.*
- (vi) *Costs and interest till payment in full.*
- (vii) *Any other relief the court may deem fit to grant.*

The Claimant's case is that she joined the respondent as a customer service Assistant on 9th March 2016, was promoted to Account Relationship Officer in January 2018 and rose to the position of Service Centre Co-ordinator in March 2021 in Nyeri and later Kisumu in March 2023.

That her duties included generation of loading plans daily, send the centre stocking matrix every Monday and Friday, co-ordinate with Dispatch officer on material transfer from different production centres, send stock, take reports, send in pending orders every Monday and Friday, participate in quarterly and annual stocktake, clean system of absolute orders and receive feedback and complaints from customers among others.

By July 2024, the Claimant's salary stood at Kshs. 113,224.00 per month and served diligently until 4th

November 2024 when her employment was terminated for certain alleged omissions.

The Claimant alleged that she was unaware of Cecypo Ltd's goods stored at the respondent's Godown and was also unaware of the terms of the storage arrangement and was notified of the missing stock on 5th September 2024 and was unaware of what had transpired between Mr. Abdul Karim and Michael Obunde, the Dispatch Officer, who was away on leave and never reported back to the workplace.

The Claimant admitted having received a notice to show cause, responded, attended a hearing, participated and received a letter of termination of employment.

According to the Claimant, Mr. Michael Obunde handled the stock as he was incharge of the physical material and reported to the Service Centre Manager and could compare stocks in the system. According to the claimant, Cecypo, Ltd's goods were offline as they had been sold already and had no control over them.

The Claimant admitted that she did not appeal the termination of her employment. That the Service Manager was reinstated after suspension.

Respondent's case

According to the respondent, the Claimant delegated stock management to the Dispatch Officer without authority of the service centre Manager, failed to supervise or monitor Michael Obunde, failed to take action on 15th August 2024 about materials leaving the service centre without documentation, failed to participate in weekly stock taking verification and comingled the respondent and Cecypo Ltd's goods in August 2024 and was rightfully dismissed from employment and was taken through a fair procedure.

The respondent stated that the goods missing were valued at Kshs. 36,990,565.99. That the sum of Kshs. 99,907 was deducted on account of the claimant's absconding duties.

The respondent sought dismissal of the claimant's case with costs.

On cross-examination, the claimant testified that she was not involved in stock management and no incident occurred on 15th August 2024 and learnt about it in September 2024. Strangely, the witness declined to respond to counsel's question whether she was aware of the right to be accompanied by a colleague to the disciplinary hearing, yet she was accompanied by one Mr. Soyinka. That she was aware of the right to appeal but did not exercise it.

RW1 Mr. Isaac Yugi confirmed that she conducted an investigation and prepared a report but did not avail a copy to the claimant or produce her statement to the investigator.

He admitted that the Dispatch Officer for unavailable to recording a statement and the respondent was the custodian of Cecypo Ltd's goods as the two companies had agreed.

The witness confirmed that the respondent's goods were monitored both physically and manually and the claimant was incharge of the system while the Dispatch Officer dispatched goods and after a discrepancy was identified

three (3) persons including the claimant were held responsible.

RWII, Carolina Marenzia testified that Cecypo Ltd's goods were at the service centre and thus part of the stock held by the respondent and the claimant was in charge of the system monitoring of the goods and the Dispatch Officer could only dispatch goods after authorization.

The witness confirmed that Mr. Michael Obunde disappeared and his employment was terminated after he failed to respond to calls and notice to show cause. RWII further confirmed that the respondent did not provide the claimant with a copy of the investigation report.

On the deduction, RWII confirmed that because the payslip was prepared by the end of the month, the number of days, the claimant was not at work were deducted.

The witness denied knowledge of usage of the claimant's name after termination of her employment.

Finally, the witness testified that the claimant's job description accorded her responsibility over all goods at

the service centre and the estimated loss included the respondent's goods.

Claimant's Submissions

As to whether termination of the Claimant's employment was unfair, Counsel for the Claimant submitted that it was and the Claimant had discharged the burden of proof and the employer had not proved the requirements of Section 45 (4) of the Employment Act for the termination of employment pass muster.

Reference was placed on **Felix Mbolonzi Kioko V. Director of Public Prosecution. (2020) eKLR** to urge the requirements of a fair termination of employment and submit that the respondent had not proved that it had a valid and justifiable reason to terminate the Claimant's employment.

