



**Omuka v Air Travel & Related Studies Centre (Cause 778 of 2019)  
[2024] KEELRC 1750 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1750 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 778 OF 2019  
NJ ABUODHA, J  
JULY 5, 2024**

**BETWEEN**

**ALEX NYANDOYA OMOUKA ..... CLAIMANT**

**AND**

**AIR TRAVEL & RELATED STUDIES CENTRE ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his statement of claim dated 7<sup>th</sup> November, 2019 and pleaded inter alia as follows: -
  - a. On or about 1<sup>st</sup> November, 1996 the Claimant was employed by the Respondent as a lecturer in Marketing Hotel & Catering Law, Hotel & Marketing services. He was also the head of department of Hotel & Catering Management, Dean, School of Hospitality studies and Dean students' body. The Claimant served up to 8<sup>th</sup> July, 2005 and he left and avers he was not paid service.
  - b. The Claimant averred that on 17<sup>th</sup> August, 2015 he was again employed by the Respondent as a lecturer/dean of school of Hotel & Catering Management at a gross of Kshs 70,000/= per month and was promised verbally to be paid Kshs 20,000 monthly responsibility allowance as a dean.
  - c. That on 1<sup>st</sup> March, 2018 his terms of payment were reviewed to Kshs 90,000/= as monthly gross salary. That by January, 2018 the Respondent was facing financial difficulties resulting in its properties being auctioned in March 2018 and it became tenant in the premises. That it then revamped the marketing department and the Claimant was appointed as the Head of Marketing with effect from 10<sup>th</sup> January, 2018. He was to get a commission of Kshs 10,000/= for every new student that enrolled and paid first term fees in full.
  - d. The Claimant averred that in course of his duties he managed to enroll about 500-600 students in 2018-2019 travelling from various parts of the country. That he went to schools (Secondary



schools) targeting form four students mainly and spoke to principals and career masters and students.

- e. The Claimant averred that he gave all students forms to fill and after the results were out those interested would go and enroll at the institution. That they would fill admission form which included name of student, the parents and the name of the person who enrolled the student. The admission form was kept inside the admission file which was at accounts office at the Finance department.
  - f. The Claimant further averred that in May 2018 he was given a claim form for the commission to fill which he did but he was not paid. He came to learn that the 2 other marketers he was working with were being paid. That when he asked the director of the Respondent he was told there was a problem and that the commission payments had been suspended. He later came to learn this was not true and that the commission was reduced from Kshs 10,000/= to Kshs 5,000/= without his consent or contrary to his contract.
  - g. The Claimant averred that on 25<sup>th</sup> May,2019 at 6.00pm the Claimant sent a short message(sms) to the said Director on phone No. 0721380590 requesting for payments who responded by sms and told him he would not pay him as the claim was time barred and that he should not report to work the next Monday unless he apologized for asking for the commission.
  - h. The Claimant even though he had done no mistake he did apologize by email and on 26<sup>th</sup> My,2019 the said Director sent an sms to the Claimant that he should not report to work until he receives his response in writing. That he never reported to work from 25/5/2019.
  - i. That on 28/5/2019 the director sent an email terminating the Claimant and purportedly giving him 1 months' notice. There was no reason for termination in the said letter. That when the Claimant called the claims department he was told he was to serve the notice outside the institution as his dues were being prepared. When he requested to be allowed to go pick up his items he was told by the said Director to go to the Respondent's premises strictly at 7.45 am on 30/5/2019. He felt he was being treated like a thief since the offices open at 8.00am and no body would have been there to serve him.
  - j. The Claimant averred that the termination fell short of the relevant provisions of the Constitution, Employment Act in that there was no substantive and or valid reason or justification and or substantive process for the said termination. That the same was contrary to the Rules of Natural Justice.
  - k. The Claimant claimed a sum of Kshs 5,801,000.00/= which was one month's notice, leave days, commission, responsibility allowance, service charge and compensation for unfair termination.
2. The Claimant in the upshot prayed for the following against the Respondent;
    - a. A declaration that the termination of the Claimants' employment with effect from 5/7/2017 was unfair and unlawful.
    - b. An order compelling the Respondent to pay the Claimant his terminal benefits amounting to Kshs 5,801,000/=
    - c. Costs of the suit and interests.
  3. The Respondent filed its Response dated 17<sup>th</sup> December, 2020 and averred inter alia as follows;



