



**Opele v Biometric Technology Ltd (Cause E350 of 2020)
[2025] KEELRC 2853 (KLR) (21 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2853 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E350 OF 2020
SC RUTTO, J
OCTOBER 21, 2025**

BETWEEN

FLORENCE KHAMALA OPELE CLAIMANT

AND

BIOMETRIC TECHNOLOGY LTD RESPONDENT

JUDGMENT

1. Through an amended Statement of Claim dated 28th March 2025, the Claimant avers that she was employed by the Respondent as the General Manager, Sales and Marketing, effective 5th April 2019, on permanent and pensionable terms.
2. The Claimant states that she was entitled to a family health scheme and was covered under a policy with Saham Assurance Kenya Limited, which was facilitated by the Respondent.
3. The Claimant further avers that on 20th January 2020, she commenced a 90-day maternity leave duly approved by the Respondent, and that on 28th January 2020, she was admitted at Coptic Hospital.
4. The Claimant avers that she developed complications during delivery and was required to undergo a caesarean section. Upon her request, Saham Assurance approved an indemnity cover with a maximum limit of Kshs 100,000/=. However, the insurer declined to honour the claim on the ground that she had ceased to be an employee of the Respondent. She states that her total medical bill amounted to Kshs 135,886/=:, and despite her plea for assistance, the Respondent’s director refused to intervene to have the policy reinstated. Consequently, she was compelled to seek financial assistance from friends and family to clear the hospital bill.
5. The Claimant further asserts that during her maternity leave, she was denied access to her official work email address.



6. She states that upon the expiry of her maternity leave on 20th April 2020, she reported back to work on 21st April 2020, only to be informed that she was no longer an employee of the Respondent. She contends that she was neither issued with a notice of termination nor informed of any suspension of her employment.
7. Accordingly, the Claimant contends that the termination of her employment was unlawful, unprocedural, unfair, and illegal. Consequently, she seeks the following reliefs against the Respondent:
 - a. A declaration that the summary dismissal of the Claimant from her permanent employment by the Respondents was malicious, unlawful, unfair, unprocedural and fundamentally violated the rights of the Claimant.
 - b. A declaration that the Claimant was entitled to her salary for the months she was on maternity leave.
 - c. A declaration that the Claimant is entitled to her dues, compensation, damages and benefits as a result of wrongful dismissal from the employment as calculated herein.
 - d. A maximum compensation of 12 months as per section 49 (c) of the Employment Act and section 15 of the Labor Institutions, Act.
 - e. Loss of earning of salary for a period of 27 years that the Claimant would have worked until statutory retirement age of 60 years.
 - f. A declaration that the Claimant was entitled to her family health scheme.
 - g. A certificate of service as per section 51 of the Employment Act.
 - h. Cost of this suit and interests at court rates.
 - i. The claim be allowed in entirety to the total sum of Kshs. 85,135,227.00/=
 - j. Any other relief as the honorable court deems fit and just to grant.
8. Opposing the Claim, the Respondent filed an Amended Statement of Response together with a Counterclaim dated 2nd April 2025. In response to the Claim, the Respondent avers that the Claimant frequently failed to perform her duties as the General Manager, Sales and Marketing, owing to persistent absenteeism and neglect of duty. It is further alleged that, as a result of her absence, the Claimant often failed to respond to work-related emails.
9. It is the Respondent's assertion that during the months of November and December 2019, the Claimant was present at work for only five days.
10. The Respondent contends that the Claimant was fully aware of the separation as of 21st January 2020. The Respondent further avers that the Claimant's email portal was changed and her account deactivated on 20th January 2020, as the decision to terminate her employment had been made on 14th January 2020.
11. The Respondent contends that the Claimant repudiated her contract of employment, thereby entitling it to terminate her services pursuant to Section 44(4) of the Employment Act, which it duly did on 14th January 2020.
12. The Respondent asserts that the Claimant's termination was lawful, based on valid grounds, and carried out in compliance with due process. Accordingly, the Respondent prays that the Claimant's claim be dismissed with costs.