Reference was further placed on the decision in **Wanyera V. Central Isido Investment Ltd (2024) KEELRC 596 (KLR)**.

On procedural fairness, Counsel submitted that the investigation was incomplete as the main subject was not investigated, the Claimant's right to fair hearing was

undermined and the Claimant was victimized and an appeal would have been futile.

Reliance was placed on the decision in **Sawe V. Ekaterra Tea Kenya PLC (2024) KEELRC**.

Counsel further submitted that the continued use the Claimant's name after termination of employment exposed her to reputational harm and potential liability and constituted the tort of passing off.

Counsel submitted that the Claimant was entitled to the reliefs sought including costs of the suit.

Respondent's submissions

Concerning termination of the claimant's employment, counsel for the respondent submitted that the termination was valid and lawful as ordained by the provisions of the Employment Act.

Reliance was placed on the decisions in **Kamundia V National Cement Company Ltd [2025] eKLR**, **Thomson Kerongo & 2 Others V James Omariba Nyaoga & 3 Others [2017] eKLR** and **Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd [2014]**

eKLR to urge that a court can only interfere with an employer's disciplinary action against an employee if there was manifest abuse of power and breach of process.

Counsel submitted that the claimant's conduct demonstrated that she had fundamentally breached her contractual obligations and the employer had a substantive justification to terminate her employment as held in **George Musamali V G4S Security Services (Kenya) Ltd [2016] eKLR**.

On procedural fairness reliance was placed on the decisions in **Howard Andrew Nyerere V Kenya Airways Ltd [2013]** and **Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd (supra)** to submit that the employer had complied with the procedural requirements.

On reliefs, counsel submitted that none was merited and the claim for Kshs.5,000,000.00 as damages for the tort of passing off had not been proved.

Counsel prayed for dismissal of the suit with costs.

Analysis and determination

It is not in dispute that the claimant was an employee of the respondent effective 9th March 2016 and rose to become its Service Centre Co-ordinator reporting to the Service Centre Manager and served diligently until 4th November 2024 when her employment was terminated by the respondent on certain grounds which implicated omission on her part.

Evidence revealed that the respondent monitored stocks of the Service Centre both physically and in the system and the Claimant was responsible for the system and the Dispatch Officer the physical stock, as he also undertook dispatch as authorised.

It would appear as if the system worked well until 15th August, 2024 when goods left the service centre without documentation and the Claimant was notified by the Tally Officer when she went to the dispatch centre but was not informed of how the goods had left the centre and did not inquire from Michael Obunde who was also present and the issue rested until early September when the irregularity came to light and culminated in the dismissal of the claimant from employment.

The issues for determination are:

- (i) *Whether termination of the Claimant's employment by the respondent was lawful and fair.*
- (ii) *Whether the Claimant is entitled to the reliefs sought.*

It is trite law that for a termination of employment to pass the fairness test under Section 45 of the Employment Act, the employer is required to demonstrate that it had not only a valid and fair reason to terminate the employee's employment but also that it conducted the termination process fairly. Equally, the reason (s) for termination of employment must relate to the employee's conduct, capacity or compatibility or operational requirements of the employer. In other words, the employer must have had a substantive justification to terminate the contract of service and must have done so using a fair procedure, as aptly captured by Ndolo J. in **Walter Ogal Anuro V Teachers Service Commission (2013) eKLR**. The Court of Appeal expressed similar sentiments in **Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR**.

Reason for termination

The notice to show cause accused the claimant of neglecting her duties in stock taking and management, delegating responsibilities to Michael Obunde, and failing to supervise him, failing to act on the information received on 15th August 2024 and failing to report the same to the Service Centre Manager, failing to participate in weekly stock take verifications and irregular transfer of Cecypo Ltds inventory to the respondent's stock.

The termination letter dated 4th November 2024 isolated three reasons for termination of employment namely; neglect of responsibilities in relation to stock taking and Management of all stocks at the Service Centre, failing to participate in record keeping, oversight and verification of physical weekly stock in all godowns at the Service Centre and comingling and non-segregation of customer stocks by irregular transfer from Cecypo Ltd's stock into the company's stock in August 2024.

In her response to the notice to show cause, the Claimant disclosed that the visit by Vinesh Rajgor and Abdul Karim on 5th September 2024 revealed that Cecypo Ltd's materials in the godown had reduced, a fact the claimant was unaware of and the Dispatch Officer Mr. Michael

Obunde was uncooperative and did not show up after promising to do so.

