



REPUBLIC OF KENYA



**Muthoga v Devkan Enterprises (Cause E935 of 2023)
[2025] KEELRC 2589 (KLR) (29 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2589 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E935 OF 2023
CN BAARI, J
SEPTEMBER 29, 2025**

BETWEEN

NANCY WAMBUI MUTHOGA CLAIMANT

AND

DEVKAN ENTERPRISES RESPONDENT

JUDGMENT

1. Before Court is the Claimant's Amended Memorandum of Claim dated 30th November, 2023, wherein, the Claimant seeks the following reliefs as against the Respondent:-
 - i. One month salary in lieu of Notice
 - ii. Salary for 22 days
 - iii. Unpaid salaries from October 2022 to September 2023
 - iv. Salary arrears from January to September 2022
 - v. Leave for 6 years
 - vi. 1 year compensation for unfair dismissal
 - vii. Unremitted Stima Sacco Savings
 - viii. Unremitted GS life Insurance Contribution
 - ix. Delivery and transfer of Motor Vehicle Reg No. KCH 047C Nissan Note and/or in the alternative, refund of Kshs 465,000 paid towards purchase of Motor Vehicle Reg No. KCH 047 C Nissan Note.
 - x. Costs of the suit



- xi. Interest from date of accrued payment till payment in full.
- xii. Certificate of Service
2. The Respondent filed a Statement of Defence dated 11th November, 2024 in response to the Claimant's claim.
3. The Claimant's case was heard on 30th April, 2025 when the Claimant testified in support of her case. She adopted her amended witness statement dated 30th November, 2023 and produced her list and bundle of documents as exhibits in the matter and were marked as Claimant's exhibits. Nos. 1-25.
4. The Respondent did not call any witnesses, and counsel proceeded to close the Respondent's case.
5. Submissions were received from the Claimant.

The Claimant's case

6. The Claimant's case is that she was employed by the Respondent as a Sales manager on the 1st July 2017 at a monthly salary of Kshs 92,948.00.
7. She states that her main duties involved invoicing, calling for orders from customers, follow ups on payments, assist in dispatching, give orders for the day on how bread will be made for distribution and assist in balancing accounts for Sales and also addressing legal work.
8. It is the Claimant's further case that on Sunday 15th October 2023, she sought leave from the Respondent for two days to attend to personal matters, and that she reported back to work on 20th October 2023. She avers that on 22nd October 2023 after she reported back to work, she was dismissed from work without being heard nor being given reasons in writing contrary to the *Employment Act*.
9. The Claimant states that at the time of her dismissal she was earning a salary of Kshs.142,948/-. It is her case that upon inquiry on her dismissal, she was informed orally by the Respondent's Directors named Meehir and Rajan that her reason for dismissal was witchcraft and practice of sorcery.
10. It is the Claimant's case that she entered into an agreement with the Respondent on motor vehicle Registration no. KCH 047C, Nissan Note at a consideration of Kshs.465,000. She states further that the agreement was made in the course of her employment and due to the nature of her work which required constant travel.
11. The Claimant avers that in consideration for the said Motor Vehicle, a monthly sum of Kshs.15,000 was deducted from her salary from June 2020 to December 2022 all amounting to Kshs.465,000 when she cleared the payment of the said purchase price.
12. The Claimant states that during the period October,2022 to 22nd October 2023, when she was orally dismissed, she was paid her full wages save for Kshs.185,000. She avers that her demand for compensation by the Respondent has been declined, ignored and/or neglected.
13. The Claimant states that she worked for the Respondent for six years without going on leave. She avers that her Sacco contributions and deductions made towards her insurance cover were never remitted.
14. On cross-examination, the Claimant confirmed that she took a 3 day off and added herself 2 more days due to an emergency and that the Respondent was aware of her leave extension.
15. It is her case that she was verbally told to leave, and that she stood dismissed for being a witch.



16. It is the Claimant's position that her pension deductions were similarly not remitted and that a disputed on the issue is before the tribunal. She clarified that at dismissal, she was paid a total of Kshs. 185,000 which was to cover the entire period of October, 2022 to 22nd October, 2023.
17. The Claimant avers that she was not given pay slips for the period when salaries were not paid.
18. It is the Claimant's prayer that the Court allows her claim as drawn.