13. With respect to the Counterclaim, the Respondent avers that despite notifying the Claimant of her separation through emails dated 14th January 2020 and 21st January 2020, she failed to return the company laptop that had been issued to her.
14. The Respondent further asserts that the Claimant was entitled to a fuel allowance of Kshs 5,000/= or the use of office transport. However, on 4th September 2019 and 16th July 2019, the Claimant allegedly signed for fuel amounting to Kshs 25,000/=. The Respondent contends that this conduct was dishonest and amounted to fraud.
15. The Respondent further contends that the Claimant's employment was characterised by absenteeism, insubordination, and failure to provide timely updates. It is the Respondent's position that it was an implied term of the employment contract that the Claimant would perform her duties with reasonable care and competence, and that any breach of this obligation entitled the employer to seek damages for negligent performance of her work.
16. It is on the basis of the foregoing that the Respondent seeks the following reliefs against the Claimant:
 - a. A declaration that under the "faithless servant" doctrine, an employee who breaches the duty of loyalty to an employer should not be granted any compensation.
 - b. A declaration that the conduct of the Respondent Mrs. Florence Khamala Opele in carrying out her duties amounts to professional negligence, incompetence and fraud against the Claimant and is thus not entitled to any relief.
 - c. A declaration that damages awarded under Section 49 (1) (c) of the Employment Act is strictly confined to instances where a finding is made that the dismissal was unjustified and does not extend to unfair dismissal under Section 49 (3) of the Employment Act which only permits reinstatement or re-engagement.
 - d. A declaration that Respondent Mrs. Florence Khamala Opele is illegally holding Laptop serial No.5CD70824FP, HP Spectre X360 intel corei5, 7th Generation, 2.5Ghz, 8Gb Ram, 500GB HDD valued at Kshs.75,000.00.
 - e. A Declaration that the services of the Respondent were lawfully terminated by the Claimant vide an email dated 14th January 2020.
 - f. A refund of Kshs.75,000.00 to the Claimant by the Respondent for the Laptop serial No.5CD70824FP, HP Spectre X360 intel corei5, 7th Generation, 2.5Ghz, 8Gb Ram, 500GB HDD.
 - g. A refund of Kshs.40,000.00 to the Claimant by the Respondent that the Claimant unlawfully claimed as fuel allowance on 4th September 2019 and 16th July 2019.
 - h. Costs of the Counter-Claim.
 - i. Any further relief that this Honourable Court may deem fit to grant.
17. In a rejoinder to the Respondent's Reply and Counterclaim, the Claimant denied the allegations regarding her alleged absence from work. She also refuted the Respondent's claim that she failed to respond to emails, adding that she had no access to her email account. The Claimant maintained that she was never issued with any notice of termination and was instead blocked from accessing her work emails.



18. In response to the Counterclaim, the Claimant denied all the allegations contained therein and maintained that she performed her duties in utmost good faith, with diligence, and consistently completed her tasks within the timelines stipulated in her employment contract. Accordingly, she prays that judgment be entered in her favour and that the Respondent's Counterclaim be dismissed with costs.
19. The matter proceeded for hearing on 5th June 2025, during which both parties called oral evidence.

Claimant's Case

20. The Claimant testified in support of her case as CW1 and at the outset, she sought to adopt her witness statement and the list and documents filed on her behalf to constitute her evidence in chief.
21. The Claimant testified that she diligently served the Respondent from the commencement of her employment until she was unlawfully and summarily dismissed on 21st April 2020.
22. She stated that she was never issued with a notice of termination or informed of any suspension of her employment.
23. The Claimant further averred that she only became aware of her termination on 31st January 2020, when the insurance company declined to honour her medical claim following the delivery of her baby.
24. The Claimant maintained that her termination was unlawful and unprocedural, and avers that she has suffered and continues to suffer loss as a result of her dismissal without justifiable cause.

Respondent's case

25. The Respondent called oral evidence through Anthony Maina, who testified as RW1. Mr. Maina identified himself as a Director in the Respondent company. Similarly, he adopted his witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
26. RW1 testified that the Respondent sent several emails to the Claimant, specifically, on 10th September 2019, 11th September 2019, 1st October 2019, 24th October 2019, 19th November 2019, and 19th December 2019, addressing various aspects of her work. However, none of these emails elicited any response from the Claimant.
27. RW1 further stated that by an email dated 14th January 2020, the Respondent notified the Claimant that her employment had been terminated, as she had failed to respond to the earlier email dated 19th December 2019.
28. According to RW1, the Claimant was instructed to hand over her duties to one Mercy Wangechi.
29. RW1 added that by an email dated 21st January 2020, the Claimant purportedly responded to the email of 19th December 2019, which had invited her to a meeting to discuss her performance. The Respondent replied on the same date, informing the Claimant that her request had been overtaken by events and that her failure to respond earlier amounted to insubordination and demonstrated disinterest in her position.
30. RW1 further testified that the Claimant had been issued with a company laptop and had full access to her email account. Therefore, when the email dated 14th January 2020 communicating her termination was sent, she was in a position to access it.



