



**Anyango v Kamili Packers Limited (Cause 985 of 2016)  
[2024] KEELRC 1264 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1264 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 985 OF 2016  
MA ONYANGO, J  
MAY 3, 2024**

**BETWEEN**

**RISPER ABISAKI ANYANGO ..... CLAIMANT**

**AND**

**KAMILI PACKERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed its Memorandum of Claim, Witness Statement, List of Witnesses and List of documents all dated 20<sup>th</sup> May, 2016, in which she averred that she was employed by the Respondent as a General Worker from March 2011 to 30<sup>th</sup> May, 2015 when her employment was terminated.
2. The Claimant avers that she worked from Mondays to Saturdays from 8.00 am to 5.30 p.m. every day and worked 30 minutes overtime which she was not paid for.
3. Further, the Claimant claims that she worked Six (6) days a week including public holidays and between the years 2013 – 2014, she did not take her annual leave.
4. The Claimant avers that throughout the period of her service, the Respondent never remitted her National Social Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues.
5. The Claimant states that on the 30<sup>th</sup> May, 2015, she reported to work as usual only to be informed by the accountant that the Manager had instructed him to tell the Claimant that her services were no longer required as the Company was reducing its workforce.
6. The Claimant avers that she was not called back to her position as promised by the Respondent because another person was hired to take over her job.
7. The Claimant avers that she had worked for Four (4) years and three (3) months without blemish at the Respondent's work.



8. The Claimant claims her dismissal by the Respondent was unfair, unlawful, malicious and unprocedural.
9. The Claimant avers that following the dismissal, the Respondent failed to pay the Claimant her terminal dues, benefits and damages particularized as follows:
  - a. Salary in lieu of notice Kshs. 11,203/=
  - b. Payment in lieu of untaken/unpaid leave between the years 2013-2014 Kshs.11,203/=
  - c. Payment in lieu of illegally deducted money summing to Kshs.1,400/=
  - d. Payment undertaken/unpaid public holidays for the entire period of service Kshs.32,862/=
  - e. Pro-rata leave for three (3) months  
Worked Kshs.1,960,525/=
  - f. Overtime for 30 extra minutes worked  
daily Kshs. 42,778.8/=
  - g. Service gratuity calculated at 15 days salary for every completed year of service being Kshs.22,406/=The Claimant further submits that as a result of illegal and unfair summary dismissal complained above, she suffered abrupt loss of income and trauma and inability to meet her continuing obligations as a result she suffered damages for which she seeks compensation at 12 months gross salary being Kshs.134,436.00/=.
10. The Claimant therefore seeks entry of judgment against the Respondent for: -
  - a. A Declaration that the Claimant's dismissal from her employment was wrong, unfair and unlawful.
  - b. A declaration that the Claimant is entitled to payment of her terminal dues and compensatory damages as pleaded
  - c. An order for the Respondent to pay the Claimant her due terminal benefits and compensatory damages totalling to Kshs.248,249.325/=
  - d. Interest on (iii) above from the date of filing suit till payment thereof
  - e. Costs of suit
  - f. The Respondent to pay the Claimant's costs with interest.

**The Respondent's case:**

11. The Respondent opposed the Claimant's Statement of Claim vide its Answer to Memorandum of Claim and Counter Claim dated 28<sup>th</sup> July, 2016.
12. The Respondent avers that the Claimant worked 6 days a week and denied that the Claimant worked on public holidays or Sundays as the Respondent used to close shop on such days.
13. The Respondent denied that the Claimant worked beyond the maximum statutory hours to qualify for overtime pay.
14. Further, the Respondent contends that the Claimant was employed in March, 2011 and was entitled to leave upon completion of twelve (12) months of consecutive service.



