

KENYA / JUDGMENT

Opiyo v Cobra Security Co. Ltd [2026] KEELRC 1191 (KLR)

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COURT

Employment and Labour Relations Court

CASE / FILE NUMBER

Cause E006 of 2025

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Opiyo v Cobra Security Co. Ltd (Cause E006 of 2025) [2026] KEELRC 1191 (KLR) (30 April 2026)
(Judgment)

Neutral citation:

[2026] KEELRC 1191 (KLR)

Republic of Kenya

In the Employment and Labour Relations Court at Kakamega

Cause E006 of 2025

DN Nderitu, J

April 30, 2026

Between

Abich Thomas Opiyo

Claimant

and

Cobra Security Co. Ltd

Respondent

Judgment

I. Introduction

1.The claimant commenced these proceedings by way of a memorandum of claim dated 28th January 2025. Through J.W Nafuye & Co Advocates, the memorandum of claim was amended on 10th March 2025. The claimant is seeking for the following reliefs –a.A Declaration do issue that

the Respondent decision to summarily dismiss the Claimant from Employment was unfair, unlawful and un-procedural. b. A declaration do issue that the Respondent's Action of summarily dismissing the Claimant from Employment violates the Claimant's rights and Fundamental freedoms as enshrined under articles 27 35, 41, 47, 50 of the Constitution of Kenya, provisions of Administrative Action Act and Employment Act 2007. c. A declaration do issue that the Respondent to pay unpaid requisite allowances owned by the Respondent to the Claimants. The Respondent contravenes article 41 of the Constitution and Provisions of Employment Act 2007. d. A declaration do issue that the Respondent to pay the claimant unpaid salary for the month of December 2024 being: - 23,500/= (d.1) One month's salary in lieu of notice being: 23,500 e. Declaration do issue that the Respondent to remit NSSF of 2,160 x 12 months forthwith - 34,560/- f. General (Statutory) damages for unfair, unlawful, and un-procedural termination being 23,500 x 12 months - 282,000/ = g. Gratuity pay for 9 years x 18 x 23,500/ 26 = 146,42/= h. Unlawful deduction from Claimant salary for the month of October 2024 - 4,500/- i. Unpaid Requisite allowances 34,000/- for Kilifi Branch + 448,800/- for Kakamega Branch = 482,800/= j. Unpaid leave for one year - 20,366.67 Total Claim = 1,017,649.75/- k. This Honourable Court be pleased to issue an order of reinstatement of the Claimant in service with effect from 28th December 2024 in the same position previously held without a break in service with full prevailing benefits (requisite allowances). l. Certificate of Servicem. Cost of the Claimn. Interest of the Claim aboveo. Any other or further relief that the Honourable court may deem fit to grant

2. The above prayers are reproduced from the amended memorandum of claim without correction obviously there are numerous grammatical errors in the same. There is need for counsel and litigants to be more thorough and careful in their pleadings to avoid obvious and embarrassing errors.

3. The amended memorandum of claim was accompanied with a verifying affidavit sworn by the Claimant. The claimant relied on his undated written statement filed with the initial memorandum claim filed on 29th January 2025.

4. The Respondent entered appearance through Chege Kibathi & Company Advocates LLP and filed a response to the initial memorandum of claim dated 2nd April 2025. It was accompanied with a list of witnesses, the written statement to John B. Mengesa (RW1), a list of documents with copies of the listed documents attached.

5. On 17th April 2025, the Claimant filed a combined list of witnesses and documents with copies of the listed documents attached.

6. The Respondent also filed a further list of documents dated 27th October 2025 with copies of the documents annexed.

7. The case came up in court for hearing on 12th September 2025 when the Claimant (CW1) testified and closed his case. The defence was heard on the same day when RW1 testified for the defence and the Respondent's case was also closed.

8.Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Ms. Nafuye for the claimant filed written submissions dated 14th January 2026, while Mr. Kihara for the Respondent filed written submissions dated 2nd March 2026.

II. The Claimant's Case

9.The claimant's case is expressed in the amended memorandum of claim, his witness statement, the documents filed, his oral testimony in court and, the written submissions by his counsel.

