



**Simba v Portside Freight Terminal Limited (Cause E136 of 2023)  
[2024] KEELRC 2093 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2093 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E136 OF 2023**

**M MBARŪ, J  
JULY 25, 2024**

**BETWEEN**

**EDNA MUTHONI SIMBA ..... CLAIMANT**

**AND**

**PORTSIDE FREIGHT TERMINAL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant in December 2009 as the stock control clerk at a wage of Ksh.15, 000 per month. On July 1, 2010, the claimant was appointed as the assistant documentation supervisor at a wage of Ksh.30, 000 per month. The claimant was appointed the ISO management representative lastly earning Ksh.135, 948 per month.
2. The claim is that senior officers of the respondent directed the claimant to leave her employment without notice, hearing or reasonable cause leading to unfair termination of employment. There was no payment of terminal dues and the claimant is seeking the following dues;
  - a. Notice pay Ksh.135,948;
  - b. 12 months compensation Ksh.1,631,376;
  - c. Salary unlawfully deducted for January 2023 Ksh.89,948;
  - d. Unpaid salary for February 2023 Ksh.889,740;
  - e. Unpaid leave Ksh.89,948;
  - f. Salary deducted and not remitted to NSSF Ksh.200;
  - g. Salary deducted and not remitted to NHIF Ksh.19,840;
  - h. Costs of the suit.

3. The claimant testified in support of her claim that upon being employed by the respondent, she worked diligently and rose through the ranks to the position of documentation executive. The respondent was growing and established a sister company, Autoports CFS with an increase of employees. To acquire international recognition and secure more work/tenders, the respondent outsourced an agency to undertake intensive training of all employees. The claimant was appointed the ISO 9001 management representative to oversee all the requirements during this process.
4. The claimant testified that the director, Hamid Sadru appointed her as the operations manager upon satisfaction of a major project. Her salary increased to Ksh.135, 948 per month from June 2017.
5. However, in July 2020, the claimant noticed that her salary deposited in the bank was less than half. She asked the human resources office, Abubakar Said about the Ksh.79, 246 salary cut who indicated that Sadru had effected these changes as the general manager. Efforts to reach Sadru were futile.
6. The claimant testified that she reached out to the directors and CEO, Abubakar Joho and Salim Sadru who promised to talk to Hamid Sadru but the matter was never addressed. The claimant continued to receive a reduced salary.
7. In the year 2022, the claimant received an email from the CEO, Hussein Khamis who had been away from the business and asked to be briefed about operations. He revamped the business reaching out to clients for new business. The claimant as the operations manager was required to communicate internally to all departments. The CEO, Hussein Khamis reached out to clients through phone messages and emails communicated changes in TD and KRA and organised with the KPA team to change container destinations where this was not marked. He also assisted some clients directly and asked them to pay him directly or through the claimant. One such client, Mr. Mohamed would constantly call the claimant to follow up if any consignment had been received.
8. On 9 January 2023, the claimant was directed by the CEO to do a partial release of a consignment to Ali Kajogoo who made payment through Mpesa and the claimant made a deposit through the KCB app. On 13 January 2023, a colleague sent an email report on the cargo release which was not fully documented. The claimant communicated to the CEO for guidance but he turned abusive and issued threats that the claimant was incompetent and would be replaced with new employees who were able to take simple instructions.
9. Alice Karwana wrote an email to Hussein Khamis to apologize. On 15 January 2023, the CEO reached out to the claimant and explained the case of Ali Kajogoo and that the issue had been resolved.
10. The claimant testified that on 24 January 2023. Khamis Hamid, general manager of Auto Ports Freight Limited summoned her to his office where he found Tariq Mansoor the accountant and Salim Juma the operations manager. Khamis asked the claimant to explain why goods were being released without delivery orders. The claimant tried to explain what had happened on 9 January 2023 without success. She noted that Hussein Khamis addressed the matter. The matter was not concluded.
11. Salim Sadru asked the claimant to organize space in the go-down. Later in the day, the claimant was called for a conference call with Khamis Hamid and Hussein Hamid over the same consignment of Air Mensies Logistics and Ali Kajogoo. The claimant was told to vacate her office and the receptionist, Nasra Luli came into the office and directed the claimant to pick up a call from Mariam Omani and not to leave the office. When Omani came in, she tried to issue the claimant with a notice of suspension and also forced her to vacate office. The claimant asked for diligence and proper procedure without success. The claimant left her office as directed.