15. It is averred that in the years 2011-2012, the Claimant encashed her leave days and for the years 2013, the Claimant took her leave from 01/08/2014 to 25/08/2014 and for the year 2014, the Claimant was on leave from 05/02/2015 to 21/02/2015. The Respondent further averred that the Claimant received her full salary on all her leave days in 2013 and 2014.
16. The Respondent asserts that it remitted all the Claimant's NSSF and NHIF dues.
17. The Respondent avers that the Claimant was issued with a warning letter on the 30/03/2015 on grounds that the Claimant was in the habit of allowing unauthorised people in the kitchen/dining hall and that the Claimant would prepare and serve food to these unauthorized people.
18. It is averred that in addition to the warning letter, the Claimant did not change even after being summoned by the Respondent's Human Resource Manager over the said unauthorized behaviour.
19. The Respondent avers that on the 29/05/2015, the Claimant and the Respondent held a meeting where it was resolved that the Claimant's employment with the Respondent was untenable hence the Claimant's final dues of Kshs.10,893.00/= were paid via cheque No. 001941 dated 30/05/2015.
20. The Respondent claims that it received a letter of complaint from the Labour office asking for clarification on the Claimant's dues. That on the 23/06/2016, the labour office called the Respondent for a reconciliation meeting and after the discussions, it was agreed that the Claimant be paid Kshs.20,590.00/= by the Respondent which was to cover the Claimant's salary in lieu of notice and leave on a pro-rata basis for the months worked and all this money was subject to the deduction of Kshs.10,893/= that the Claimant had already received from the Respondent.
21. The Respondent avers that upon agreement by the Claimant it drew a cheque in the sum of Kshs.9,703/= and submitted to the Labour Office which however refused to receive the cheque stating that it was to be drawn in favour of the Ministry of Labour to hold in trust for the Claimant. Consequently, the Respondent complied with the said instructions and drew the cheque in favour of Ministry of Labour.
22. The Respondent claims that the Claimant was warned verbally on several occasions and issued with a warning letter.
23. The Court was urged to dismiss the Claimant's suit with costs.
24. In response, the Claimant filed a Reply to the Respondent's Memorandum of Claim dated 8<sup>th</sup> August, 2016 denying all the averments contained in the Respondent's reply.

### **Hearing:**

25. On 1<sup>st</sup> February, 2022, the matter came up for hearing. The Claimant adopted her witness statement dated 14/12/2015 and relied on her List of Documents dated 20/12/2016 as part of her evidence.
26. She admitted that nobody was allowed into the kitchen and it was only one day that the Claimant allowed a fellow employee who was unwell and who asked for water to take medicine.
27. She stated that she was given a warning letter on 07/04/2015 which she received and signed.
28. She stated that the reason she was given for her dismissal was that there were many employees and the Respondent was reducing staff.
29. The Claimant stated that she was never notified of the intention to terminate employment by the Respondent and after she was terminated another employee was hired in her place.



30. The Claimant further states that she was not given a hearing for allowing the colleague into the kitchen but just a warning letter.
31. The Claimant further states that she reported to work at 8.am and was supposed to leave at 5.30 pm but always had to wait for all staff to take tea and wash dishes before leaving work. That she always left work after 6.30 pm.
32. Further, the Claimant stated that she engaged the Labour Office who tabulated her dues at Kshs.9,000/= but she rejected the tabulation since the tabulation was made without her involvement and did not include her overtime payment.
33. She further stated that when she left employment she was paid her salary for the month of May in the sum of Kshs.10,893/=.
34. On the 28/04/2022, the Respondent's Witness Mr. Anthony Ndambuki adopted his Witness Statement dated 15<sup>th</sup> February, 2022 together with the Respondent's list of documents.
35. RW1 stated that he joined the Respondent on the 20<sup>th</sup> November, 2017 as an administration assistant.
36. He stated that he was not present at the time of the Claimant's dismissal and only relied on the Respondent's document's on record.
37. RW1 testified that the Claimant was dismissed on the 29<sup>th</sup> May, 2015 and that there was no dismissal letter to that effect.
38. RW1 further stated that there was a warning letter issued to the Claimant by the Respondent dated 30<sup>th</sup> March, 2015 and received by the Claimant on the 07/04/2015.
39. RW1 testified that there was no show cause letter issued to the Claimant at the time of the dismissal and no minutes of disciplinary hearing conducted prior to the dismissal.
40. Further, RW1 stated that the Claimant cashed in her leave days for the years 2011 and 2012.
41. On re-examination, the RW1 stated that the Claimant was entitled to 8.75 days which was paid in the final tabulation of the labour office and was paid all her outstanding leave days.
42. As directed by the Court on 28<sup>th</sup> April, 2022, the parties filed written submissions.