10.In the memorandum of claim, it is pleaded that the Claimant was employed by the Respondent as a Supervisor/Rider from 2nd November 2015 and served continuously, with his contract being verbally renewed over time, until his dismissal on 28th December 2024. Over the course of his employment, the claimant worked across several branches of the Respondent and was eventually promoted to the position of Branch In-Charge (Reliever) in February 2021.

11.It is the Claimant's case that during his tenure as a reliever, the Respondent agreed to pay to him a weekly allowance of Kshs3,500. He started that while some allowances were paid in earlier deployments, the Respondent allegedly failed to pay substantial portions of the same during his assignments in Kilifi and Kakamega, resulting in significant arrears.

12.The Claimant further contends that despite repeated follow-ups, including formal emails to the Respondent's management, no action was taken to settle the outstanding dues. He also avers that although statutory deductions for NSSF were made from his salary, the Respondent failed to remit the same for a period of 16 months.

13.With regard to termination, the Claimant asserts that the disciplinary process leading to his dismissal was fundamentally flawed. He states that he was issued with a show cause letter and compelled to sign it without being afforded adequate time to consider or respond to the allegations. Thereafter, he was sent on compulsory leave, during which period an unlawful salary deduction of Kshs4,500 was effected.

14.Upon resumption, the Claimant was summoned to attend a disciplinary hearing, which was rescheduled without justification. The Claimant further avers that he was not furnished with the outcome of the disciplinary proceedings or his subsequent appeal, thereby denying him the opportunity to understand the basis of the decision taken against him.

15.It is the Claimant's position that the summary dismissal was unlawful, unprocedural, and in violation of his constitutional rights to fair labour practices, fair administrative action, and a fair hearing. He contends that the allegations against him were unfounded and that the Respondent acted with malice and in disregard of due process.

16.As a result, the Claimant claims that he suffered loss and damage, including loss of employment, unpaid dues, and violation of his rights, and consequently seeks various remedies including compensation for unfair termination, payment of unpaid allowances and salary, refund of unlawful deductions, remittance of NSSF contributions, service pay, issuance of a certificate of service, and other appropriate reliefs, as stated in the introductory part of this judgment.

17.In his testimony in court, the claimant reiterated the contents of the foregoing pleadings and his undated written statement. He produced and adopted the documents in his list of documents dated 17th April 2025, and the same were marked as exhibits 1 to 7.

18.The claimant testified that he was issued with a show cause letter on 28th August 2024 and was compelled to sign it immediately without being given adequate time to consider the allegations. He stated that he was directed to file his response by the close of business on 30th August 2024. He testified that he proceeded on 105 days' leave and, on resumption, he was directed to attend the hearing with no time to prepare. He stated that he was not informed of his right to representation or the date or venue of the hearing.

19.In cross-examination, the claimant stated that his engagement in Kakamega for 2 years and in Kilifi from November 2021 to February 2022 was on short time posting, and that he was entitled to the allowances of Khs 448,800/= and Kshs 34,000/= respectively. He contended that his salary was paid less the allowances.

20.He admitted attending the disciplinary hearing. He admitted that after receiving Kshs32,250/= from the Respondent's client, one Jackline Lukalo, he refunded only Ksh14,000/= and never paid the balance. He conceded that he was heard and informed of his right to appeal, although he stated that the appeal decision of 6th January 2025 in regard of the appeal was not lawful as he was not called to the hearing thereof.

21.In re-examination the Claimant stated that he was entitled to Kshs3,500 weekly while in Kilifi and Kakamega as the basis for the claim for unpaid allowances. He maintained that the deduction of Kshs4,500/= from his salary was unlawful.

22.The claimant stated that he is now an employee of Coalition Security since October 2025.

III. Respondent's Case

23.In the amended memorandum of response, the respondent admits that the Claimant was its employee, having been engaged him on or about 2nd November 2015 as a rider/supervisor. He was initially earning a monthly salary of Kshs20,000/= which was later enhanced to Kshs23,500/=.

24.It is the Respondent's case that the Claimant was lawfully and procedurally dismissed summarily on 28th December 2024 on account of gross misconduct. The Respondent asserts that the dismissal arose from serious acts of misconduct, including embezzlement of company funds, conflict of interest, and breach of trust.

