

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
ELDORET
CAUSE NO. 105 OF 2018

JOSEPH SOITA ONDICHO
CLAIMANT

VERSUS

FRODAK KENYA LIMITED1ST
RESPONDENT

BUTALI SUGAR MILLS.....2ND RESPONDENT

JUDGMENT

1. The Claim herein was instituted by the Claimant vide a Memorandum of Claim dated 5th February 2018 seeking the following orders against the Respondents: -
 - a. A declaration that the termination process as carried out by the Respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law
 - b. Payment of sums of money claimed in the Memorandum of Claim.

c. Costs and interests

d. Any other relief that the Court may deem fit and just to grant

2. The Claimant averred that he was employed by the Respondent from 1st March 2013 until 2nd May 2017 when his employment was unfairly terminated by the Respondents without any justifiable reasons.
3. The Claimant particularized the unlawfulness of the termination of his employment as follows:
 - i. The termination was without any fair valid reason
 - ii. The termination was not in accordance with fair procedure
 - iii. No leave pay was given
 - iv. No one months' salary in lieu of notice was paid
 - v. No overtime dues were paid
 - vi. No compensation for unfair termination was paid.

4. The Claimant contended that owing to the unfair and unlawful termination, he is entitled to terminal benefits which he itemized to be:

- i. One month pay in lieu of notice Kshs. 5,520
 - ii. Compensation for unfair termination.....Kshs 57,600
 - iii. Unpaid house allowance Kshs 37,440
 - iv. Pro-rata leave..... Kshs 8,320
 - v. Service pay/Gratuity Kshs 9,600
 - vi. Unpaid public holiday worked.....Kshs 1,333.3
 - vii. Underpayment.....Kshs. 84,008.6
 - viii. Accrued leave earned but not taken Kshs. 19,200
- Total**Kshs. 223,021.9**

5. In response, the 1st Respondent filed a Reply to the Statement of Claim dated 3rd May 2018 denying the averments made by the Claimant in his claim. The 1st Respondent stated that if the Claimant was dismissed from employment, it was because he participated in an illegal strike.

6. The 1st Respondent urged the court to strike out the Claimant's case with costs.
7. The 2nd Respondent entered appearance on 25th June 2019 through the firm of L.G Menezes & Company Advocates but did not file any pleadings.

The Evidence

8. The Claimant testified on 4th November 2024 as CW1 and adopted his witness statement recorded on 9th February 2018 as part of his evidence in chief. He also relied on the documents he filed in support of his case as his evidence.
9. The Claimant stated that he was employed by the 1st Respondent and that his employment was terminated on 2nd May 2017 without notice. It was his testimony that on that date, he reported to work and found a notice at the gate barring workers from entering the premises. He averred that he worked overtime without pay and also worked on public holidays for which he was never compensated. He denied attending any disciplinary hearing and maintained that he did not receive a letter of dismissal.

10. On cross-examination by Counsel Achieng, the Claimant stated that he signed an employment contract which was reviewed every six months. He averred that he was paid based on the work done, at the rate of Kshs. 14 per tonne. He denied participating in any strike and stated that he was not aware of one. He maintained that the cause of his termination was his request for an overall and other work equipment. He admitted that he received Kshs. 10,600 at the Labour Office after he was terminated from employment.
11. On re-examination, the Claimant stated that he was paid by the 1st Respondent.
12. The 1st Respondent on its part called George Onyango its Operations Manager who testified as RW1. He adopted his witness statement as part of his evidence in chief and relied on the documents filed by the 1st Respondent in support of its case.
13. RW1 in his evidence stated that the Claimant was employed as a loader on a 3 months contract that was renewable. He asserted that the Claimant was a piece rate worker and was remunerated according to the tonnage loaded. It was his

testimony that the Claimant was paid Kshs 17 per tonnage. According to RW1, the Claimant was paid all his dues after he was terminated from employment as a result of participating in an unlawful strike.

14. During cross examination, RW1 confirmed that the Claimant was the 1st Respondent's employee. He stated that the Claimant was not issued with a notice to show cause before he was terminated from employment. He maintained that the Claimant was paid his dues and that he was issued with a Certificate of Service.
15. At the close of their respective cases, parties filed written submissions. The Claimant's submissions are dated 21st February 2025 while the 1st Respondent's submissions are dated 3rd February 2025. The 2nd Respondent did not file its submissions.
16. In his submissions, the Claimant asserted that he testified that he was sent away from work without being told the reason and without being accorded any hearing. While citing the case in ***Postal Corporation of Kenya vs Andrew K.***

Tanui(2019)eKLR, the Claimant submitted that the purported invitation to attend disciplinary hearing does not meet the requirements laid down by section 41 of the Employment Act.