- i. The Respondent denied the contents of the claim and averred that the Claimant was issued with a letter of engagement after having secured employment with the Respondent on or about 17<sup>th</sup> August,2015.
- ii. The Respondent also denied the Claimant's enrollment capacity of the students.
- iii. The Respondent denied all the allegations of unfair termination and stated that the Claimant was issued with one month notice which he served on leave as his dues were being prepared. That after receiving his final payments he signed an acknowledgment intimating that he had no further claim against the Respondent.
- iv. The Respondent averred that by the time his employment was terminated he had taken up all his leave days which were covered during the school breaks. That if any leave days were left the same were covered during the one month notice period.
- v. The Respondent averred that the Claimant is not entitled to service charge due to his habitual absconding from work leading to termination sometimes in May 2018. That he was reinstated in July 2018. The Respondent denied all the allegations of irregularities leveled against him as baseless.
- vi. The Respondent prayed that the case be dismissed with costs.

#### **Evidence**

4. Both the Claimant's case and the Respondent's case was heard on 28<sup>th</sup> September,2023.
5. {{abbr{title Claimant Witness} 1, the Claimant herein, adopted his statement and documents filed as his evidence in chief and clarified that his termination date was 28<sup>th</sup> May,2019 and not 5<sup>th</sup> July,2017.
6. In cross examination CW1 testified that he was employed first in 1996 and left in June 2005 and came back in August 2015. That he was not fully paid his dues when he left in 2005. He was only paid his salary for that month. That when he joined the Respondent in 2015 he was given a new letter of appointment with different salary. That he signed in 2015 that he had been paid his dues which was under duress.
7. CW 1 testified that he was not paid in lieu of notice and he never took his 42 leave days as he was very busy. That he used to work on weekends which was his off days. CW1 claimed commission for 360 students admitted. He clarified that the admission forms were in custody of the Respondent and that he did not have them since he was not the only one marketing the Respondent.
8. CW1 testified that the Respondent promised him responsibility allowance of Kshs 20,000/= which was a verbal agreement not in writing but which he was never paid. That every head of school was entitled to responsibility allowance. That he was terminated due to asking for his allowance. It was his evidence that he never worked after being issued with the termination letter as he was requested to stay home. He was never paid for the period he was home together with May and June salary. He was later paid Kshs 98,300/= and cleared with his employer.
9. In re-examination, CW 1 clarified that the Respondent did not dispute that he received Kshs 100,000/= as responsibility allowance and that the discharge voucher had been prepared and he needed money for his children who were hungry. He was asked to clear before being paid.



10. The Respondent on the other hand called its witness the Human Resource Manager RW1 who testified and adopted her statement and the Respondent's documents filed in court as her evidence in chief.
11. In cross examination RW 1 testified that she had worked for the Respondent as its HRM since 2010 and that the Claimant was terminated on 28<sup>th</sup> May,2019 when he absconded duty which was the reason for termination and it was indicated in the letter. That there was some exchange between the Claimant and the Director before the termination but could not confirm if the Claimant was told not to come to work.
12. RW 1 testified that the Claimant was taken through disciplinary process. He was issued with a show cause letter which was not before the court. According to her the letter of 1<sup>st</sup> July,2018 was the show cause letter. It was her evidence that the Claimant was not served with the specific allegations and asked to respond. RW1 confirmed the communication between the Claimant and the director where the Claimant was asking for his commission Kshs 5,000/= per student which was declined with the director stating it was time barred.
13. RW1 confirmed that the Claimant was informed to stay home until called back. But was instead issued with termination letter and he was never called back to work. RW1 confirmed that the termination letter did not compute the Claimant's terminal dues and further that the claimant was required to clear before he could be paid his dues.
14. RW1 confirmed that the Claimant was paid service for 3 years. That there was no indication for salary for May and June. RW1 testified that the employment contract did not provide that the Claimant was entitled to responsibility allowance. RW1 testified that the Claimant did not produce evidence of any student enrolled to claim Kshs 10,000/= per student. The records were kept by head of marketing. She confirmed that the marketing department used to go to schools and conduct talks at schools.
15. RW 1 testified that the accounts department produced documents in support of fees paid together with receipts and there was no document supporting the Claimant's claim. The Claimant was to sign a declaration before he was paid.
16. In re-examination RW1 clarified that the Claimant confirmed that he received all his money. That the Claimant applied for his leave which was approved. RW1 clarified that the admission letters were not signed or stamped. That there was no confirmation that the number of students were admitted or fees paid. RW1 clarified that the contacts provided on the listed students was for schools not students. That it was not possible to know the number of students enrolled and the Claimant was fully paid his dues before he left.