25. In particular, the Respondent avers that on 27th June 2024, the Claimant was entrusted with Kshs4,500 to repair a motorbike registration number KMDU 2905, but he failed to carry out the repairs or account for the funds. The Respondent states that during the disciplinary hearing held on 13th December 2024, the Claimant admitted to having received the said funds but failed to account for the same even after a period of nearly five months.

26. Further, the Respondent contends that on 6th May 2024, the Claimant received Kshs32,250 from a client, out of which he settled an invoice of Kshs14,934 owed to Cobra Security Company Ltd for security services, but unlawfully retained the balance of Kshs17,316 as payment for investigative services he personally rendered. The Respondent avers that such services fall within the scope of its business and that the Claimant's actions amounted to a conflict of interest and a breach of his contractual and fiduciary duties.

27. The Respondent further states that the Claimant had a history of disciplinary issues, including a warning order dated 9th June 2017, a warning letter dated 28th May 2018 and, a cautionary letter dated 4th July 2018. This sequence of misconduct informed the decision to summarily dismiss the Claimant.

28. It is the Respondent's position that due process was applied leading up to the dismissal. The Claimant was issued with a show cause letter, accorded an opportunity to respond, and subsequently subjected to a disciplinary hearing. The Respondent maintains that the Claimant admitted to the allegations during the hearing and that the decision to summarily dismiss him was justified and lawful.

29. The Respondent further avers that all terminal dues owing to the Claimant were computed and paid in full, and that the dismissal letter provided a window for review within seven (7) days that the Claimant did not utilize.

30. In response to the specific reliefs claimed, the Respondent denies liability for compensation, notice pay, and severance pay, maintaining that the dismissal was lawful. The allegations of non-remittance of NSSF contributions are denied asserting that all statutory deductions were duly remitted. The Respondent further denies owing any unpaid allowances or leave, contending that all the dues to the Claimant were settled in accordance with company policy.

31. The Respondent, therefore, maintains that the Claimant's claim is without merit, premature, and should be dismissed with costs.

32. In his testimony in court JOHN B. MENGESA (RW1), the HR Manager, reiterated the contents of the foregoing pleadings and his written statement dated 2nd April 2025. He produced and adopted the documents in the Respondents' list of documents dated 2nd April 2025 and the further list of document dated 27th October 2025, which were marked as Respondent's exhibits 1 to 19.

33.RW1 testified that while the claimant had worked with the Respondent for nine years he was not entitled to an allowance while in Kilifi and Kakamega, where he was on a permanent basis, unlike in Kericho and Kisumu, where he was a reliever.

34.He testified that while the claimant's disciplinary proceedings commenced with the issuance of a show-cause letter, which the claimant responded to and submitted the response late as the same was expected by 30th August 2024. He stated that the Respondent's panel made a unanimous decision to summarily dismiss the Claimant as he had collected money from the Respondent's clients against company policy. RW1 further stated that the Claimant was given an opportunity to be heard before his dismissal and he was thus not entitled to notice. He further stated that the Claimant had diverted Kshs4,500/= sent to him for repair of a motorbike, which failed to do and the amount was later surcharged in the October 2024 from his salary. RW1 maintained that the Claimant should not be reinstated as he was not a good employee and the relationship between him and the employer had irretrievably broken down.

35.In cross-examination, RW1 conceded that the Claimant was not informed of his right to be accompanied by a witness or a union official. He, however, maintained that the Claimant appeared before the disciplinary hearing panel as evidenced in the minutes adduced, and that the appeal was dismissed as the Claimant was found guilty of gross misconduct.

36.RW1 maintained that all statutory deductions made had been paid and that the Claimant had taken all his leave days.

37.In re-exam, he maintained that before the decision to dismiss the claimant was made, an investigation report had been prepared.

IV. Submissions

38.The Claimant's counsel submitted on three issues – Whether the Claimant was wrongfully dismissed; Whether he is deserving of the remedies sought; and, Who bears the costs of the suit.