12. The claimant reached out to the directors and CEO seeking clarity of her suspension without success. She also noticed that for the 2 weeks suspension period, her salary was deducted.
13. The claimant testified that at this point she had a nervous breakdown following work frustrations and reduced salary without any explanations from her employer.
14. On 18 February 2023, the claimant was issued with a warning letter.
15. While on suspension, one director Ali Joho called the claimant to assist the newly appointed KRA employees to settle in by providing them with workstations and how to do their work. The claimant told him that she was on suspension and could not address as required. Later, Fahmy Joho called her and told her to report back to work the following day since there was a misunderstanding but the claimant indicated that she was not feeling safe taking into account what had transpired but she reported back to work as directed.
16. On 27 February 2023, Khamis Hamid and Salim Juma found the claimant in her office and demanded to know why she had returned without notice after suspension. She explained that Fahmy Joho had asked her to return but both told her that she had been fired and should vacate office. They instructed Suleiman Maulana and a security guard to remove her from the office forcefully. Since efforts to have terminal dues were without success.
17. Upon cross-examination, the claimant testified that she had no letter increasing her salary to ksh.135, 948. The salaries for January to February 2023 were not paid or the NSSF and NHIF remittances.
18. Upon issuance of the suspension notice, the claimant verbally discussed it with Khamis Hussein and observed that there was no due diligence before issuance of the same. There is no written response thereof.

### **Response**

19. In response, the respondent has made mere denials save to admit that the claimant was employed as a stock clerk on 1<sup>st</sup> October 2009. There was no unfair termination as alleged and the claimant was not sent away from her office. The claim made is denied and should be dismissed with costs.
20. Various work records were filed.
21. In evidence, the respondent called Miriam Omani the human resources manager who testified that the claimant was employed as a stock control clerk on 1<sup>st</sup> October 2009 and confirmed on 1<sup>st</sup> July 2020 for the position of assistant document supervisor earning Ksh.30, 000 per month. Gradually the salary increased to Ksh.79, 246 per month.
22. Omani testified that in the year 2016, the respondent issued an internal memo dated 23 August 2016 that the company was in the process of achieving ISO 9001-2008 certification and therefore appointed the claimant to take the role of management representative to train other employees on the regulations, terms and conditions of the certification. The training took about 3 years from 2017 to 2020.
23. The respondent paid all the necessary NSSF and NHIF dues on behalf of the claimant.
24. The claimant proceeded on her annual leave for the period of her employment and would be allowed off days on different occasions upon request.
25. The claimant was not diligent in her duties. She was cited for gross misconduct and was suspended on 25 January 2022 for two weeks without pay due to the gravity of the matter.

26. The claimant was also issued with a warning letter on 18 February 2023 on account of proceeding on unauthorized leave. Despite directions to give reasons, the claimant continued to be absent from work without good cause leading to termination of employment.
27. At the close of the hearing, both parties filed written submissions.

### **Determination**

28. As outlined above, the respondent filed some work records. The letter and notice terminating the employment of the claimant are not filed. The claimant was not issued with such a letter as confirmed in her evidence in court.
29. Through a letter dated 18 February 2023, the respondent warned the claimant that she had proceeded on leave without prior permission of the concerned authorities, resulting in willful insubordination and gross negligence of your duties. Absenting yourself from duties without prior intimation is misconduct for which you are making yourself liable for necessary action.
30. On this account, the respondent warned the claimant that;

You are hereby warned to refrain from such activities; failure to do so shall invoke appropriate action. You are further advised to submit a written explanation of your unauthorized leave as soon as you receive this letter. ...
31. There is nothing after this communication.
32. The claimant testified that she called the director and discussed the matter and returned to work. But, immediately, another director directed her to vacate office and security was called to forcefully remove her.
33. The claimant also admitted that all her communications with the respondent through the various directors were verbal, through phone or email. She verbally responded to the suspension notice and warning notice.
34. An employee does not terminate her employment. The employer has the legal duty to end employment and issue written notice stating the reason thereof.
35. Even in a serious case such as alleged gross misconduct, the employer has the legal duty to take the employee through the due process before termination of employment. Leaving the employee at large does not aid the employer's case. Instead, the employer is left exposed to claims such as herein.
36. Section 41(2) of the *Employment Act* requires the employer to issue notice and allow the employee to attend and make representations in the presence of another employee of her choice. Where the employer is unable to address these mandatory motions of the law, such matter must be addressed and demonstrated to the court. Section 41(2) requires that;
  - 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”.
37. Where the employer fails to address these provisions and requirements, there is unlawful termination of employment.

38. In addressing a claim of alleged unfair termination of employment for lack of due process, the court in the case of *Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club, Cause No. 440 of 2013* held that;

No employer shall terminate the employment of an employee unfairly... termination of employment is unfair by an employer if the employee fails to prove (a) that the reason for termination is valid: and (b) that the reason for termination is fair...