17. On this basis, the Claimant urged the court to make a finding that he had discharged the burden of proving unfair termination of his employment by the Respondents.
18. On its part, the 1st Respondent submitted that the Claimant on cross examination confirmed that he was earning Kshs 14 per tonne and this made him a piece rate worker since his remuneration was based on the amount of work done and not a fixed regular schedule of payment. In support of this position, the 1st Respondent cited the case of **Garama Karisa Masha vs Krystalline Salt Limited (2016) KEELRC 535 (KLR)** and **Krysatlline Salt Limited vs Kwekwe Mwakele & 67others (2017)**.
19. Further, the 1st Respondent submitted that the Claimant in his testimony stated that he had a contract with the 1st Respondent for a period of 6 months. According to the 1st Respondent, no evidence has been tabled that there was an existing contract at the time of the alleged termination from employment. It is

submitted that since the contract period had lapsed, the claimant cannot be heard to claim that he was unlawfully terminated from employment. Reliance was placed on the case of ***Registered Trustees of the Presbyterian Church of East Africa & Another vs Ruth Gathoni Ngotho Kariuki (2017) KECA 194 (KLR)*** and ***Mikis & 55 Others Vs Frodak Services (Frodak Kenya Limited & Another (2024) KEELRC 2765(KLR)***.

20. In the end, the 1st Respondent prayed for the dismissal of the Claimant's suit with costs.

DETERMINATION

21. Upon considering the pleadings herein, the evidence of the parties, the submissions and the authorities cited, I find that the issues for determination are: -

- i. Whether the Claimant was an employee of the 1st Respondent or the 2nd Respondent
- ii. Whether the Claimant's employment was unfairly terminated
- iii. Whether the reliefs sought should issued

22. On the first issue, the 1st Respondent in its reply to the Statement of Claim denied that the Claimant was its employee but during the course of these proceedings and particularly in the evidence of RW1 it became clear that the Respondent had engaged the Claimant as a loader during the period it is alleged that he partook in an illegal strike. Further, in the Respondent's list of documents dated 20th April 2021, the Respondent attached the Claimant's employment contracts as well as the payroll listings showing that the Claimant was indeed engaged by the Respondent. The Claimant was therefore indeed an employee of the 1st Respondent.

Whether the Claimant's employment was unfairly terminated

23. The Claimant in his testimony and in the witness statement he adopted in court as part of his evidence stated that he was terminated from employment on 2nd May 2017 without notice.

24. On the other hand, the 1st Respondent averred that the Claimant was terminated from employment after he participated in an illegal strike.

25. Although the Claimant denied that his termination from employment was occasioned by the strike that took place on 2nd May 2017, the Court takes judicial notice of the industrial action that occurred on the said date at the 2nd Respondent's premises resulting in the disruption of work operations and the subsequent termination of several employees, including the Claimant.
26. Considering the dates relating to the cause of action, this Court notes that it has previously dealt with similar cases arising from the same incident, where employees filed suits alleging unfair termination, yet the evidence revealed that the termination resulted from participation in an unprotected strike.
27. Section 80 of the Labour Relations Act provides for consequences of participating in an unprotected strike as follows:

80. Strike or lock-out not in compliance with this Act.

(1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with

this Act is deemed to have breached the employee's contract and—

(a) is liable to disciplinary action; and

(b) is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.

(2) A person who refuses to take part or to continue to take part in any strike or lock-out that is not in compliance with this Act may not be—

(a) expelled from any trade union, employers organization or other body or deprived of any right or benefit as a result of that refusal; or

(b) placed under any disability or disadvantaged, compared to other members or the trade union, employers' organisation or other body as a result of that refusal.

(3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.

28. There is evidence on record, particularly the strike report letter dated 3rd May 2017 by the County Labour Officer, attached to the 1st Respondent's list of documents, indicating that the 1st Respondent terminated its employees on the basis that the strike was not convened in accordance with the provisions of sections 76 to 79 of the Labour Relations Act, which outline what constitutes a protected strike and what does not.
29. The Claimant having participated in the unprotected strike, he was liable to disciplinary action. The Respondent therefore had valid reason for terminating the employment of the Claimant.
30. The issue that the court needs to address is whether the 1st Respondent took the Claimant through the due process stipulated at section 41 of the Employment Act. In his testimony, the Claimant denied being invited to a disciplinary hearing before he was terminated from employment.

