



**Nzioka & another v Gateway Marine Services Limited (Cause E139 of 2023)  
[2024] KEELRC 2296 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2296 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E139 OF 2023  
M MBARŪ, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**BONIFACE KITAVI NZIOKA ..... 1<sup>ST</sup> CLAIMANT**

**STEVE OTIENO MBOYA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**GATEWAY MARINE SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The issues in dispute herein are the wrongful, unlawful and unfair termination of employment. The claimants are seeking an order of reinstatement and in the alternative, payment of terminal dues.
2. The claimants were employed by the respondent as head of operations and head of the department of clearing and imports respectively. One had a salary of Ksh.174, 000 and the other Ksh.120, 000 per month.
3. The claim is that on 21<sup>st</sup> October 2022, the claimants were summoned by the respondent's human resources manager and served with letters advising them that their employment would be terminated within 30 days. No reasons were given but during payment of final dues, the respondent indicated that termination of employment was due to redundancy by dint of payment of service pay. No notice had been served under Section 40 of the *Employment Act* or a report made to the labour officer that there was a redundancy. The claimants had worked well in their respective departments and there was no justification for termination of employment.
4. The claimants are seeking judgment and a declaration that there was an unfair termination of employment and an order of reinstatement to issue compensation for the unfair termination of employment. They claim the following;
  - a. 12 months compensation;



- b. Unpaid salary from 1<sup>st</sup> May to November 21, 2021;
  - c. 3 months' notice pay;
  - d. General damages for unlawful discrimination;
  - e. General damages for psychological trauma and humiliation suffered;
  - f. Costs of the suit.
5. The 1<sup>st</sup> claimant testified that he was employed as head of operations earning Ksh.174, 000 per month. He worked well until 21<sup>st</sup> October 2022 when he was summoned to the office and was shocked to be issued with a 30-day notice terminating his employment. No reasons were given but while his final dues were being paid, he was informed that there was a redundancy. The respondent did not adhere to the provisions of Section 40 of the Employment and no notice was issued to employees or the labour officer. As the head of operations, the claimant felt singled out and targeted for discriminatory treatment since no other employee was dismissed. He was traumatized by such action which meant that he had lost employment for no fault and no reasons were given.
  6. The 1<sup>st</sup> claimant testified that following termination of employment, his terminal dues were not paid and was forced to return to his home village since he could not afford life in the city. This has caused him trauma and distress at the instance of the respondent and should be paid damages.
  7. The claimant testified that he was employed on 6 October 2021 on permanent and pensionable terms. Upon completing his probation period, the respondent was to issue the letter of confirmation but failed to do so. The response that he refused to sign the letter is not correct. After 3 months the general manager called him and verbally confirmed the employment contract. Employment continued to the same terms. Later the general manager called to terminate his employment without prior notice or hearing and the allegations that there was a redundancy were not justified and the orders sought should be issued with a reinstatement or payment of terminal dues.
  8. The tabulation of final payments indicates severance pay was due at ksh.95, 080 and what came to his mind upon such payment was that the reason leading to termination of employment was a redundancy. The due process for redundancy was not followed. His contract was to end on 13 January 2023 but was terminated prematurely on 21<sup>st</sup> November 2022. He had legitimate expectations to serve the full-term contract but was not allowed. At the time, he was serving a loan secured through his employment and was forced to go at a huge loss upon a failure to service the loan facility.
  9. The claimant testified that if there was a redundancy, Victor immediately took over his position, meaning the alleged redundancy was just a guise to terminate his employment unfairly. He is seeking reinstatement.
  10. Upon cross-examination, the claimant testified that his net salary was Ksh.150, 000 with a phone allowance of Ksh.4,000. He had statutory deductions. His claim for damages for discriminatory treatment was because Victor took up his duties. The non-payment of half salary was without his consent or approval and the balance is due.
  11. The 2<sup>nd</sup> claimant testified that he was employed in June 2021 at a salary of Ksh.120, 000 per month and on permanent and pensionable terms. He was placed on probation for 3 months with effect from 1<sup>st</sup> July 2021 to 1<sup>st</sup> October 2021. There was no official communication about confirmation but the supervisor verbally confirmed his employment. Upon termination of employment, someone else took over his duties.



12. Upon cross-examination, the claimant testified that on 1<sup>st</sup> June 2022, his contract was extended to 31<sup>st</sup> December 2022 but the termination of employment was in November 2022. He was not allowed to serve under his full-term contract. He had a month before the end of his contract.
13. The claimant testified that his salary had various deductions and thus claims underpayment of salary. On 21<sup>st</sup> October 2022, the respondent issued him with a notice terminating employment a month before the contract came to an end. This resulted in unfair termination of employment.