39.On termination, it is submitted that the disciplinary process leading to the Claimant's dismissal was fundamentally flawed and did not meet the threshold of procedural fairness under Section 41 of the Employment Act (the Act).

40.It is submitted that the Claimant was issued with a show-cause letter dated 27th August 2024, requiring a response within one day, to which the Claimant complied. Thereafter, he was immediately compelled to proceed on leave for 78 days awaiting the disciplinary process to be concluded. However, the Claimant only learnt of the pending disciplinary hearing shortly before the end of his leave when he was required to travel from Kakamega to Nairobi on short notice.

41.It is further submitted that the Claimant was not informed of his right to be accompanied by a workmate or an officeil of his union during the disciplinary hearing, and that new allegations — particularly regarding receipt of client funds through his personal M-Pesa account — were introduced during the disciplinary hearing despite the same not forming part of the allegations in the show-cause letter. Counsel argues that this denied the Claimant adequate time and opportunity to prepare his defence.

42.In support of this position, counsel cited *Frederick Odongo Owegi v CFC Life Assurance Ltd* [2014] eKLR, wherein the necessity of affording an employee a fair opportunity to respond to all allegations before adverse action is taken was emphasized.

43.Counsel pointed to email correspondence demonstrating that the Respondent pressured the claimant to respond urgently and sign documents, imputing that the disciplinary process had a predetermined outcome and the process was merely intended to justify the dismissal.

44.On the right to appeal, it is submitted that although the Claimant lodged an appeal against the dismissal in accordance with his contract of employment, the Respondent failed to accord him a fair hearing and merely issued a summary rejection of the appeal without giving reasons therefor. Counsel relies on the decision in *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, wherein the Court underscored the importance of fairness and reasonableness in disciplinary timelines and processes.

45.It is further submitted that the Respondent's reliance on previous warning letters was misplaced, as those issues were not in the show-cause notice and therefore could not lawfully form the basis for the dismissal.

46.On remedies, Counsel sumitted that the Claimant is entitled to – compensation for unfair termination, having established that both procedural and substantive fairness were lacking; salary in lieu of notice, on the basis that the summary dismissal was unlawful; unpaid salary for December 2024; unpaid allowances, particularly for his service in Kilifi and Kakamega, which he asserts were agreed upon, albeit verbally; refund of unlawful deductions, specifically Kshs4,500 deducted from his October 2024 salary without explanation, contrary to Section 19 of the Act; gratuity, calculated based on 9 years of service, which he argues is payable in light of his long service and the circumstances of termination; unpaid leave, amounting to Kshs. 20,366.67; and, NSSF remittances, which he alleges were not made despite deductions from his salary.

47.On the claim for unlawful deductions, it is submitted that Section 19 of the Act strictly regulates deductions and requires that an employee be informed in advance, which was not done in this case.

48.The Claimant also seeks issuance of a certificate of service pursuant to Section 51 of the Act, that is mandatory upon termination.

49.On costs and interest, the Claimant's counsel submitted that costs should follow the event and prays for interest on all monetary awards at court rates.

50. In conclusion, it is submitted that the Claimant proved his case on a balance of probabilities and the Court is urged to find that the dismissal was unfair and grant the reliefs sought.

51. On the other hand, the Respondent's counsel submitted globally in objection to the claim, asserting that the Claimant's dismissal was lawful, justified, and procedurally fair within the meaning of the Act. Counsel contends that termination of employment must meet the twin requirements of substantive justification and procedural fairness, as anchored under Sections 41 and 43 of the Act. Further, it is submitted and submits that, on the validity of the reason for termination, the Claimant was summarily dismissed for gross misconduct involving embezzlement of company funds, conflict of interest, and breach of trust. It is argued that the Claimant received funds from clients on behalf of the Respondent but failed to remit or account for the same fully and promptly. Further, it is submitted that the Claimant admitted to engaging in private investigation services for a client while still in employ of the Respondent in contravention of the terms of his contract of employment.

52. It is submitted that Section 44(4)(g) of the Act permits summary dismissal where an employee commits or is reasonably suspected of committing a criminal offence against the employer or its property. It is submitted that the Claimant's conduct fell squarely within this provision and justified the summary dismissal.