31. In the decided case of, **Simon v Frodak Services Limited [2025] KEELRC 1288 (KLR)**, this Court held as follows: -

“38. Even though the Respondent had valid reason to terminate the Claimant’s employment, it was obliged to comply with section 41 of the Employment Act in relation to the procedure for termination. The Respondent’s witness stated that following the strike there was a meeting between representatives of Butali Sugar, representatives of the workers and representatives of the Respondent. That the representatives of the workers walked out of the meeting in defiance. That the issue was thereafter reported to the Kakamega County Labour Officer who after hearing the parties, came to the conclusion that the strike was unmerited, illegal. That the employees together with their representatives again walked out of the meeting at the County Labour Office in defiance.

39. It was the Respondent’s case that because of the strike the management of Butali Sugar incurred heavy losses and declined to allow the employees who participated in the strike to work in their premises. That this led to the termination of the

employment of the Claimant together with all the other striking employees.

40. From the foregoing it is the finding of the court that in the prevailing circumstances and taking into account the number of employees involved which was over 300, it was not possible to expect the Respondent to strictly comply with section 41 of the Employment Act. The fact that Butali Sugar declined to admit the employees back to work left the Respondent with no option other than to terminate the employment of all the employees including the Claimant.

41. In the circumstances and noting that the Claimant participated in an unprotected strike, it is my finding that the Claimant has not proved that the Respondent unfairly terminated his employment.”

32. The facts of this case being similar to the case of **Simon v Frodak Services Limited** (supra), this Court adopts the reasoning and findings in the said decision. Accordingly, I find that the Claimant has not proved that his termination was unfair as alleged.

33. On the third issue as to whether the Claimant is entitled to the prayers sought in the Memorandum of Claim, the Claimant prayed for a declaration that the termination process as carried out by the Respondent is unlawful and payment of terminal benefits as enumerated in paragraph 4 of this judgment. The court will address the reliefs sought by the Claimant in separate heads as hereunder:

i. A declaration that the termination process as carried out by the Respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law

Having found that the termination of the Claimant's employment was not unfair and/or unlawful he is not entitled to this prayer.

ii. One month pay in lieu of notice

The Claimant in his testimony admitted that he was paid his salary of Kshs 10,600 at the Labour office. He is therefore not entitled to this prayer.

iii. Compensation for unfair termination

Having found that the termination of the Claimant's employment was not unfair he is not entitled to compensation.

iv. Unpaid house allowance

The Claimant was paid on the basis of the quantity of work done. His contract states that he was paid Kshs. 17 per tonne of cane loaded. The pay was therefore inclusive of house allowance. He is not entitled to house allowance.

v. Pro-rata leave

The Claimant did not state the period for which the prorata leave is sought. The court however notes that there is no evidence on record that the Claimant ever went on paid annual leave or was ever paid in lieu thereof. The Claim for pro rata leave was however never proved.

vi. Service pay/Gratuity

The prayer for service pay fails, as the evidence on record demonstrates that the Claimant was a registered member of the National Social Security Fund (NSSF).

vii. Unpaid public holiday worked

The Claimant did not state the period for which the unpaid public holiday leave is sought. This prayer is declined for lack of particulars.

viii. Underpayment

In view of the fact that the Claimant was paid per tonnage he is not entitled to overtime as his pay was not dependent on the time worked but on the quantity of work done.

ix. Accrued leave earned but not taken

The 1st Respondent did not produce any evidence to show that the Claimant ever went on paid annual leave or was ever paid in lieu thereof. The Claimant stated that he worked for the 1st Respondent from 1st March 2013 to 2nd May 2017. He is entitled to annual leave for the almost four years he worked for the 1st Respondent. I

award him 55 days based on 1.75 days per month provided for in section 28(1) of the Employment Act. Since the Claimant was on piece rate I base this pay on the minimum daily wage applicable for a loader at the time the Claimant left employment in May, 2017 which was (296.20 x 84) Kshs. 24,880.8

34. Consequently, judgment is entered for the Claimant in the following terms:

- i. Accrued leave earned but not taken Kshs. 24,880.8
- ii. The 1st Respondent is directed to issue the Claimant with a certificate of service within 30 days
- iii. The 1st Respondent shall meet the Claimant's costs of this suit.

**DATED, DELIVERED AND SIGNED
THIS 9TH DAY OF OCTOBER, 2025.**

**M. ONYANGO
JUDGE**