The Claimant stated that stocktake for the Cecypo Ltd's goods was done by Michael Obunde since the goods were offline.

The Claimant could not recall when the last stock take took place but admitted that she was taking part whenever it took place. The Claimant having delegated responsibility to Mr. Michael Obunde.

That the Dispatch Officer received all materials to the Service Centre and did the dispatch and he and the Service Centre Manager were responsible for what came in and went out and the Dispatch Officer reported to the Service Centre Manager.

The Claimant stated that as the Service Centre Co-ordinator, she co-ordinated activities at the Centre such as customer service, operations being present in weekly stock take. That stocks were being done by workers in the dispatch.

Finally, the claimant denied knowledge of transfer of Cecypo Ltd's stocks to the respondent in the godown.

During the hearing, it emerged that the last stock take was in June 2024 and godown 3 had steel and they did not know how to material was to be handled or who would check collection of the goods. It also emerged that the Claimant was not aware of all the goods in godown 3 but agreed that some pieces of versatile which were supposed to be in godown 3 were moved to godown 2.

Further, the claimant admitted that on 15th August 2024, she was not shown any documentation on the dispatch of the 105 pieces of materials she was unaware of.

Finally, the claimant admitted that she was unable to send weekly reports because she was overwhelmed with work.

All attendees of the disciplinary hearing including the Claimant signed the minutes on 28th October, 2024.

The foregoing account would appear to show that the Claimant as the respondent's Service Centre Co-ordinator was not a hands on co-ordinator. It also reveals that Mr. Michael Obunde, the Dispatch Officer was solely responsible for physical goods while the Claimant dealt

with the stock in the system, with minimal synchronization, a loophole Mr. Michael Obunde appear to have exploited for personal gain.

In determining whether the respondent had a reason (s) to terminate the claimant's employment, the Court is guided by the provisions of the Employment Act and Judicial pronouncements.

Section 43 of the Employment Act provides: -

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 43 (2) of the Employment Act, has been construed to mean that all the employer is supposed to show is that it had reasonable basis to believe that it had a reason to terminate the employee's employment.

In **Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR** B.O.M. Manani J expressed himself as follows: -

"In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists."

The Court of Appeal had expressed a similar view in **Kenya Revenue Authority V. Revwel 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. This is a partly subjective test."

The foregoing sentiments resonate with the guidelines in Halsburys Laws of England, 4th Edition Vo. 16 (B)

paragraph 642, on the band or range of reasonable responses test applied by Lord Denning MR in **British Leyland (UK) Ltd V Swift (1981) IR LR 91** as follows: -

“... The correct test is: Was it reasonable for the employer 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 an employer might reasonably take one view; another quite reasonably take a different view.”

From the evidence on record, it is clear that although the claimant was the respondent's Service Centre Coordinator, her coordination was not free from blemish whether it related to the respondent or the customers, in this case Cecypo Ltd.

Having admitted that she did not enquire as to how 105 pieces left the godown, comingling having taken place and failure to file stock reports, the respondent cannot be faulted for believing that it had a genuine basis to terminate the Claimant's employment for gross misconduct pursuant to the provisions of **Section 44(4)**

(c) of the Employment Act which enlists negligence, careless and improper performance of work which was an employee's duty under the contract of employment.

For the foregoing reasons, it is the finding of the court that the respondent has demonstrated that it had a valid and fair reasons to terminate the Claimant's employment.

Procedure

While the provisions of Section 45(2)(c) of the Employment Act are explicit that the procedure employed by the employer in terminating the services of an employee must be fair, Section 41 prescribes the essential elements. Significantly, Section 41 of the Employment Act is couched in mandatory tone and must be complied with as held in **Pius Machafu Isindu V. Lavington Security Guards Ltd (2017) eKLR**. See also **Jane Samba Mukala V Ol Tukai Lodge Ltd (2013) eKLR**.

The precepts of procedural fairness under Section 41 of the Employment were enumerated by the Court of Appeal in **Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR** and are reasons for which termination of employment was being considered, explanation of the

grounds of termination in a language understood by the employees in the presence of another employee of the employee's choice or shopfloor union representative, right to make representations made by the employee and hearing and considering the representations made by the employee and/or his or her representative.

