

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 745 OF 2019

DANIEL MUSESWA WENANI.....
.....**CLAIMANT**

VERSUS

COMPLY INDUSTRIES LIMITED.....
.....**RESPONDENT**

JUDGMENT

The suit was brought vide an amended statement of claim dated 31/1/2020 against the Respondents seeking the following reliefs: -

- a) An order restraining the Respondent by itself, agents and/or employees from terminating the employment services of the Claimant or in any other way interfering with his rights, benefits and privileges as an employee on grounds of forced resignation and lock out from the Respondent's employment premises or for any other reason without following due process.
- b) An order directing the Respondent to reinstate the Claimant to its employment without loss of benefits or status.
- c) An order that the Claimant herein pay the special damages:
 - (i) One month's salary in lieu of notice Kshs. 240,120.00
 - (ii) 12 months' pay for unfair termination of employment (12 x 240,120) = Kshs. 2,881,440.00

(iii) Service pay for 7 years as per the CBA (21 days x 7 years x 240,120/26) = Kshs. 1,357,602.00

(iv) *Prorata* leave days (2.5 x 3 months x 240,120/30) = Kshs. 60,030.00

Total Kshs. 4,539,192.00

- d) An order that the costs of this suit be met by the Respondent
- e) An order that the Respondent herein pays interest on items (b), (c) and (d) at court rates from date of filing the suit until payment in full.
- f) Any other further or better relief that this honourable court may deem fit.

The Claimant (CW1) adopted a witness statement dated 6th November 2019 as his evidence in chief and produced exhibits '1' to '5' including letter of appointment dated 1/4/2012; Claimant's pay slip; Claimant's copy of application for leave dated 16/1/2019; a letter for the Claimant to the General Manager dated 6/5/2019 and letter of demand from the Advocates from the Claimant to the Respondent dated 22/7/2019.

CW1 testified that he was employed by the Respondent by a letter dated 1/4/2012 as the Head of Personnel Department, at a monthly salary of Kshs. 240,120.00 shown in the pay slips.

That he was hard working and loyal and worked well. That he was based at Nakuru office until 1/4/2019 when he was verbally told to report to Respondent's Nairobi office to sort out some human resource issues after he had come from his annual and paternity leave which had began on

17/1/2019 and ended on 26/3/2019 as per the application for leave form dated 16/1/2019.

CW1 stated that he worked at the Nairobi office until 23/1/2019 at 4:19 p.m. when the General Manager called CW1 and told him

“due to the current prevailing conditions, the boss has said you will not continue working with us. Today is your last day and come back to Nakuru and collect your letter.”

The Claimant reported to Nakuru office on 3/5/2019 to collect the letter, however, the General Manager in the presence of operations manager Mr. Kihumbu asked the Claimant to write a letter resigning from employment.

CW1 said he declined to resign since he had done nothing wrong. The Claimant was then asked to leave and not to report until he changes his mind on resignation.

The Claimant wrote the letter dated 3/5/2019 protesting the unlawful threats to resign from employment. The Respondent did not respond to the letter.

The Respondent paid the Claimant's salary for May 2019 and did not pay salary for June and July 2019.

The Claimant states that there has been no further correspondence with the Respondent and so he remains an employee of the Respondent to date.

The Claimant was locked out from the Respondent's premises since then.

The Claimant states he has been unable to get any other gainful employment since he remains in limbo.

That the Claimant instructed his Advocate to write a letter of demand to the Respondent dated 22/7/2019 seeking clarification on his employment status and asking for payment of his salary.

The Respondent did not reply to the letter of demand hence this suit which was first filed on 6th November 2019 together with an urgent application seeking to stop the Respondent from terminating the employment of the Claimant pending the hearing and determination of this suit. The court did not grant the interim reliefs sought.

The Claimant reiterated his evidence under cross-examination by M/s. Oteo Advocate for the Respondent.

Claimant denied that he had received any letter of dismissal from his employment as alleged by the Respondent. Claimant admitted that he was not on leave between the 23/4/2019 and 3/5/2019 but was in shock after he was told to collect a letter of dismissal. Claimant said his job had ended on 23/4/2019 upon the verbal communication by the General Manager.

Claimant said he was on annual and paternity leave between 17/1/2019 to 23/3/2019. That he was employed on 1/4/2012. That he was entitled to 14 days paternity leave and had 28 days pending annual leave at the time he took the leave. Claimant admitted NSSF was paid for him and that he was

a member of Respondent's pension fund. That same was paid in May 2019.

Claimant said he had since done many interviews and had not obtained alternative employment. Claimant said one Mr. Wachira, acted in his place while he was on leave. Claimant said the letter he wrote explained his circumstances. He said most of office communication was by phone and verbally.

The Respondent called RW1 Nicodemus Musyoka in its defence. He relied on amended memorandum of reply to the amended claim dated 27/2/2020.

RW1 relied on a witness statement dated 22/7/2020. RW1 admitted that the Claimant worked for the Respondent from 1st April 2012 and stated that the Claimant was summarily dismissed on 31st May 2019 on account of absenteeism.

RW1 stated that the Claimant earned a basic salary of Kshs. 208,800.00 and a house allowance of Kshs. 31,320.00 and produced pay slip for the month of May 2019. Gross pay was Kshs. 240,000.00.

