



**Kibira v Twiga Foods Limited (Cause 463 of 2019)
[2025] KEELRC 2751 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2751 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 463 OF 2019
L NDOLO, J
OCTOBER 9, 2025**

BETWEEN

MAXTON DUKE KIBIRA CLAIMANT

AND

TWIGA FOODS LIMITED RESPONDENT

JUDGMENT

1. The issue is dispute as stated by the Claimant in his Memorandum of Claim dated 12th July 2019, is unfair dismissal and unlawful withholding of his terminal dues. The Respondent filed a Memorandum of Reply dated 15th November 2019.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Legal Manager, Beatrice Maiyo.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 7th February 2015, in the position of Sales Representative. At the time separation, the Claimant earned a monthly salary of Kshs. 100,000.
4. The Claimant worked for the Respondent until 13th December 2018, when his employment was terminated on account of what was termed as 'performance below the set and agreed expectations'.
5. The Claimant complains that he was not afforded due process, prior to termination of his employment. He further accuses the Respondent of unfair labour practices to his detriment, particulars being:
 - a. Unjustified and unlawful deductions made from the Claimant's salary to the tune of Kshs. 426,000;
 - b. Tossing the Claimant from one station to the next, and forcing him to work overtime without pay, under the threat of termination;



- c. Failure to give prior notice to the Claimant, outlining reasons that would lead to termination of his employment;
 - d. Terminating the Claimant's employment without giving him any valid reasons for it or according him an opportunity to be heard;
 - e. Failure to conduct performance appraisals prior to termination of the Claimant's employment;
 - f. Lack of fairness, equity and justice in the termination process;
 - g. Failure to take into consideration the duration of the Claimant's service, his competence, skill, ability and reliability;
 - h. Failure to provide the Claimant with a relevant job description for the work he had been employed to do, thus subjecting him to uncertainty;
 - i. Engaging the Claimant in unnecessary confrontation, making the work environment difficult and unbearable;
 - j. Forcing the Claimant to undertake work outside his area of expertise, without any training;
 - k. Introduction of unattainable and unrealistic targets, contrary to the terms of the employment contract;
 - l. Forcing the Claimant to work overtime without compensation, with threats of termination of employment;
 - m. Shifting sales accounts and targets without consultation and unrealistic targets;
 - n. Subjecting the Claimant to uncondusive and harsh working conditions and environment;
 - o. Withholding the Claimant's pay in lieu of notice.
6. The Claimant pursues the following remedies:
- a. A declaration that the termination of his employment was unlawful and unfair;
 - b. 12 months' salary in compensation for unfair termination;
 - c. Refund of Kshs. 426,000 being unlawful deductions;
 - d. Compensation for overtime work;
 - e. Balance of notice pay being Kshs. 125,000;
 - f. Costs plus interest.

The Respondent's Case

- 7. In its Memorandum of Reply dated 15th November 2019, the Respondent states that the Claimant's employment contract commenced on 2nd May 2016 and not 7th February 2015 as pleaded by the Claimant.
- 8. The Respondent claims to have had several meetings with the Claimant, regarding his performance. The Respondent adds that the Claimant was notified of the reason for termination of his employment being, repeated performance way below the set and agreed expectations.



9. The Respondent avers that the Claimant was engaged as a Sales Representative, with a clear job description.
10. The Respondent denies having effected illegal deductions from the Claimant's salary, stating that any deductions were on account of bonus the Claimant did not qualify for. The Respondent further denies that the Claimant worked overtime.

Findings and Determination

11. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

12. The Claimant's employment was terminated by letter dated 13th December 2018 stating thus:

"Termination Of Employment

We refer to various correspondences between the Company and yourself regarding the performance of your depot. We also refer to the meetings regarding your performance held on 23rd November 2018.

At the meeting held on 23rd November 2018 the following details about your performance were brought up:

1. Realization
2. Unbanked revenue

It was agreed that your depot realization was to be at 95% and zero unbanked revenue.

Despite repeated warnings, discussions and interventions about the performance of your depot, you have continued to perform below the set and agreed expectations. More specifically, you have continued to:

1. achieve average realization rates of 85% which said rates are below the minimum set target of 92%;
2. achieve average returns rate of 23% is way above the maximum set target of 5%;
3. record unbanked revenues that exceed the minimum agreed balance of KES. 30,000.

As a result, the Company's management has decided to terminate your employment effective 13th December 2018.

Your final dues including notice pay and accrued leave pay will be paid out to you once we confirm receipt of all working tools assigned to you and we reconcile any deductions against your staff account.

We wish you all the best in your future endeavours.

Yours sincerely,

(signed)



For: Twiga Foods Ltd
People Operations Officer”

13. According to this letter and other evidence on record, the reason for termination of the Claimant’s employment was poor performance.
14. At the outset it is important to point out that the disciplinary procedure in addressing cases of poor performance is distinct from the one employed in allegations of misconduct.
15. The procedure for dealing with cases of poor performance was established in Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 273 of 2010) as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”
16. In *Jane Samba Mkala v Ol Tukai Lodge Limited* [2013] eKLR my sister Mbaru J held that an employer alleging poor performance by an employee must demonstrate the existence of an objective performance evaluation system, as a benchmark for assessing performance, while providing support for improvement.
17. Being one of the grounds recognised by the provisions of the *Employment Act*, a verdict of poor performance can only be made pursuant to the procedural fairness requirements established under Section 41 of the *Employment Act*, which provides 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.
 - (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. “
18. The Respondent’s witness, Beatrice Maiyo, who described herself as Legal Manager was unable to point out any proof of poor performance on the part of the Claimant. More significantly, the Claimant’s job description, which would have formed his performance benchmark, was not availed. The Court was therefore at a loss as to how the verdict of poor performance was arrived at.
19. There is one more thing to say about this matter and it is this; it is evident that the Claimant was surcharged for unbanked cash, which was one of the concerns raised by the Respondent regarding the Claimant’s performance. The Court noted that some of the deductions went beyond half of the Claimant’s salary.



20. In its decision in Kenya National Library Services Board v Beatrice N. Ayoti [2014] eKLR this Court held that a surcharge is a disciplinary action that can only be taken pursuant to the procedural fairness provisions of Section 41 of the Employment Act.
21. In this case, the decision to surcharge the Claimant appears to have been unilateral. In fact, as confirmed by the Respondent's witness, there was no document to show how the surcharge figures were arrived at.
22. Moreover, by surcharging the Claimant and at the same time terminating his employment on account of the same allegations of unbanked cash, the Respondent breached the rule against double jeopardy.
23. On the whole, I find and hold that the termination of the Claimant's employment was substantively and procedurally unfair.

Remedies

24. As a consequence, I award the Claimant six (6) months' salary in compensation. In making this award, I have considered the Claimant's length of service and the Respondent's failure to follow due process in bringing the employment relationship to an end. I have further taken into account that the Claimant was subjected to an irregular surcharge.
25. In light of the finding that the surcharge slapped on the Claimant was irregular, the surcharge amount of Kshs. 426,000 is due to the Claimant.
26. No basis was established for the claims for balance of notice pay and overtime compensation, which therefore fail and are disallowed.
27. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 6 months' salary in compensation.....Kshs. 600,000
 - b. Irregular surcharge.....Kshs.426,000
 - Total.....Kshs.1,026,000
28. This amount is subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
29. The Claimant will have the costs of the case.
30. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF OCTOBER 2025

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JUDGE

Appearance:

Ms. Ochieng for the Claimant

Mr. Otieno for the Respondent