### **Response**

14. In response, the respondent's case is that the 1<sup>st</sup> claimant was under a fixed-term contract that was to run from 12 January 2022 to 13 January 2023 while the 2<sup>nd</sup> claimant had a contract running from 1<sup>st</sup> July 2022 to 30 December 2022. The fixed-term contracts were to end as agreed unless there was a renewal and created no legitimate expectation of renewal.
15. The 2<sup>nd</sup> claimant's contract terminated as agreed and there is no reason to claim unfair termination of employment as alleged. An employer is not under any obligation to give the employee reasons for non-renewal of fixed term contract unless there is such obligation created under the expiring contract. The 2<sup>nd</sup> claimant was thus bound under his fixed term contract and cannot justify any claims outside such contract.
16. The 1<sup>st</sup> claimant had a contract due to expire on 13 January 2023 but due to the effects of Covid-19, the respondent was unable to sustain the employment and the contract was frustrated. Following the pandemic, most employers including the respondent could not hire employees apart from fixed-term contracts as the situation was fluid and unknown. Termination of employment was due to financial constraints and difficulties and the 1<sup>st</sup> claimant was paid severance pay and all pending leave days. There was no unfair termination of employment as alleged. The claims made should be dismissed with costs.
17. In evidence, the respondent called Shazia Firoz the general manager and was then the head of administration. She testified that the 1<sup>st</sup> claimant's contract was to expire on 13 January 2023 but was terminated on 21<sup>st</sup> October 2022 about two months before it was due to end. Due to the COVID-19 pandemic effect, the respondent had financial difficulties and severance was paid. During the 2021/2022 financial year, the respondent had a salary deduction due to the effects of COVID-19 and the company is still trying to recover. Every employee suffered a salary cut. The company records are filed to demonstrate the effects and the need for pay cuts.
18. Firoz testified that the 2<sup>nd</sup> claimant was on a contract running from 1<sup>st</sup> July 2022 to 30 December 2022 and it ran to full term. There was no obligation to issue notice or give reasons for non-renewal of the expired contract. The claimant's desire to be re-employed was impossible at the time since the other employee agreed to work at half salary.
19. The claimants were issued with letters terminating employment on 21<sup>st</sup> October 2022. There was payment of one month in lieu of notice as set out under the contract. Loss of employment was involuntary due to financial difficulties due to the pandemic. The employees who took over the duties held by the claimants were junior staff and had been working for the respondent for many years before. They agreed to be paid at half salary.
20. At the close of the hearing, both parties filed written submissions.



## Determination

21. In a letter dated 6 October 2021, the respondent employed the 1<sup>st</sup> claimant with effect from 11 October 2021 on a probation term of 3 months. His salary was agreed at a total gross of Ksh.174, 000 which included Ksh.150, 000 basic pay plus Ksh.20, 000 house allowance, and Ksh.4, 000 telephone allowance.

This probation contract lapsed on 5 January 2022.

22. On 10 January 2022, the 1<sup>st</sup> claimant was issued with a contract of employment running from 12 January 2022 and ending on 13 January 2023.

The salary due was agreed at Ksh.174, 000.

23. Through a letter dated 21<sup>st</sup> October 2022, the respondent issued the claimant notice of 30 days terminating his employment by invoking the termination clause. No other reasons were given Being;

- a. Basic pay Ksh.133,112;
- b. Leave arrears Ksh.120,435;
- c. Severance pay Ksh.95,060;

Total Ksh.348, 627.

24. Whereas the employer is allowed to issue a written contract of employment under the provisions of Section 10(3) of the *Employment Act*, the practice of invoking the termination clause at will is no longer applicable in employment and labour relations. Sections 43 and 45 of the *Employment Act* require the employer to give the employee reasons and justification upon which employment is terminated.

25. Ms. Firoz testified that the respondent had suffered financial difficulties during the Covid-19 pandemic. This affected operations and led to the termination of employment.

26. It is worth noting that the claimants were employed post-Covid-19 pandemic. The respondent had gone through the COVID phase successfully. To use the reason that employment terminated due to Covid effect is to go contrary to the provisions of Sections 43 and 45 of the *Employment Act* which requires the employer to terminate employment for valid and genuine reasons. In the case of *Musa Mwale Ashibira v African Blooms Ltd* [2018] eKLR the court held that;

Pursuant to sections 43 and 45 of the *Employment Act*, 2007, an employer is under a duty to prove the reasons for dismissing an employee, and that the reasons are valid and fair.

27. In the case of *Zablon Bisonga Mose v Real Careers Limited* [2018] eKLR, the court held that termination of employment must be based on valid and genuine reasons. Where there is no due process or a substantive reason(s) leading to termination of employment, the same is held unfair in terms of section 45 of the *Employment Act*, 2007.

28. Even where there are reasons leading to termination of employment, which is not the case here, the employee is entitled to due process and notice before termination of employment. Where there were financial difficulties, this being a redundancy situation not assigned to any misconduct, the motions of Section 40 of the *Employment Act* were not adhered to in this case. There was no effort whatsoever in addressing the provisions of Section 41 of the *Employment Act* either.