31. RW1 stated in further evidence that by the time the Claimant sent her email on 21st January 2020, she was fully aware of the separation. On the same date, the Respondent reaffirmed that her services had been terminated.
32. RW1 further testified that the Claimant missed at least two management meetings on 19th and 20th December 2019 and that she only reported to work for five days during the months of November and December 2019.
33. RW1 stated that following the Claimant's alleged desertion and the subsequent decision to terminate her employment, the Respondent stopped processing her salary.
34. He further stated that the Claimant's medical cover expired in January 2020 and was not renewed since her termination from employment had already been effected and communicated to her.
35. RW1 made reference to a letter dated 2nd March 2020 from the insurance company informing the Claimant that her cover had not been renewed because she had deserted her duties and her employment had been terminated.
36. According to RW1, the Claimant's alleged maternity leave was never approved by the Respondent and was irrelevant, as she had already been directed by the email dated 14th January 2020 to hand over her duties, having been terminated on inter alia, insubordination and desertion of duty.
37. In RW1's view, the Claimant did not suffer any loss or damage since she was no longer an employee of the Respondent at the time of her delivery, her services having been terminated on 14th January 2020.
38. RW1 was categorical that prior to 14th January 2020, the Claimant had full and unrestricted access to her official email account.
39. He maintained that the Respondent followed due process in terminating the Claimant's employment.
40. RW1 further contended that there was no basis for the claim of three months' unpaid salary, as by the time the Claimant allegedly proceeded on maternity leave, she was already aware that her employment had been terminated.
41. In RW1's view, the Respondent had fully justified the termination of the Claimant's employment in accordance with Sections 41, 43, and 45 of the [Employment Act](#).
42. He added that the Claimant was not entitled to any damages, as per the "doctrine of the faithless servant" as cited in the Counterclaim.

Submissions

43. On the Claimant's part, it was submitted that the Respondent's actions were unlawful, procedurally flawed, and unfair, as they failed to follow the established rules before terminating her employment. In support of this position, the Claimant relied on the decisions in *Moses Ochieng v Unilever Kenya Limited* [2018] KEELRC 1602 (KLR) and *Gilbert Mariera Makori v Equity Bank Ltd* [2016] eKLR.
44. The Claimant further argued that the termination of her employment while she was on maternity leave was unjustified and discriminatory.
45. The Claimant further contended that the Respondent made no effort to contact her via phone or email, nor did it request her to report back to work after alleging that she had abandoned her duties.
46. On the other hand, the Respondent submitted that the Claimant's employment was terminated due to repeated instances of absenteeism, as established by the evidence before the Court. In the same vein, the



Respondent submitted that the Claimant admitted to failing to seek permission for the days absent. In support of these submissions, the Respondent invited the Court to consider the decisions in *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd* [2014] KEELRC 1145 (KLR), *Rodgers Titus Wasike v General Motors East Africa Limited* [2020] KECA 529 (KLR), and *Thomas Dzombo Kirunga v Krystalline Salt Limited* [2020] KEELRC 506 (KLR).

47. The Respondent further submitted that the Claimant was given ample opportunity to respond via her company-issued laptop account, to which she had access.
48. According to the Respondent, there was sufficient cause for summary dismissal.
49. Referencing the case of *Elizabeth Wakanyi Kibe v Telkom Kenya Limited* (2014) eKLR, the Respondent posited that employees whose contracts are lawfully terminated are not entitled to remuneration for work not performed.
50. The Respondent further argued that, even if the Court finds that procedural requirements were not fully complied with, it has the discretion to limit any award of damages by taking into account the circumstances surrounding the dismissal. To buttress this position, reliance was placed on the case of *Wangereka v Rupra* [2023] KEELRC 625 (KLR).
51. It was further submitted that the Claimant's dismissal arose directly from her misconduct, which caused significant harm to the Respondent.

Analysis and determination

52. Upon considering the pleadings filed by both parties, the evidence on record, and their rival submissions, the Court identifies the following issues for determination:–
 - i. Whether the Respondent has demonstrated that there was a valid and fair reason for terminating the Claimant's employment;
 - ii. Whether the Claimant was accorded procedural fairness prior to the termination of her employment;
 - iii. Whether the Respondent has proved its Counterclaim; and
 - iv. Whether the Claimant is entitled to the reliefs sought.

Valid and fair reason for termination of employment?