53. On procedural fairness, the Respondent maintains that the Claimant was issued with a show cause letter dated 27th August 2024 to which and he responded on 30th August 2024. He was thereafter invited to a disciplinary hearing held on 13th December 2024 wherein he was heard. The Respondent contends that the Claimant actively participated in the process and even provided a detailed written response, demonstrating that he was accorded a fair hearing in compliance with Section 41 of the Act.

54. The counsel for the Respondent further submitted that the Claimant's appeal was considered and determined thereby exhausting the internal dispute resolution mechanism.

55. On remedies sought, the Respondent submits that the Claimant is not entitled to notice pay by virtue of Section 44(1) of the Act that defines summary dismissal as termination without notice. It is further argued that compensation under Section 49 of the Act is not available where termination is lawful and justified.

56. On the claim for gratuity, the Respondent's counsel cited *Bamburi Cement Limited v William Kilonzi* [2016] eKLR wherein the Court held that gratuity is a discretionary or contractual benefit and is not automatically payable unless expressly provided for in the contract of employment or applicable policy. The Respondent submits that the Claimant failed to demonstrate any contractual basis for the claim for gratuity.

57. Regarding unpaid allowances, it is argued that the alleged weekly allowance was not part of the Claimant's contract but was based on an alleged verbal agreement that was not proved. It is further contended that the amounts claimed are exaggerated and inconsistent with the Claimant's salary.

58. On leave pay, the Respondent's coounsel submitted that the Claimant had exhausted all his leave days prior to dismissal as supported by leave application and approval records.

59. On NSSF remittances, the Respondent maintains that all statutory deductions were duly remitted and relies on payment records to demonstrate compliance.

60. In conclusion, it is submitted that it has been demonstrated that there were both valid reasons for the dismissal and compliance with due process. The Court is urged to find that the Claimant has failed to prove unfair dismissal and dismiss the claim in its entirety with costs.

V. Issues For Determination

61. The court has carefully and dutifully gone through the pleadings filed, the documentary and oral evidence tendered by the parties, and the written submissions by their respective counsel. The following issues are for determination – a. Whether the Claimant was unfairly and unlawfully dismissed. b. Whether the Claimant is entitled to the reliefs sought. c. Costs.

VI. Dismissal

62. The claimant was issued with a show cause letter dated 27th August 2024. The claimant, however, alleges that he was neither informed in advance of the evidence the Respondent was to rely on, nor informed of the outcome of the disciplinary hearing or his appeal. The show-cause letter stated as follows – Cobra Security Company Ltd Cobra Security House No. 531 - Langata Road, Karen PO Box 27749-00506, Nairobi Tel 0203585025/0703100**Hotline. 0721 444 *info@cobrasecurityltd.com www.cobrasecurityltd.com To, Thomas Abich Opiyo, C/O Cobra security Co. Ltd. Kakamega Branch Dear Thomas, Re : Show Cause Letter It has been discovered with concern that you have been misappropriating company monies paid to you by clients for services rendered as highlighted below: - 1. On 5th May 2024 client Jackline Mwanesi Lukalo sent Kshs 32,000.00 to your Mpesa account for services rendered in the month of April 2024. On 6th May 2025 you only sent Kshs. 14,934.00 to the company's paybill account and remained with a balance of Kshs. 17,070.00. You have not remitted the balance to the company to date. 2. On 7th March 2024 client Flagship Project Ltd sent Kshs. 31,320.00 to your M-Pesa account transaction No. SC76C9NAPW at 10.06PM for services rendered. You Later on 22nd April 2024 paid the amount to the company's account after several follow ups by the Credit Controller. 3. On 3rd February 2022 client Erick Ngozo sent to your mpesa account kshs 17386.00 for services rendered. On 4th February 2022, you deposited only part Kshs 16,300.00 and remained with a balance of Kshs. 1,086/= which you later deposited to company's account on 7th June 2022 after several follow ups by the credit controller. May I have your written explanation on the three above highlighted issues by COB on 29th August 2024. Also explain why appropriate disciplinary action should not be taken against you for the above misconduct. Sign below to signify receipt of this letter. Your Faithfully, For Cobra Security Co. Ltd James Ngwalla Head Of Operations Sign..... Date... 30/08/2024

63.The Claimant alleges that the Respondent forced him to sign and return the show cause letter before the close of the day on the material date despite his request for time to internalise the contents. He, however, stated that he filed a justifiable response.