The Respondent's Case

19. The Respondent's case is that the Claimant was indeed its employee for a period of seven years and one month. It avers that the Claimant was granted leave to be out of office between 16th and 17th October 2023, after which she was expected to report back to work.
20. The Respondent states that the Claimant failed to report back to work on the day she was due to report back to work and as a result, her immediate supervisor enquired as to why she was not back to work which message was never responded to.
21. The Respondent avers that on one occasion while reviewing security footage, they were able to see the Claimant around one of their factories which was not her work station. The Respondent further states that on seeing her via the security footage, they wrote a message to the Claimant asking her to leave the factory area at once and report back to her office, but again, this message was never responded to.
22. It is the Respondent's case that following her insistent absence from work, the Claimant was informed via text message to report back to the office for a disciplinary hearing which she failed to attend.
23. The Respondent further avers that due to her prolonged absence from duty, it had no choice but to inform the Claimant that her employment had been terminated as a result of her continued absence from her work place without leave.
24. The Respondent states that Claimant never reported back to her workplace and as such, she is the author of her own dismissal and cannot now use the same to unjustly enrich herself.
25. The Respondent denies any wrongdoing in its engagement with the Claimant and avers that it acted within the confines of the law in its engagement with the Claimant herein. It states that the Claimant's claim is made in bad faith in a clear attempt to unfairly profit by maligning the Respondent despite the Respondent following all legal procedures during its engagement with the Claimant.
26. The Respondent further avers that this matter is similar to a suit currently pending before the Chief Magistrate's Court at Milimani in Nairobi, wherein, the Claimant has raised similar issues against the directors of the Respondent Company and as such, this matter is sub judis.
27. It is the Respondent's prayer that the Claimant's claim be dismissed and it be awarded the costs of this suit.

The Claimant's Submissions

28. The Claimant submits that her termination by the Respondent has no substantive justification and was not procedural. She sought reliance in the case of *Walter Ogal Anuro Vs. Teachers Service Commission* {20131 eKLR, to buttress this assertion.
29. The Claimant submits that while she must establish that a dismissal occurred, Section 47(5) of the *Employment Act* places the burden on the employer to justify the termination. She submits that the



Respondent has not provided credible evidence to support the allegation that she engaged in alleged activities of witchcraft and/or sorcery.

30. The Claimant further submits that the Respondent has not produced before this Honourable Court any document to demonstrate that a show cause letter was issued to the Claimant before bringing her employment contract to an end. She had reliance in *Kenfreight IE.A.) Limited v. Benson K. Nguti* £20161 eKLR for the holding that:-

“An employee facing termination for misconduct must be afforded an opportunity to respond to the allegations before a decision is made.”

31. It is submitted that the Respondent neither conducted any disciplinary hearing nor accorded the Claimant an opportunity to respond to the charges levelled against her and that led to the termination of her employment contract. She submits that her termination was procedurally unfair.
32. The Claimant submits that she is entitled to the reliefs sought and prays that her claim is allowed as prayed.

Analysis and Determination

33. Upon careful consideration of the pleadings herein, the grievant’s testimony and the parties’ submissions, the following issues crystallize for determination:-

- i. Whether the Claimant’s dismissal was unfair; and
- ii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant’s dismissal was unfair

34. The Claimant contends that she was unlawfully dismissed from the service of the Respondent on the premise that she was neither issued with a show cause letter nor heard prior to the dismissal.
35. On its part, the Respondent asserts that it dismissed the Claimant on account of her insistent absence from work and that it informed her via text message to report back to the office for a disciplinary hearing, but which she failed to attend. The Respondent maintains that due to the Claimant’s prolonged absence from duty, it had no choice but to inform her that her employment had been terminated as a result of her continued absence from her work place without leave.
36. Section 41 of the *Employment Act*, 2007 sets out in no uncertain terms the procedure that an employer must adhere to in terminating an employee as follows:-

“(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.”

37. The Claimant’s position is that on Sunday 15th October 2023, she sought leave from the Respondent for two days to attend to personal matters and that she reported back to work on 20th October 2023. She avers that on 22nd October 2023, she was dismissed from work without being heard nor being given reasons in writing on why she was being dismissed contrary to the *Employment Act*.



38. It is her case that she made an inquiry on her dismissal and she was informed orally by the Respondent's Directors named Meehir and Rajan that the reason for her dismissal was witchcraft and practice of sorcery. She avers that this position was again affirmed by the Respondent's Human Resources Manager.
39. The record does not bear any evidence that the Claimant was informed in writing of the charges against her, and nothing further shows that she was allowed an opportunity to be heard. The text message that the Respondent says was sent to the Claimant was not produced in evidence.
40. In the case of *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR, the Court had this to say on procedural fairness:-

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

41. The Respondent did not at all show that it even tried to adhere to the tenets of Section 41 of the *Employment Act* on procedural fairness. This Court thus on this basis, reaches the conclusion that the Respondent failed the procedural fairness test in not granting the Claimant an opportunity to be heard.
42. The Claimant's dismissal is therefore no doubt unprocedural and unfair, and so I hold.
43. On whether the Respondent had valid, fair and justified grounds to dismiss the Claimant, the Respondent's position is that it dismissed the Claimant for absconding duty.
44. On her part, the Claimant confirmed that she took 3 days off and added herself 2 more days due to an emergency, and that the Respondent was aware of her leave extension. It is her case that she was verbally told to leave, and that she stood dismissed for being a witch and for practicing sorcery.
45. The Respondent not having led any evidence, did not controvert the Claimant's assertion that it was aware of the Claimant extending her leave. This then left the Court with only the Claimant's side of the story.
46. In *Nyeri Civil Appeal No. 79 of 2016 Kenya Power and Lighting Company Limited vs. Agrey Lukorito Wasike*, the court in underscoring the proviso to Section 43 held that under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair.



