



**Mmbasu v Frodak Kenya Limited & another (Cause 113 of 2018)
[2025] KEELRC 2775 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2775 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 113 OF 2018
MA ONYANGO, J
OCTOBER 9, 2025**

BETWEEN

YOHANA MMBASU CLAIMANT

AND

FRODAK KENYA LIMITED 1ST RESPONDENT

BUTALI SUGAR MILLS 2ND RESPONDENT

JUDGMENT

1. The Claim herein was instituted vide Memorandum of Claim dated 1st February 2018 by the Claimant 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 28th April 2016 until 2nd May 2017 when his employment was unfairly terminated by the Respondent 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. 6,210
 - ii. Unpaid house allowance Kshs 810
 - iii. Compensation for unfair termination Kshs. 64,800
 - iv. Unpaid public holiday worked.....Kshs 375
 - v. Service pay/Gratuity Kshs 2,700
 - vi. Underpayment.....Kshs. 12,186.6
 - vii. Accrued leave earned but not taken Kshs. 5,400
- Total Kshs. 92,481.6
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 particularly, that he was the Respondents' employee. It is the 1st Respondent's case that since there existed no employment or contractual obligation binding the Claimant and the 1st Respondent, the claim herein is misconceived and unwarranted.
6. The 1st Respondent however stated that if the Claimant was dismissed from employment, it was because he participated in an illegal strike.
7. The 1st Respondent urged the court to strike out the Claimant's case.
8. The 2nd Respondent entered appearance on 25th June 2019, participated in the proceedings but did not file any pleadings.

The Evidence

- 9. The suit was heard on 4th November 2024. The Claimant testified as CW1 and adopted his witness statement filed with his claim as part of his evidence in chief. He also relied on the documents he filed in support of his case as his evidence.
- 10. The Claimant stated that he was employed by the Respondents in April 2016 and worked until 2nd May 2017 when his employment was terminated without any notice.
- 11. He stated that on the said date, he reported to work as usual but was denied access to the Respondents' premises at the gate. He further stated that during the course of his employment, he was not paid overtime dues despite working every day of the week, including public holidays. He also claimed that he was not paid house allowance and that statutory deductions for NSSF and NHIF were not remitted. Consequently, he prayed to be awarded the reliefs as tabulated in his Memorandum of Claim.
- 12. On cross-examination by Counsel Wambua, the Claimant stated that he was employed by the 2nd Respondent as a loader and was paid according to tonnage at the rate of Kshs. 14 per tonne.



13. He stated that the 1st Respondent was assigning him work under the 2nd Respondent and that his wages were paid in cash by Mr. George Onyango.
14. The Claimant denied participating in the strike but admitted that he received some money from the Respondent at the Kakamega Labour Office after leaving employment.
15. On cross-examination by Counsel Menezes for the 2nd Respondent, the Claimant stated that he was working for the 2nd Respondent through the 1st Respondent, that he had a 6 months' employment contract with the 1st Respondent. He averred that he was engaged by the 1st Respondent and that he received payments from the 2nd Respondent. He denied having been served with a show cause letter on 4th May 2017 and stated that he was neither invited to a disciplinary hearing nor issued with a termination letter dated 5th May 2017.
16. On re-examination, the Claimant stated that at the labour office, he was not paid overtime, leave dues and house allowance.
17. At the close of the Claimant's case, counsel for the 1st Respondent sought orders that the evidence of the 1st Respondent's witness in Cause No. 105 of 2018 be applied to the present suit. The Court allowed the application, and the said evidence was accordingly adopted as part of the record in this matter.
18. Parties were then directed to file written submissions. The Claimant's submissions are dated 27th January 2025 while the 1st Respondent's submissions are dated 25th February 2025. The 2nd Respondent did not file its submissions.
19. 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. 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*.
20. 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.
21. On its part, the 1st Respondent submitted that the Claimant on cross examination confirmed that he was earning Kshs 14 per tonne and that as such, 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).
22. 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 was tabled that there was an existing contract at the time of the alleged termination of 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).
23. In the end, the 1st Respondent prayed for the dismissal of the Claimant's suit with costs.



Determination

24. 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 be issued
25. On the first issue, the 1st Respondent in its reply to the Statement of Claim denied that the Claimant was its employee. However, from the documents filed by 1st Respondent, particularly the Claimant's employment contracts and the payroll cash listings at page 10 of the of its lists of documents, it is clear that the 1st Respondent had engaged the Claimant as a loader. The Claimant was thus the 1st Respondent's employee.

Whether the Claimant's employment was unfairly terminated

26. 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 together with other loaders without notice.
27. On the other hand, the 1st Respondent averred that the Claimant was terminated from employment after he participated in an illegal strike.
28. Although the Claimant denied that his termination from employment was occasioned by the strike that took place on 2nd May 2017, the Court notes that there was an 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.
29. 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.
30. 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.
31. 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.
32. In the decided case of, *Simon v Frodak Services Limited* [2025] KEELRC 1288 (KLR), this court while dealing with a similar matter 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.”
33. The facts herein being similar to those in *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.
34. The third issue for determination is whether the Claimant has proved entitlement to the remedies sought in the Memorandum of Claim. The Claimant sought a declaration that the termination of his employment by the Respondent was unlawful, together with payment of terminal dues as outlined in paragraph 4 of this judgment. The Court will consider each of the prayers separately under the following heads.



- 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 9,000 at the Labour office. He is therefore not entitled to this prayer.
- iii. 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.
- iv. Compensation for unfair termination
Having found that the termination of the Claimant's employment was not unfair he is not entitled to compensation.
- v. 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.
- vi. Service pay/Gratuity
The prayer for service pay fails as there is evidence on record showing that the Claimant was a registered member of the National Social Security Fund.
- vii. 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.
- viii. 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 28th April 2016 to 2nd May 2017. He is entitled to annual leave for the one year he worked for the 1st Respondent. I award him 21 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 21) Kshs. 6,220.2

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

- i. Accrued leave earned but not taken Kshs. 6,220.2
- 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