64.The response to the show-cause letter was dated 30th August 2024. It was RW1's evidence that the Claimant filed his response before he proceeded on leave, a position the claimant confirmed. The Claimant stated that on 9th December 2024, before he resumed from leave on 11th December 2024, he was invited to attend a disciplinary hearing on 11th December 2024. The same hearing was rescheduled to 13th December 2024. The claimant argued that he was not informed of his right to be accompanied by a witness or a union official/officer of his choice.

65.The Claimant testified that he appeared for the hearing, but he was not informed in writing of the decision to dismiss him in the letter dated 28th December 2024.1.The letter of dismissal dated 28th December 2024 stated as follows –Cobra Security Company LtdCobra Security HouseNo. 531 - Langata Road, KarenPO Box 27749-00506, NairobiTel 0203585025/0703100**Hotline. 0721 444 *info@cobrasecurityltd.comwww.cobrasecurityltd.comTo,Thomas Abich Opiyo,PO Box 46310-00100NAIROBI.28th December, 2024Dear Thomas,Ref: Letter for summary dismissalThis letter serves to notify you of your summary dismissal from Cobra Security Company Limited with effect from 28/12/2024.The reason for your termination is gross misconduct, specifically embezzlement of company funds, engaging in conflict of interest and abusing the trust bestowed on you.You were sent Kes.4,500/= to the repair motor bike KMDU 2905 on 27/06/2024 while at Kakamega branch, which you didn't. During the disciplinary hearing on the 13/12/2024, you admitted to have received the money but failed to account for it after almost five months.On 06/05/2024, you received Kes. 32,250/= from a client, paid one invoice to Cobra Security Company Ltd of Kes. 14,934/= for security services rendered and retained Kes. 17,316/= for services you offered to the same client as investigation fees, same services offered by Cobra Security Company Ltd. This in itself amounts to conflict of interest.You may appeal against our decision within seven (7) days to the management from the date of this letter. Appealing the decision will not delay the dismissal taking effect but if you are subsequently reinstated as an employee, any lost pay will be re-imbursed.Upon receipt of this letter, kindly organize and hand over company property in your possession to the head of operations and obtain a clearance certificate. Your final dues will be calculated thereafter and will be paid on a date to be advised.Yours sincerely,For: Cobra Security Company Limited.John B MengesaHuman Resource & Administration ManagerReceived Sign.. Date....2/01/2025

VII. Substantive Fairness

67.What this court is invited to determine is whether the decision to dismiss the Claimant met the reasonable test, as enunciated by Lord Denning in *British Leyland UK Limited v Swift* (1981) I.R.L.R. 91, wherein it was held that –“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...”

68.The Respondent reasonably believed that the Claimant had misappropriated company funds and engaged in activities in conflict of interest. The Claimant admitted in the hearing that he had indeed received company funds but remitted the same to the Respondent’s Pay-Bill after the credit-controller had detected the same.

69.In the minutes of the disciplinary hearing, the claimant admitted that he had received Kshs4,500 for the repair of a motorcycle, but he could not purchase the speedometer, which he claims was expensive in Kakamega, but he did not return the money or inform the Respondent accordingly.

70.The court has read the Claimant’s response to the show-cause letter and noted that the Claimant had indeed received money on behalf of the Respondent and had at first remitted part thereof but later paid the balance.

71.On the issue of conflict of interest, the claimant’s employment contract dated 2nd November 2015 at clause 9 provided that –Involvement in other trade or business activities: During your period of employment, you shall devote the whole of your time and attention exclusively to your work, and you shall not participate in any other trade or business activities without the consent in writing of your Head of Department.

72.The claimant admitted that he had undertaken private investigations for one of the Respondent’s clients. The Respondent’s position is that undertaking the private investigations, which are in the realm of the Respondent’s line of work and business amounted to a conflict of interest.