39. In the case of *Donald Odeke v Fidelity Security Limited, Cause No. 1998 of 2011* the court held that;

An employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them... it does not matter what offence the employee is charged with. If the employee is not heard, the termination is ipso facto unfair.

40. In this case, the response filed comprised mere denials and the witness called did not present any material particulars that the claimant was taken through the due process before being forced out of office. Indeed, no notice terminating employment was issued or filed in court as required under the provisions of Section 10(6) and (7) of the *Employment Act*.

41. In the case of *Pauline Maisy Omung'ala Chesang v Chief Justice and President of The Supreme Court of Kenya & another* [2020] eKLR the court held that even where the employee has committed criminal acts and has a matter pending before a criminal court, the employment relationship is secured and protected under the law and before termination of employment on account of alleged gross misconduct, the employee must be taken through the due process. The Court of Appeal in the case of *Oyombe v Eco Bank Limited* [2022] KECA 540 (KLR) outlined the key elements that an employer must address before termination of employment being;

Under this Section [section 41 of the Act], four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being:

- a. An explanation of the grounds of termination in a language understood by the employee;
- b. The reason for which the employer is considering termination;
- c. Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
- d. Hearing and considering any representation made by the employee and the representative chosen by the employee.

42. The four elements must thus be discernible for the procedure to pass muster

43. In this case, all the four elements are absent.

44. The response that the claimant absconded duty, was insubordinate and failed to respond to the notices issued was left bare. Upon such allegations, the respondent did nothing to protect himself. No disciplinary proceedings were held or the claimant invited to address. Even where the warning notice directed the claimant to address immediately and she failed to oblige, her continued employment was not addressed with finality. There is no notice terminating employment and the reasons thereof.

45. The court finds there was unlawful and unfair termination of the claimant's employment by the respondent. This is contrary to the mandatory provisions of Sections 35, 41, 43 and 45 of the Employment Act.
46. The claimant is entitled to notice pay and compensation.
47. The claimant is seeking payment of Ksh.135, 948 in notice pay as her last salary. The respondent's case is that the claimant was earning Ksh.79, 246 per month. Indeed, the claimant was appointed and issued with written letters stating the position and wages to be paid. The last letter increasing her wages is dated 18 June 2013.
48. Through a memo dated 22 June 2017 to all employees, the respondent appointed the claimant to be the overall in charge of overseeing the implementation of the certification process. This was an additional role without reference or change to the letter of appointment.
49. Changes to the letter of appointment and increase in wages arise from the employer. In this case, the claimant's core position was not changed. The wage due is Ksh.79, 246 in notice pay.
50. In assessing compensation due to the finding that there was unfair termination of employment, the claimant served the respondent for over 16 years running from the year 2009 to 2023. Part of the records filed by the respondent is the warning dated 18 February 2023. The warning related to the claimant being absent from work without prior authorization. The claimant did not file her response to the notice save to call the directors to verbally address the same. This denies the court the reasons inherent in the notice. In assessing the due compensation, under the provisions of Section 45(5) of the Employment Act, the court is required to consider this warning record. The evidence that the claimant was not taken through the due process or terminal dues paid and to date, no notice terminating employment has been issued, the court finds compensation at 10 months gross salary be an appropriate award. The claimant was last earning Ksh.79, 246 which translates to Ksh.792, 460 in compensation.
51. On the claims that there were salary deductions from Ksh.135, 948 to Ksh.79, 246 as addressed above, there is no record of changing the due wage. Where the respondent may have compensated the claimant for the role of ISO representative, there was no review of the employment contract and written notice of a wage change upwards. The changes done in removing the benefit the claimant had enjoyed during such period only compounded the unfair termination of employment addressed above.
52. On the claim for unpaid leave, the respondent filed various leave application forms. The last approved annual leave taken is from 20 to 24 September 2021 for 5 days. There is no record from October 2021 to February 2023. The claim for Ksh.89, 948 is not challenged in any material way.
53. On the claims for deducted and unremitted NSSF and NHIF dues, are statutory deductions and remittances due to the statutory body. The claimant can only claim service pay.
54. On the claim for costs, the claimant went to great lengths to seek out the respondent to resolve this matter before filing suit. As noted above, there is no letter terminating employment of a Certificate of Service to allow the claimant to seek new employment. These basics are crucial to consider when assessing whether to award costs. In this case, the claim for costs is justified.
55. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
  - a. A declaration that the respondent terminated the claimant's employment unlawfully and unfairly;

- b. Compensation awarded at Ksh.792,460;
- c. Notice pay Ksh.79,246;
- d. Leave pay Ksh.89,948;
- e. Certificate of service be issued under Section 51 of the Employment Act;
- f. Costs of the suit.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 25 DAY OF JULY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....