In the instant case, it is evident that the respondent issued a notice to show cause dated 24th September 2024 and the Claimant responded vide letter dated 26th September 2024 and was vide letter dated 27th September 2024 invited for a disciplinary hearing slated for 1st October 2024 and was notified of her right to be accompanied by a witness.

It is also evident that the Claimant attended the hearing on 23rd October 2024, was informed of the charges participated in the proceedings and signed the minutes and a letter of termination of services dated 4th November 2024 was issued and received on 5th November, 2024, which informed the Claimant of his right to appeal but opted not to.

Section 45 (4) of the Employment Act provides that: -

A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in Section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

The provisions of **Section 45(5)** itemise the parameters the court takes into account in making the determination under **Section 45(4)(b) of the Act** such as the procedure adopted by the employer communication of the decision to the employee, handling of appeal if any, conduct and capability of the employee, compliance with statutory provisions, germane to termination including issuance of a certificate of service, provisions handling of such cases and warning letters, if any.

Although the respondent made credible effort to comply with the statutory provisions, and in particular the provisions of Section 41 of the Employment Act; it did not avail a copy of the investigation report to the claimant.

Having investigated and prepared a report on the incident on 15th August 2024, it behooved the respondent to avail a copy to the claimant to appraise her of the findings and enable her mount a defence to the charges. RW1 admitted on cross-examination that he prepared the investigation report.

Additionally, he admitted having recorded the claimant's statement, which he did not avail to the court. RWII also confirmed on cross-examination that the Claimant was not given a copy of the investigation report.

It is trite law that an employee facing imminent termination of employment on the basis of specific charges levelled by the employer is entitled to the evidence and documents the employer intends to rely on in the prosecution of its case to enable him or her prepare for his/her defence. It is one of the essential elements of the right to fair hearing which if violated vitiates the disciplinary process.

See in this regard, **OI Pejeta Ranching Co. Ltd V David Wanjau Muhoro (2017) KECA 329 (KIR) Postal Corporation of Kenya V Andrew K. Tanui (Supra)**

and Regent Management Ltd V Wilberforce Ojiambo Oundo (2018) KECA 883 (KLR).

The failure or refusal by an employer to avail a copy of the investigation report pursuant to which an employee is subjected to a disciplinary hearing violates the employee's right to a fair hearing as it impedes his or her ability to respond to the charges effectively and undoubtedly tilts the scale in favour of the employer. In this case, the non availment of the investigation report to the claimant tainted the disciplinary hearing. It follows that the respondent did not act in accordance with justice and equity which rendered the termination of the claimant's employment procedurally flawed and thus unfair.

Appropriate reliefs

Declaration

Having found as above, the declaration sought, that termination of the Claimant's employment by the respondent was unfair is merited.

Kshs. 99,907.60 unexplained deduction

The respondent's explanation that the deduction arose from the fact that the payslip was prepared at the end of

the month and the claimant worked for only 4 days in November 2024 was sufficiently convincing. The Claimant could not be paid for days she had not worked.

The prayer is declined.

General damages for illegal and unlawful and unauthorised use of the Claimant's name.

Notably, neither the Claimant's written witness statement dated 17th March 2025 nor the oral evidence set out the particulars of the alleged usage of her name by the respondent and in particular, the circumstances in which it was used, when and how and the detriment, if any, suffered.

The prayer lacks supportive evidence and it is dismissed.

12 months compensation

Having found that termination of the Claimant's employment by the respondent was procedurally unfair, the Claimant is entitled to compensation in accordance with the provisions of Section 49(1)(c) of the Employment Act, up to a maximum of 12 months gross salary.

Considering that the Claimant was an employee of the respondent for a period of about 8 years and 7 months,

had no recorded instances of misconduct and considering further that the claimant did not appeal the respondent's decision or express his wish to remain in the respondent's employment and substantially contributed to the termination of employment, the court is satisfied that the equivalent of two (2) months gross salary is fair, Kshs. 226,448.

Certificate of service

The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act.

The upshot of the foregoing is that Judgment is entered in favour of the Claimant against the respondent in the following terms: -

- (a) Declaration that termination of employment was unfair.*
- (b) Equivalent of two (2) months salary Kshs. 226,448.00.*
- (c) Certificate of service.*
- (d) Parties shall bear their own costs.*

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF SEPTEMBER, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d) of the Constitution** which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

ORIGINAL