53. According to the Respondent, the Claimant's employment was terminated on 14th January 2020 on account of absenteeism. The Claimant, however, contends that she was not informed of the termination of her employment and only became aware of the same on 31st January 2020, when the insurance company declined to process her medical claim.
54. To put this issue into perspective, it is pertinent to examine the contents of the email dated 14th January 2020, which is couched as follows:

“Dear Florence,

Reference my email and communications of 19th December 2019 whose contents you are well aware. We note your lack of response and interest as regards the subject. We therefore direct that you proceed to handover to Madam Mercy Wangechi at the earliest possible.”



55. From the contents of the email dated 14th January 2020, it is evident that the Respondent did not expressly communicate to the Claimant that her employment had been terminated or specify the reasons for such termination. Accordingly, the reason for her termination cannot be inferred from that email.
56. It is in the Response to the Statement of Claim that the Respondent provided the reason for terminating the Claimant's employment, citing absenteeism. On this score, the Respondent alleges that the Claimant reported to work for only five days during the months of November and December 2019. The Claimant, however, disputes these allegations, describing them as false and malicious.
57. Section 43(1) of the *Employment Act* requires an employer to prove the reasons for terminating an employee's contract of employment, failure to which the termination is rendered unfair. Further, under Section 45(2)(a) and (b), a termination is deemed unfair if the employer fails to prove that the reason was valid, fair, and related to the employee's conduct, capacity, compatibility, or the employer's operational requirements.
58. In support of its assertion that the Claimant's employment was terminated on the basis of absenteeism, the Respondent exhibited attendance registers for November and December 2019, showing that the Claimant attended work for five days in November and four days in December.
59. Further exhibited by the Respondent was the attendance register for January 2020, which shows that the Claimant did not attend work at all during that month.
60. During cross-examination, the Claimant stated that she had taken two weeks' sick leave in December 2019 and that in January 2020, she was on sick leave in anticipation of childbirth. She claimed to have applied for the leave via email but did not produce any documentary evidence to support this assertion or to demonstrate that the Respondent was aware of the reason for her absence from work.
61. In an email dated 21st January 2020, the Claimant informed the Respondent, among other things, that she was still unable to report to the office due to her medical condition, as stated in her earlier emails.
62. However, the Claimant did not produce any of the earlier emails referred to in her email of 21st January 2020, to substantiate her claim.
63. Further, while the Claimant asserted during cross-examination that her role required her to work outside the office to secure clients, she provided no evidence of any work undertaken during the period in question.
64. Notwithstanding that the Claimant's duties were not confined to the office, it was reasonably expected that she would produce evidence such as reports or correspondence demonstrating that she continued to discharge her responsibilities, albeit not being physically present in the office. This expectation is reinforced by her own admission that she submitted monthly reports to the Respondent, none of which were exhibited in evidence.
65. Under Section 30(1) of the *Employment Act*, an employee is entitled to sick leave of at least seven days with full pay and a further seven days with half pay, provided that the employee produces a certificate of incapacity to work signed by a qualified medical practitioner.
66. Additionally, Section 30(2) stipulates that for an employee to be entitled to sick leave with full pay, they must notify or cause to be notified the employer of their absence and the reasons for it as soon as is reasonably practicable.



67. In light of these statutory provisions, the pertinent question is whether the Claimant notified the Respondent of her illness and her need to take sick leave.
68. Further, and equally important, did the Claimant submit a medical report to the Respondent in compliance with Section 30(2) of the *Employment Act*?
69. The evidence on record shows that the Claimant did not comply with these statutory requirements.
70. It therefore emerges that the Claimant was absent from work without evidence of authorization from her employer.
71. Even if her absence was occasioned by ill health, the Claimant had a duty to notify the Respondent of her condition and her inability to report to work. As stated herein, she did not adduce evidence to demonstrate that she discharged this obligation.
72. Consequently, the Claimant failed to act in accordance with the provisions of the *Employment Act*, and her absence from work amounted to absence without lawful cause or authorization.
73. Pursuant to Section 44(4)(a) of the *Employment Act*, absence from work without leave or lawful cause constitutes a valid and reasonable ground for summary dismissal.
74. Accordingly, the Court finds that the Claimant's absence from duty without leave or lawful authority constituted a valid and fair reason for the Respondent to terminate her employment.

Procedural fairness?