47. Further in the case of Charles Musungu Odana v Kenya Ports Authority [2019] eKLR the Court stated:-

“It is now clear that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment.”

48. In the end, I reach the conclusion that the Respondent, who did not lead any evidence, failed to establish valid, fair and justified ground to dismiss the Claimant. I therefore, find and hold that the Claimant’s dismissal is both procedurally and substantively unfair and unlawful.

Whether the Claimant is entitled to the remedies sought

One Month Pay in lieu of Notice

49. The Respondent did not at all purport to have either given the Claimant notice of dismissal or pay in lieu thereof, and having found the termination procedurally unfair, entitles her to the statutory 1 month pay in lieu of notice, and which is hereby awarded.

50. On the claim for payment of Salary for 22 days, the Claimant admitted receipt of Kshs.185,000 at her dismissal which she contends was not her salary. It would be difficult for this court to agree with the Claimant as she did not account the purpose for which the amount was paid. In my view, this amount having been paid during her exit, could only have been the Claimant’s terminal dues whether full or partial.

51. This prayer therefore fails.

52. On the claims for unpaid salaries from October 2022 to September 2023 as well as salary arrears from January to September 2022, the Respondent did not lead any evidence to show that it paid salaries to the Claimant in that period. The pay slips produced in evidence did not include those of the period subject of the claim and the Respondent did not in its defence controvert this claims. The claims are found to have merit, and are allowed as prayed.

53. On the claim on account of leave for 6 years, the issue subject of this claim is the Claimant extending her leave. The Claimant is thus not truthful to on one hand admit going on leave and even extending leading to her dismissal, and to again contend that she did not take leave for a whole six years.

54. This Court is alive to the obligation on the employer to keep employee records, but at the same time, the Claimant was under duty to prove her case on a balance of probability. This claim has in my view not been proven and it fails.

Compensation for unlawful dismissal

55. The Claimant sought to be awarded the equivalent of 12 months’ salary as compensation for the unfair dismissal. Having found that the Claimant’s dismissal was unfair, no doubt entitles her to an award of compensation.

56. Compensation for unfair termination/dismissal is by law capped at a maximum of 12 months’ salary. Section 49(4) of the Employment Act, further provides 13 factors that guide the Court in arriving at the appropriate award.

57. The Claimant admitted on cross-examination that she took 3 days off which she extended by a further 2 days owing to an emergency that she had to attend to.



58. The Respondent contends that Claimant never reported back to her place of work and as such, she is the author of her own dismissal and cannot now use the same to unjustly enrich herself.
59. By the Claimant's own admission, she to an extent contributed to her own dismissal for proceeding to personally extend her leave without recourse to the employer and without laying prove that the Respondent allowed the extension.
60. In the circumstances, I deem an award of nine (9) months salary sufficient compensation for the wrongful dismissal and which is hereby awarded.
61. The Claimant's claim on the unremitted Stima Sacco Savings is merited going by the statement from the Sacco that was placed before court, similar to the claim for unremitted GS life Insurance Contribution.
62. The two claims succeed and are allowed as prayed.
63. On the claim for the Motor vehicle, though it is evident that the Claimant made monthly contributions to benefit from a 1500 cc vehicle, nothing shows that this was in respect of purchase of the car, but more for its utility purposes.
64. Further, there is no express agreement between the parties herein on the purchase of the said motor vehicle and this claim fails.
65. In whole, the Claimant's claim succeeds and orders granted as herein below:-
 - a. A declaration that the Claimant's dismissal was wrongful.
 - b. An award of one (1) month salary in lieu of notice at Kshs. 142,948/-
 - c. An award of Nine (9) months salary as compensation for the unfair termination at Kshs.1,286,532/-
 - d. Unpaid salaries from October 2022 to September, 2023 at Kshs.1,530,376/-
 - e. Unremitted Stima Sacco savings of Kshs.1500/-
 - f. Unremitted GS Life Insurance contributions at Kshs.162,645
 - g. That the Claimant be issued with a certificate of service within 14 days of this judgment.
 - h. Costs.
66. Judgment of the Court.

SIGNED, DELIVERED AND DATED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Okato h/b for Mr. Ojienda for the Claimant

Mr. Mwangi present for the Respondent

Ms. Esther S – C/A