73.The above conduct on the part of the Claimant was gross. The court finds and holds that the reason(s) for the summary dismissal of the Claimant were within what a reasonable employer in the circumstances could have arrived at and further finds and holds that the Respondent was justified in dismissing the Claimant. The Respondent had reasonable grounds for the dismissal in line with Section 43 of the Act. Further, the claimant’s misconduct was gross and within the provisions of Section 44(4)(g) of the Act.

VIII. Procedural Fairness

74.The Claimant challenged the procedural steps leading to the dismissal for failure by the Respondent to inform him of his right to be accompanied by a colleague, the introduction of a new allegation that was not in the show-cause letter, the failure by the Respondent to inform of his dismissal in writing and, the refusal by the Respondent to hear his appeal.

75.The Respondent took the position that the Claimant was informed of the charges levelled against him through the show-cause letter dated 27th August 2024 and that he filed a response dated 30th August 2024. He was later invited to the disciplinary hearing which he attended.

76.The Respondent took the view that the claimant attended the disciplinary proceedings as evidenced in the minutes of the disciplinary hearing. The Claimant was dismissed after that hearing and his appeal was considered and his dismissal was upheld.

77.Procedural fairness is mandatory even where the employer contemplates summary dismissal for gross misconduct under Section 44 of the Act. The procedural fairness for gross misconduct is as defined under section 41(2) of the Act that –“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.”

78.The court finds that there was substantial compliance with Section 41 of the Act by the Respondent before the dismissal. The claimant was informed of the charges facing him through the show-cause letter. He responded in writing and verbally at the disciplinary hearing. As regards the additional charge of failure to account for Ksh4,500/=, the claimant responded during the hearing that he had indeed received the money but had not utilised the same on the motorbike repair as directed.

79.Although the claimant did not raise the issue of representation at the disciplinary hearing, the email trail adduced by the claimant informs that the claimant was invited to the disciplinary hearing and was on 28th December 2024, vide email, issued with the letter of dismissal. The contention that he was not served with the letter or informed of the same is thus not true.

80.From the foregoing, the court is of the view and holds that while the dismissal was substantially fair, the procedure applied was not satisfactory. The Claimant was not informed of his right to avail witnesses and even appear with a co-worker or an official/officer of his union of choice. Further, an additional charge in regard to the Kshs4,500 was added at the hearing hence denying him the opportunity to prepare his defence in that regard. Procedurally, therefore, the Claimant was denied the opportunity to be heard and to present his defence within the meaning and context of the provisions of the law and more so Sections 41, 43, 44, & 45 of the Act. This rendered the dismissal unfair and unlawful for lack of procedural compliance.

IX. Reliefs

81.Having held that the dismissal of the Claimant by the Respondent was justified in substance but procedurally defective, the court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.

82.Prayers (a) & (b) are for declarations that the claimant’s dismissal was unfair and unlawful.The court has found that the dismissal was justified in substance but procedurally defective and thus the court shall issue an appropriate order.

83. Prayer (c) is for allowances of Kshs34,000/= while the Claimant served in Kilifi branch and Kshs448,000/= while he served at the Kakamega Branch respectively. The Claimant argued that he was entitled to a weekly allowance of Kshs3,500/- during his engagement in the two branches, which were not paid. The Respondent argued that the claimant's salary, as per his contract, was consolidated with no allowances.

84. RW1 testified that the Claimant was not entitled to allowances in his engagement in Kilifi and Kakamega, where he was engaged on permanent basis, unlike in Kericho and Kisumu, where he had worked as a reliever. The letter dated 16th October 2021 transferring the Claimant to Kilifi indicates that he was to take over the duties first as a reliever from October 20th to October 26th, 2021. Thereafter, he was to take over as the in-charge of the said Kilifi Branch. The letter of 17th February 2022 transferred the Claimant to Kakamega, where he was to act as a reliever from 22nd to 28th February, 2022 and thereafter take full responsibility of the branch. Both of these letters indicated that the claimant was to be paid the requisite allowances upon arrival at the new station. There was no rate of payment indicated in the said letters. The claimant admitted having received Kshs18,000/- while at Kilifi Branch and Kshs 6,500/= while at the Kakamega Branch.