29. In the case of *Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd* (2013) eKLR, the court summarized the legal fairness requirements set out in Section 41 of the *Employment Act* as follows;
- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
  - b) That the employer has allowed a representative of the employee either a fellow employee or a shop floor representative to be present during the explanation.
  - c) That the employer has heard and considered any explanations by the employee or their representative.
  - d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.
- There was an unfair termination of employment.
30. The 1<sup>st</sup> claimant is seeking payment in lieu of notice. Notice was issued even though there was no procedural fairness.
31. On the claim for compensation, the claimant had hoped to serve under his contract until the end. He lost 3 months and such should be paid for in accordance with Section 49 of the *Employment Act*.
32. The 1<sup>st</sup> claimant had a gross salary of Ksh.174, 000 per month. This is the correct multiplier all at Ksh.522, 000 in compensation.
33. The 1<sup>st</sup> claimant is also seeking payment of unpaid salaries from 1<sup>st</sup> May 2021 to 21<sup>st</sup> November 2021. Ms. Firoz testified that due to Covid-19 employees agreed to a pay cut but any salary deduction should be with the approval and consent of the employee and in accordance with Section 10(5) of the *Employment Act*. Such consent should be obtained before the employer can interfere with the salary paid to the employee. In this case, the claim for deductions in salary without any written consent by the 1<sup>st</sup> claimant is justified at Ksh.295, 800.
34. In tabulating terminal dues, the respondent applied a basic salary of Ksh.133, 000. This was under the mistaken belief that the claimant had agreed to a salary cut. Without evidence of consent obtained from the claimant, the under-assessed terminal dues are not justified and the 1<sup>st</sup> claimant is entitled to ksh.346, 249.
35. On the claim for discriminatory treatment and payment for damages for trauma and distress, loss of employment is distressful and part of the reasons why under Sections 43 and 45 of the *Employment Act* the employer is required to give reasons and justification. In this case, this is addressed and established to be unfair termination of employment. A case of discrimination must be contradistinguished between similarly situated employees. The claimant as head of his department was replaced by his junior employee who was at a lower wage. A claim that there was discriminatory treatment and trauma cannot be discerned under the given circumstances.
36. The 2<sup>nd</sup> claimant was employed under a contract dated 1<sup>st</sup> July 2022 and expiring on 30 December 2022. His salary was agreed at ksh.120 per month.
37. On 21<sup>st</sup> October 2022, the 2<sup>nd</sup> claimant was issued with a notice terminating his employment within 30 days. That ended employment with effect from 20 November 2022, a period of 40 days before the expiry of his employment contract ending on 30 December 2022.



38. Indeed, similar to the 1<sup>st</sup> claimant, the wording of the notice terminating employment was the same. Whereas the employer has the right to terminate employment due to operational reasons, Section 45(2) of the [Employment Act](#) requires the employer to give valid reasons leading to termination of employment. These provide are;
- (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.
39. It is not sufficient for an employer to state that the employment contract allowed for notice pay before termination of employment. The [Employment Act](#) mandates the employer to have valid and fair reason and to apply fair procedure before termination of employment. Even in a case where there are operational needs resulting in loss of employment, due process is mandatory. In the case of [Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers \(Kudbeiba\) v Nairobi Hospital](#) [2022] eKLR the court held that where an employer relies on operational reasons to justify termination of employment, such reliance on Section 40 of the Act should be read together with Sections 43, 45 and the [Employment Act](#). Section 45 (2) (b) of the Act provides for termination of employment on operational requirements of the employer. The employer has the prerogative to declare redundancies so long as they follow the procedure as laid down in Section 40 of the Act. Without addressing such provisions, the resulting termination of employment is unfair. See [Rose Njambi Mwangi v Point East Africa Limited](#) [2021] eKLR.
40. In this case, even where the respondent knew that the 2<sup>nd</sup> claimant’s employment contract was due to end on 30 December 2022 it proceeded to issue notice dated 21<sup>st</sup> October 2022 without giving any reasons to justify the premature termination of employment.
- There was an unfair termination of employment.
- The claimant was issued with a notice of pay.
41. For the unfair termination of employment, the court finds an award of two months ' gross salary an appropriate remedy. The claimant was earning Ksh.120, 000 under his contract and the total due is ksh.240, 000.
42. On the claim for unpaid salaries deducted without the written consent of the 2<sup>nd</sup> claimant, the sum of Ksh.156, 000 is due.
43. The claim for the wrong tabulation of terminal dues is on the basis that the respondent reduced the salary due and applied the sum of Ksh.85, 607 instead of Ksh.120, 000. The due contract sum is Ksh.120, 000 and the under-assessed salary in terminal dues payment is awarded at ksh.226, 554.
44. The analysis of the claim for discriminatory treatment and trauma is as addressed above.
45. On costs, the provisions of Section 45(5) of the [Employment Act](#) require the court to consider the procedures gone into by the employer in terminating employment. The payment of terminal dues immediately at the end of employment. All these place the respondent in good standing save for the legal lapses addressed above. Each party is to bear its costs.



46. Accordingly, judgment is hereby entered for the claimants against the respondent in the following terms;

a. Employment terminated unfairly;

1<sup>st</sup> claimant is awarded;

i. Compensation at Ksh.522,000

ii. Unpaid salaries Ksh.295,800;

iii. Unpaid terminal dues Ksh.346,249;

2<sup>nd</sup> claimant is awarded;

i. Compensation ksh.240,000;

ii. Unpaid salary Ksh.156,000;

iii. Unpaid terminal dues ksh.226,554.20;

b. Each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