### **Claimant's Submissions.**

17. The Claimant filed his written submissions dated 20<sup>th</sup> November,2023 and he relied on the case of *Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited*(ELRC Cause 22 of 2019)(2022) KEELRC 1302 (KLR) 21 July 2022(Judgment) on procedure for termination. The Claimant also relied on the case of *Galgalo Jarso Jillo vs Agricultural Finance Corporation*[2021]eKLR.
18. On the reliefs sought the Claimant submitted on the 1 month's salary in lieu of notice that he was terminated with immediate effect without any written notice or payment in lieu of notice hence entitled to the same under Section 35(6) of the *Employment Act*.
19. On the prayer for 42 leave days the Claimant submitted that he never took his annual leave as legally entitled under section 28(1) of the *Employment Act* for the 5 years he worked with the Respondent.



- The Claimant submitted that the Respondent's allegations that he took the 30 days' notice as leave was not right as notice could not be counted as leave. The Claimant submitted that from the Respondent's leave application forms attached he was entitled to 30 days leave days as the balance of days not taken.
20. On the prayer for unpaid commission the Claimant submitted that in his appointment letter of 16/1/2018 the Respondent stipulated that he was entitled to the commission at the rate of Kshs 10,000/= on every new student enrolled and paid full first term fees. That he was never accused of never discharging his duties or meeting his targets since when he joined the Respondent the school was at the verge of collapsing with 120 students but during his tenure the students increased to 500 students and were still growing at his departure.
  21. The Claimant submitted that the Respondent's witness admitted that the records of the students admitted in to school and fees paid would be kept by the accounts department and not by the Claimant. That the records were not produced by the Respondent. The Claimant submitted that he produced a list of schools visited for recruitment and follow up which was not discredited by the Respondent. That he also produced brochure or flyer used to announce the college and courses offered.
  22. The Claimant submitted that the Director did not dispute that the Claimant enrolled students he was only requesting for requisition and that the same was time barred. He went ahead to tell the Claimant not to raise requisitions for past enrolments and he would only pay for new enrolments going foRward. It was his submissions that there was no explanation on how the said past commissions were time barred since the contract did not put a time frame on the payment of the Commission. The Same Contract did not stipulate that the payment of the Commission was subject to the Claimant raising a requisition.
  23. It was his submission that the change of the commission from Kshs 10,000/= per student to Kshs 5,000/= was done orally by the Respondent without the consent of the Claimant which was against [Employment Act](#) sections 13,17,18 and 19. That during cross-examination he confirmed having admitted 360 students hence he was entitled to Kshs 3,600,000/= as commission.
  24. On the prayer for responsibility allowance the Claimant submitted that he was only paid Kshs 100,000/= as responsibility allowance which was a gentleman's agreement without writing and the Respondent refused to pay any further responsibility allowance. That there was no express denial of the same by the Director.
  25. On the prayer for service charge the claimant submitted that he was entitled for the same for the 5 years worked.
  26. On the prayer for Compensation for unfair termination the Claimant submitted that there was no reason for his termination nor disciplinary process. That he should be awarded maximum compensation under section 49 of the [Act](#) of 12 months. It was his submissions that he worked for the Respondent for 5 years without any disciplinary issues yet he was terminated with no valid reasons and without due process without payment of terminal dues despite demand.
  27. The Claimant submitted that he was entitled to Kshs 5,578,841.15 /= from the various heads above as well as costs and interests herein.

### **Respondent's Submissions**

28. The Respondent filed its written submissions dated 22<sup>nd</sup> November, 2023 and on the issue of unpaid commission submitted that the Claimant ought to have brought 380 students who should have paid full first term fees for him to claim Ksh 3,800,000/= as commission.



29. It was its submissions that there was no evidence put forth on the list of 380 students who the Claimant personally enrolled and whether the enrolled students fully complied with the condition of payment of full first term fees. The Respondent relied on section 107 of the Evidence Act that the Claimant ought to prove his allegations.
30. The Respondent submitted that the attached admission letters which was an attempt in evidence were not signed nor stamped hence could not be authenticated as either having been produced at school or at any cybercafe in town. It was its submission that the same should be dismissed for being unfounded and lacking in merit.
31. The Respondent submitted that when the Claimant was terminated he served his notice of one month at home. That he was paid for the month of June 2019 despite being at home. That at the time of his termination he did not have any salary arrears. That on 23<sup>rd</sup> July, 2019 the Claimant signed for acknowledgement of having been paid all his dues and confirmed that he had no further claim against the Respondent. That the Claimant did not deny signing the said document. That his assertion that he signed under duress must be rejected as there was no evidence on how the Respondent forced him to sign the document.
32. The Respondent submitted that he paid the Claimant his final dues to the tune of Kshs 98,300/= hence this claim was an afterthought.
33. The Respondent submitted that the Claimant applied for his leave days which were approved and they produced all the evidence which was documented since 2016. That there was no balance of leave days when the Claimant left employment with Respondent.
34. On the Claim for responsibility allowance the Respondent submitted that the Claimant did not adduce any evidence as to what this was and what difference it had with his usual monthly salary. That his contract did not provide for such a pay hence the Claimant should not change employment contract as he wishes.
35. On the prayer for 12 months' salary compensation the Respondent submitted that the same was not payable as there was no evidence of what the claim was and how the same arose.
36. The Respondent submitted that compensation was to be done as per the employment contract and the Claimant having been paid one-month salary in lieu of notice and having not proved any other claim against the Respondent his claim should be dismissed.