85. In the absence of a contract indicating the rate of allowance that was payable to the claimant, there is no basis for award of this claim as his salary was consolidated and the same was paid in full.

86. Prayer (d) is for unpaid December 2024 salary of Kshs23,500/-. The claimant was on leave in the month of December until his dismissal on 28th December 2024. He was still in employment while on leave. There is no evidence that the salary for the days worked in December up to 27th December 2024 was paid. Thus, the claimant was entitled to 27 days' salary of $Kshs23,500/- \times 27/30 = Kshs21,150/-$.

87. Prayer d(1) is for one month's salary in lieu of notice. The court has found that the client's dismissal was justified in substance but wanting in procedure. While the misconduct was gross, the Claimant is awarded the sum of Kshs23,500/= as one month's salary in lieu of notice.

88. Prayer (e) is for a declaration for the Respondent to remit National Social Security Fund (NSSF) deductions for 12 months. In the body of the claim, the Claimant alleges that the unremitted deductions were for 16 months. This makes the claim ambiguous. There was no specificity of the year when the said deductions had not been remitted. RW1 testified that all dues had been paid. The court opines that NSSF is a statutory body with an enforcement mechanism for unremitted deductions and thus remittance may be enforced by NSSF. In any event, the claim is ambiguous as stated above and the same fails.

89. Prayer (f) is for general damages for unfair termination. No damages were proved beyond what may be awarded under Section 49 of the Act. This claim shall fail. Awarding compensation to the claimant shall amount to rewarding gross misconduct.

90. Prayer (g) is for gratuity for 9 years worked. Gratuity is not an automatic remedy available in the Act. There was no provision for gratuity in the claimant's contract and thus there is no basis for the award of the same. Gratuity is payable under a term in the contract or at the discretion of an employer – Bamburi cement limited V William Kilonzi (supra).

91. Prayer (h) is for refund of the unlawful deduction of Ksh4,500/- from October 2024 salary. The Claimant in the minutes on the disciplinary hearing admitted to having received Kshs4,500/- for the repair of a motorbike but he did not get it repaired. He had not informed the employer of that fact and did not refund the money. The said deduction was thus a surcharge for monies paid but not utilized for the intended purpose.

92. Prayer (i) is for leave for 2024. The Claimant's case is that he went for the pending leave days of 78 days, but the leave for 2024 was not utilised. The Respondent maintained that the Claimant took all his leave days. The leave form dated 6th September 2024 indicated that the claimant had 78 days utilised leave days from the previous year. His entitlement for the last year was 21 days. The Respondent is the custodian of employment records and ought to have availed the records to rebut this claim. In the absence of such records the claimant proved that he was entitled to 21 days of leave equivalent to Kshs20,366.67.

93. Prayer (k) is for reinstatement. The court has found that the claimant's dismissal was justified in substance. The procedural defects did not invalidate the gross misconduct on the part of the Claimant. The circumstances of this case are such that trust between the parties was lost and the relationship irretrievably broken down. It is not an appropriate case for an order of reinstatement.

94. The Claimant seeks a certificate of service under Section 51 of the Act. The issuance of the same is unconditional and the court orders that a certificate of service be issued to the Claimant within 30 days of this judgment.

X. Costs

95. The Claimant is awarded one-half costs of the cause.

XI. Disposal/orders

96. The court issues the following orders – a. The dismissal of the Claimant is declared unfair and unlawful only for lack of procedural fairness. b. The claimant is awarded a total of Kshs41,516.67. The said sum is made up as follows – i. Unpaid salary for December 2024 days worked..... Kshs21,150.00 ii. Leave days (21 days)..... Ksh20,366.67 iii. One Month's salary in lieu of notice.. Kshs23,500.00 Total..... Kshs65,016.67 The award is subject to statutory deductions. c. A certificate of service shall be issued by the Respondent in the name of the Claimant and the same delivered to his counsel on record within 30 days of this judgment. d. The claimant is awarded costs of the cause based on the award made.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 30TH DAY OF APRIL
2026.....DAVID NDERITUJUDGE

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