**The Claimant's Submissions:**

43. The Claimant in her written submissions filed in Court on 26<sup>th</sup> May, 2022 submitted that at the time of termination, she was earning a gross salary of Kshs.12,150/= and a net salary of Kshs.11,203/=.
44. The Claimant submitted that the reason given by the Respondent for her termination was that the Respondent was reducing its workforce which the Claimant claims was not true as the Respondent employed someone else to take her place.
45. The Claimant submitted that she was only warned about allowing unauthorized persons at her workplace once on the 30<sup>th</sup> March, 2015 and that there was no other accusation of misconduct levelled against her.
46. The Claimant submitted that her employment was terminated without her being given an opportunity to defend herself on the allegations.
47. The Claimant submitted that the termination was unfair for the reasons that the respondent violated the principals set out in section 41 and 45 of the [Employment Act](#).



48. The Claimant cited the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where the Court observed that “for termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.
49. The Claimant submitted that she is entitled to salary in lieu of notice as she was not issued with any notice and/or salary in lieu of notice.
50. On compensatory damages, the Claimant submitted that she had worked with the Respondent for a period of four (4) years and three (3) months. The Claimant urged the Court to award her compensatory damages equivalent of twelve (12) months’ salary.
51. On leave days, the Claimant submitted that whereas she had worked for 4 years and 3 months, she had not taken any leave or salary in lieu of leave and that the respondent did not tender any evidence to show that the Claimant had been granted leave or been paid salary in lieu of leave.
52. To buttress this point, the Claimant relied on section 28 and 74 of the *Employment Act* which provided that the Respondent had the burden of proving that the Claimant had taken leave and that the Respondent ought to have kept a record of the time and the number of leave days taken by the Claimant.

#### **The Respondent’s Submissions:**

53. The Respondent filed written submissions dated 3<sup>rd</sup> June, 2022 in which it identified the issues for determination to be whether the Claimant was summarily dismissed for gross misconduct at work and whether the Claimant was entitled to the reliefs sought.
54. The Respondent relying on Section 44(1) of the *Employment Act* submitted that the allegations against the Claimant which eventually formed part of the grounds for dismissal was that she allowed unauthorized access by unauthorized people in the kitchen area.
55. The Respondent submitted that despite numerous verbal and written warnings from the Respondent’s management, the Claimant failed, neglected and refused to follow sound instructions of her supervisor/manager.
56. The Respondent maintained that the Claimant’s conduct was an act of gross misconduct which justified the Claimant’s summary dismissal.
57. The Respondent contended that the decision to dismiss the Claimant was upon reasons that were valid and fair, relying on the case of *Godfrey Barasa Ochieng vs Security Guards Services Limited* (2017) eKLR.
58. On the second issue whether the Claimant is entitled to the relief’s sought, the Respondent stated that it already offered the Claimant one month’s salary in lieu of notice.
59. On entitlement to payment in lieu of leave days not taken, the Respondent submitted that the Claimant was not entitled to the said relief as she had already encashed all her leave days in the years 2013-2014. That the Claimant applied for her 21 days annual leave which after being granted she went on leave from 01/08/2014-25/08/2014.
60. The Respondent further stated that the Claimant went on leave from 5<sup>th</sup> February to 21<sup>st</sup> February amounting to 15 leave days and thus the Claimant is not entitled to the relief.
61. On compensatory damages for unfair termination, the Respondent submitted that the Claimant is not entitled to the said relief as the Claimant was not unfairly terminated as the Claimant had not



discharged the said burden of proof. It relied on the case of Michael Aloo Achieng Emporium Limited (Supra) to justify the point.

62. Based on the foregoing, the Respondent submitted that the Claimant had not proved any allegations that the Claimant was unfairly terminated and therefore the Claimant was not entitled to the prayers sought.
63. The Court was urged the Court to dismiss the Claimant's suit with costs.