### **Determination**

37. I have reviewed and considered the pleadings by both parties and testimony by the Claimant.
38. I have I have come up with two main issues;
  - a. Whether the Claimant's termination of employment was unfair and unlawful
  - b. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant's termination of employment was unfair and unlawful**

39. In this instant case, the Respondent alleged that they terminated the Claimant due to absconding of duties. The Claimant on the other hand alleges to have been terminated after requesting for his commission.



40. I have perused the Notice of termination letter of 28<sup>th</sup> May,2019 where the Respondent terminated the services of the Claimant with effect from 27<sup>th</sup> May,2019. The termination letter did not specify the reason for the termination. The Respondent's witness during hearing testified that the Claimant was terminated due to absconding of duty and the same was indicated in the termination letter which is not true. The Respondent's witness also confirmed that the Claimant had some exchange with the director before termination although she could not confirm if the Claimant was told not to report or not.
41. It is therefore clear that there was no reason for the termination of the Claimant which must be valid and fair one as provided for under section 43 of the [Employment Act](#).
42. It is an established principle that there must be a valid and fair reason before termination. In [Mary Chemweno Kiptui v Kenya Pipeline Company Limited](#) [2014] eKLR the court held as follows: -
- Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.
43. Regarding procedural fairness courts have repeatedly emphasized on both substantial and procedural fairness in a number of cases including in the case of [Janet Nyandiko v Kenya Commercial Bank Limited](#) [2017]eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive test for termination but also procedural test.
44. Further Section 41 sets out the mandatory procedure to be followed before termination and provides that the employee to be explained the reason for termination in language he/she understands and consider the representations by such an employee who should have an employee of his/her choice.
45. This is also the Position by the courts as was observed in [Kenya Union Of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited](#) [2014] eKLR that: -
- Section 41 of the [Employment Act](#) is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative."
46. The Respondent never gave the Claimant a show cause letter. The Respondent's witness confirmed that they gave the Claimant a show cause letter which was not produced before this court. The same is said to be for the year 2018 while the Claimant was terminated in 2019 for unknown reasons. The Respondent did not take the Claimant through disciplinary hearing or give him a chance to defend himself. There were no charges levelled against him in the first place for the Claimant to respond which fact was admitted by the Respondent's witness.
47. The allegations that the Claimant was paid one-month salary in lieu of notice does not make the process valid since the Claimant was terminated with immediate effect without any notice. The Respondent has also alleged that the Claimant received his final dues and signed a discharge voucher.
48. The Claimant has stated that he signed the discharge voucher under duress and that he needed the money since his children were hungry. He was also advised to clear with the Respondent in order to be paid his dues. I have perused the discharge voucher which is indicated as final dues without any



specifications. In the case of *Ndungu v Kenol Kobil Limited* (Cause 534 of 2014) [2017] KEELRC 1039 (KLR) (31 May 2017) (Judgment) the court had this to say about the Equitable estoppel;

“Looking at the instant case, I would say that the indemnity signed by the claimant is not clear as it does not state parameters that the claimant would not pursue.

51. The respondents cannot therefore rely on the doctrine of estoppel.”

49. In this instance case even if the Claimant signed the discharge voucher the same was not clear which final dues were paid and which parameters he would not pursue. The Respondent was not heard complaining of the performance of the Claimant who alleged that when he rejoined the Respondent there were 120 students and by the time he left there were around 500 students. This means that the Claimant performed quite well and the Respondent was unwise terminating the Claimant for requesting his commission.
50. On the burden of proving and justifying the grounds of dismissal/termination of employment, Section 47(5) of the *Employment Act* puts the same to the employer.
51. In conclusion I am of the view that the Claimant’s termination was procedurally flawed hence the Claimant was unfairly terminated.