75. The requirement of fair procedure is anchored in Section 45(2)(c) of the *Employment Act*, while the specific procedural safeguards governing a fair hearing are set out under Section 41. In a nutshell, an employer is required to notify an employee of the intended termination in a language the employee understands and to afford the employee an opportunity to respond to the allegations raised in the presence of a fellow employee of their own choice.
76. The Claimant has consistently maintained that she was not issued with any notice prior to her termination. Conversely, the Respondent contends that it adhered to due process in effecting the termination.
77. However, the evidence on record does not support the Respondent's position. Here is why. There is no indication that the Respondent put the Claimant on notice that it was contemplating terminating her employment on account of absenteeism.
78. What's more, there is no evidence that the Claimant was given an opportunity to present her defence in the presence of a fellow employee of her choice before the Respondent made the decision to terminate her employment.
79. It therefore follows that the Respondent did not adhere to the process contemplated under Section 41 of the *Employment Act* prior to terminating the Claimant's employment. To augment this position, RW1 confirmed during cross-examination that the Claimant was not issued with a notice of termination.
80. Further evidence of the Respondent's non-compliance with the procedural requirements under Section 41 is reflected in the unconventional manner through which the Claimant discovered that her employment had been terminated. This is coupled with the fact that the Respondent's email of 14th January 2020 did not expressly communicate the termination of the Claimant's employment.



81. Regardless of any alleged misconduct on the part of the Claimant, the Respondent was still bound to observe the procedural safeguards under Section 41 of the *Employment Act*. Compliance with this provision was mandatory and not optional; it constituted the bare minimum standard of fairness.
82. In interpreting Section 41, the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR outlined the following key elements of a fair termination process:
- “ Four elements must thus be discernible for the procedure to pass muster:
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made; and
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
83. This Court is bound by, and fully concurs with, the above pronouncement of the Court of Appeal.
84. In light of the foregoing, the Court finds that the Respondent’s failure to comply with the mandatory procedural requirements under Section 41 of the *Employment Act* rendered the termination of the Claimant’s employment procedurally unfair and therefore unlawful.

Merit in the Counterclaim?

85. In its Counterclaim, the Respondent avers that under the contract of employment, the Claimant was entitled to a monthly fuel allowance of Kshs 5,000/=. However, on 4th September 2019 and 16th July 2019, the Claimant allegedly drew fuel worth Kshs 25,000/= on each occasion, contrary to the terms of the agreement. In support of this claim, the Respondent produced petty cash vouchers showing that the Claimant topped up fuel for Kshs 25,000/= twice. Notably, the Claimant did not discount the Respondent’s claim in this regard.
86. A perusal of the Claimant’s contract of employment reveals that indeed she was entitled to a fuel allowance of Kshs 5,000/= per month or the option of office transport. There is no evidence that she was authorised to exceed this amount.
87. Consequently, the court finds that the Respondent’s Counterclaim succeeds, and it is entitled to recover Kshs 40,000/=, being the excess amount incurred by the Claimant beyond the contractual limit.

Reliefs?

88. Having found that while the Respondent had a valid and fair reason to terminate the Claimant’s employment, it failed to comply with the mandatory procedural requirements under Section 41 of the *Employment Act*, the Court awards the Claimant compensation equivalent to two (2) months of her gross salary. In arriving at this award, the Court has taken into account the duration of the employment relationship, which was relatively short, and the Claimant’s own contribution to the termination of her employment.



89. The claim for unpaid salary for the three months during which the Claimant alleges she was on maternity leave is declined, as it is evident that by that time, the employment relationship had already been terminated. Therefore, any contractual benefit due to the Claimant had by then ceased.
90. The claim for loss of earnings for 27 years is likewise declined, as it is anticipatory in nature. In so holding, the Court aligns with the decision of the Court of Appeal in *D.K. Njagi Marete v Teachers Service Commission* [2020] eKLR, which affirmed that employment on permanent and pensionable terms does not, in itself, guarantee continued employment until the mandatory retirement age of 60 years.

Orders

91. In the final analysis, the Court makes the following final orders: -
- a. The Claimant's claim succeeds, and the Court hereby declares that the termination of her employment was procedurally flawed and therefore unlawful.
 - b. The Claimant is awarded Kshs 500,000.00 as compensatory damages, equivalent to two (2) months of her gross salary.
 - c. The Respondent's Counterclaim succeeds to the extent of Kshs 40,000.00.
 - d. The amount in (c) above shall be set off against the Claimant's total award in (b), resulting in a net award of Kshs 460,000.00 payable to the Claimant.
 - e. Interest on the amount in (d) shall accrue at court rates from the date of judgment until payment in full.
 - f. Each party shall bear its own costs, given that both the Claim and the Counterclaim have partly succeeded.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Karani instructed by Mr. Ambutsi for the Claimant

Mr. Kigata for the Respondent

Millicent Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