### **Determination**

64. The issues arising for determination based on the pleadings, evidence and submissions on record are whether the termination of the Claimant's employment by the Respondent was fair and if the Claimant is entitled to the prayers sought.
65. Unfair termination is provided for in section 45(1) and (2) of the *Employment Act* which provide that
- (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.
66. In the instant case the Claimant testified that she reported to work on 30<sup>th</sup> May 2015 and was informed that there were too many employees and the employer was reducing staff. She was never issued with a letter of termination. She was never given a hearing or notice to show cause.
67. The Respondent through RW1 admitted that there was no letter of termination or minutes to prove that the Claimant was given a hearing. The Respondent's averment that the Claimant was given a hearing was not proved.
68. On valid reason for termination the Respondent stated in the Memorandum of Response that the Claimant was guilty of gross misconduct for allowing strangers into the Kitchen and giving them food. The Claimant on her part stated that she only allowed a sick colleague to enter into the kitchen to collect water for taking medicine. She stated that she was issued with a warning letter for the same on 30<sup>th</sup> March 2015 and there was no other incident to warrant the termination of her employment.
69. It was further not disputed by the Respondent that the Claimant was not issued with a letter of termination stating the grounds of termination.
70. I find that there was no reason at all for the termination of the Claimant's employment. In *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR the Court observed that for termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.
71. In the instant case the Claimant failed to prove both substantive and procedural fairness. The termination was therefore unfair and I declare accordingly.



72. On remedies the Claimant prayed for salary in lieu of notice, leave not taken, public holidays worked and not paid, prorata leave, overtime and compensation. I will consider each of the prayers separately.
73. Having found that the Claimant's employment was unfairly terminated she is entitled to pay in lieu of notice which I award her at Kshs.12,150.00.
74. The Claimant prayed for leave not taken for 2013/2014 and pro-rata leave for 2015. The Respondent stated that the Claimant encashed her leave for 2011 and 2012, that in 2013 and 2014 the Claimant took leave from 01/08/2014 to 25/08/2014 and from 05/02/2015 to 21/02/2015 respectively. The Respondent attached leave forms for the same at pages 5 and 7 of its bundle of documents. It did not produce any evidence of encashment of leave by the Claimant.
75. According to section 10 and 74 of the Employment Act the leave records to be kept by an employer should include the following particulars:
- “entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated”
- (Refer to section 10(3)(a)(i) and 74(1)(f) of the Act)
76. No such records were produced by the Respondent. The leave forms produced do not indicate how many days are due and how many days remain to the credit of the employee after the leave approved is taken.
77. In the absence of the particulars required by law the court awards the Claimant 21 days leave for 2013/2014 in the sum of Kshs.  $21/30 \times 12150 = 8,505.00$ .
78. On pro-rata leave the Respondent at page 24 of its bundle indicated that the Claimant was entitled to 8.75 days being Kshs. 3,540.00 which I award her.
79. On overtime the Respondent did not dispute that the Claimant was supposed to work up to 5.30 pm but because she had to clean dishes used for evening tea she left the office after 6.30 pm.
80. Working from 8 am to 6.30 pm daily with one-hour lunch break for six days adds up to 57 hours a week. The maximum number of hours per week should be 52 hours. (see Rule 5 and 6 of the Regulation of Wages (General) Order) under the Labour Institutions Act.
81. The Claimant therefore worked for an extra 5 hours each week and therefore 20 hours each month. For the 51 months she was in employment she worked for  $5 \times 4 \times 51 = 1020$  hours. The Claimant's hourly rate of pay was  $1/225 \times 12150 = 54$ . Overtime is calculated at 1.5 times of normal hourly rate meaning that the Claimant's hourly rate was  $54 \times 1.5 \times 1020 = 82,620$  which I award her.
82. The prayer for service gratuity was withdrawn. The prayer for unpaid public holidays was not proved.
83. Having been unfairly terminated, the Claimant is entitled to compensation under section 49 of the Act. Taking into account all the relevant factors under section 49(40), especially the manner in which the Claimant's employment was terminated, the length of service, the fact that she is not entitled to any other payments and the conduct of the Respondent, it is my view that 5 months salary in the sum of Kshs.  $12150 \times 5 = 60,750.00$  is reasonable compensation. I accordingly award her the same.
84. In conclusion therefore, the Claimant is awarded the following:
- a. Pay in lieu of notice Kshs. 12,150



- b. Pay in lieu of Leave Kshs. 8,505
  - c. Pro rata leave Kshs. 3,540
  - d. Overtime Kshs. 82,620
  - e. Compensation Kshs. 60,750
- Total Kshs. 167,565

85. The Claimant will have costs of the suit

86. The decretal sum shall attract interest at court rates from date of judgement.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 3<sup>RD</sup> DAY OF MAY 2024.**

**MAUREEN ONYANGO**

**JUDGE**