#### **Whether the Claimant is entitled to reliefs sought.**

52. On the prayer for one-month salary in lieu of notice I appreciate that the Claimant’s services were terminated on 28<sup>th</sup> May, 2019 with immediate effect. The Respondent advised the Claimant to take the month of June as his notice and alleged to have paid him. I have perused the discharge voucher of the alleged June Salary and I note the same is not signed by Claimant who has denied receiving the same as well as May Salary. The Respondent’s Witness during hearing acknowledged that there was no entry for May and June Salary. I therefore award the Claimant the one Month salary in lieu of notice.
53. On the prayer for 42 leave days I have perused the leave forms attached by the Respondent and I note that the Claimant had pending leave days between 2016 and 2019 to the tune of 30 days and not 42 days. The Respondent’s allegations that the 30- days notice should be converted to leave is not right since notice is not equivalent of leave days. The Respondent’s assertions that the Claimant could be away from work when schools closed is also not right since the work the Claimant was involved in was more of marketing the Respondent services and he had tight schedules.
54. On the prayer for unpaid commission this was the main issue which made parties part ways. The Claimant has alleged that he was to be paid Kshs 10,000/= for each new student enrolled and who paid first term fees in full. This was provided for in his January 2018 contract. When he requested the same from the Director, from the sms attached, the Director told him that he did not make any requisition and that the same was time barred. That he would only pay the onward requisitions.
55. The Claimant also stated that the commission was changed from Kshs 10,000/= to Kshs 5,000/= orally without his consent. I agree that this went against the *Employment Act* which requires such changes to be done with the consent of the employee and in writing. The Claimant during hearing confirmed to have enrolled 360 students. That the admission letters were in the custody of the Respondent.
56. The Respondent’s witness during hearing testified that the Accounts office which had the said admission documents and the fees paid had produced documents to show the Claimant was not entitled to the commission. The Respondent who is the custodian of employment records did not produce those documents. The Respondent did not dispute if the Claimant did not enroll any students or if the stated number was true or not.



57. In the circumstance I am inclined to agree with the Claimant that he was entitled to the commission as per his contract. He produced sample admission letters although they were not signed and stamped that is what he had and he could not produce what was in the custody of the Respondent.
58. The Claimant has produced brochures and flyers together with the schools they would attend to show he really went overboard to advertise the Respondent. The Respondent's witness confirmed that the marketing team used to go to different schools to market the institution. The Respondent did not dispute that the same effort increased the students as per the Claimant's testimony.
59. The Respondent did not point to another person as having contributed to the growth of the number of students rather than the Claimant. I am also curious why the Respondent's director terminated the Claimant for asking about the commission if he was not entitled. The Claimant seemed to say that others have been paid which fact the director did not dispute.
60. In the circumstances I allow the prayer for the unpaid commission in the tune of Kshs 3,600,000/=
61. On the prayer for Responsibility Allowance the Claimant has stated that this was not in writing. It was also not part of the contract. The Claimant alleged to have been paid some Kshs 100,000/= in 2017 but did not produce evidence of such payment. Without evidence this court is inclined in not awarding such a prayer as he who claims must prove under section 107 of the *Evidence Act*.
62. On the prayer for service charge I note that the contract provided for statutory deductions which included NSSF. The Claimant has attached his NSSF statements and I note that there were deductions on his behalf even when he was not an employee of the Respondent and the Respondent has made deductions as early as May 2019. In the circumstances I decline to award the same since he was a member of NSSF which is an exception under section 35(6) of the *Employment Act*.
63. The prayer for 12 months compensation for unfair termination succeeds since the termination was unlawful. I award the Claimant 10 months compensation due to the conduct of the Respondent in terminating his services and the fact the Claimant first worked with the Respondent for like ten years; he left and then he came back for another five years to mean his performance was good.
64. In conclusion the Claimant's claim is hereby allowed with costs as follows;
- a. One Month salary in lieu of Notice.....Kshs 90,000/=
  - b. Unpaid leave for 30 days...Kshs 103,841.15/=
  - c. Unpaid Commission.....Kshs 3,600,000/=
  - d. Responsibility Allowance .....NIL
  - e. Service Charge.....NIL
  - f. 10 month's salary as compensation for unlawful termination.....Kshs 900,000/=
- Total.....KSHS....4,693,841.15/=
- g. Items (a), (b), (c) and (f) shall be subject to taxes and statutory deductions but shall attract interest at Court rates from the date of the judgment until payment in full.

**DATED AT NAIROBI THIS 5TH DAY OF JULY, 2024**

**DELIVERED VIRTUALLY THIS 5TH DAY OF JULY, 2024**

**ABUODHA NELSON JORUM**



**JUDGE**