RW1 said that on 1/4/2019, the Claimant was assigned duties to establish Nairobi branch office. The Claimant worked without any issue until 23rd April 2019 when he approached the General Manager Nairobi and verbally stated that he was not willing to continue working at the Nairobi Branch and as such he was ready to resign from the company. Since then, the Claimant never reported back to work and only re-appeared on 3/5/2019.

On 3/5/2019, the Nairobi, General Manager and Operations Manager held a meeting with a client in a bid to understand where the issue was so as to arrive at an amicable solution.

At the end of the meeting, it was agreed that the Claimant was to resume his duties at Nakuru branch.

The Claimant on 6th May 2019, served RW1 with a letter dated 3/5/2019 addressed to the General Manager. The Claimant left and did not return to work again.

The Respondent wrote a show cause letter to the Claimant dated 13/5/2019 inviting the Claimant to a meeting. The Respondent was unable to serve the show cause letter to the Claimant as he failed to pick any calls. The Respondent did not know the personal mail box of the Claimant as he was not at the residence he had provided to the Respondent. The Claimant did not resume work and was then summarily dismissed from work in terms of section 44 of the Employment Act, 2007 by a letter dated 28th June, 2019 with effect from 31st May 2019. The letter provides the reason for the summary dismissal to be absconding duties without reasonable cause and or formal communication to the employer.

The Respondent offered to pay salary for the month of May 2019 in respect of which the claimant had not worked to serve as notice pay. The Claimant was offered a right of appeal within 7 days. The letter is addressed to P. O. Box 14663, Nakuru by the General Manager Mr. Nilsh Mehta.

Under cross-examination by Advocate Mwenesi for the Claimant RW1 said the Claimant did not apply for leave of absence on 23/4/2019. That he just disappeared and came back to office on 3/5/2019. RW1 said he worked for the Respondent since 2011 and was familiar with the company procedures. RW1 said the company does not issue verbal directions.

RW1 said on 6/5/2019, the Claimant brought the letter dated 3/5/2019 to RW1. That the two did not discuss the letter since RW1 was junior to the Claimant. RW1 said the Claimant was paid May 2019 salary. That the Claimant did not work in June and July and is not entitled to any salary for the two months.

That the notice to show cause is dated 13/5/2019 and the letter of dismissal is dated 28/6/2019. RW1 said he was not aware if the Claimant received both letters. The Claimant was not issued with any notice of redundancy.

RW1 said Claimant is not entitled to payment in lieu of leave or notice pay. He had taken his whole leave and was paid for May though he did not work.

RW1 denied that the Claimant was unlawfully summarily dismissed having absconded work.

RW1 says that the explanation by the Claimant in the letter dated 6/5/2019 was an afterthought. RW1 said he did not know if the Respondent was aware where the Claimant lived. RW1 did not know if the notice to show cause and dismissal letters were physically delivered to the Claimant.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence adduced by Cw1 and Rw1.

The Claimant states that when he returned to Nakuru Office on 3/5/2019, he was called to a meeting by the General Manager in the presence of the Operations Manager and he was told to resign from employment. That the Claimant resisted to resign forcefully and was sent away by the Respondent.

The Respondent on the other hand states that the Claimant was called to a conciliation meeting by the General Manager in the presence of the Operations Manager with a view to resolve the grievance about the transfer to Nairobi. That the Respondent allowed the Claimant to return back to the Nakuru office but then did not return to the office again and hence a notice to show cause letter was written to him but he did not return to the office and the Respondent proceeded to summarily dismiss the Claimant for absconding work.

The resolution of this matter depends wholly on the credibility of CW1 and RW1 and the veracity of the versions they told on the matter.

The show cause letter dated 13th May 2019 was in respect of the absence by the Claimant for the period 24/4/2019 to 2/5/2019 without reasonable cause. Further the Respondent stated that the Claimant failed to report to work from 6/5/2019 to the date of the letter without any reasonable cause.

The letter by the Claimant detailing the verbal termination of his employment on 23/4/2019 is dated 3/5/2019. The date she held a meeting with the General Manager and the Operations Manager at Nakuru at 3 p.m. where he says he was coerced to resign from his position.

The testimony by RW1, who was the assistant to the Claimant and the person poised to take over the job of the Claimant at Nakuru is largely hearsay hence he was not in a position to contradict, the communication between the Claimant and the General Manager Mr. Mehta.

According to the Claimant, he was only to report to Nakuru on 24/4/2019 to collect a letter of termination. The court believes his testimony that he was shocked and so delayed to go back to Nakuru from Nairobi for the purpose of collecting the letter of termination only.

The meeting held between the Claimant and the General Manager on 3/5/2019 was not recorded and no minutes of the same are before court. The only direct evidence for that meeting is that of the Claimant. The narration by RW1 is merely unsupported hearsay without explanation why the General manager or the operations manager who are said to have convened the meeting could not come to court to refute the evidence by the Claimant that on 23/4/2019 the General Manager had verbally terminated his employment and that when he came for the letter of termination on 3/5/2019, he was called to a meeting by the General Manager where he was coerced to write a letter of resignation but refused.

It is the finding by the court that the evidence by the Claimant is consistent, credible and supported by the letter he wrote to the Respondent on 3/5/2019. That the evidence by RW1 is hearsay and insufficient to rebut the credible evidence by the Claimant.

It is the court's finding that the Respondent terminated the employment of the Claimant via telephone on 23/4/2019 and the Claimant had no obligation to continue working for the Respondent from that date. Indeed, the Respondent paid the Claimant the May 2019 salary in the words of RW1 in lieu of one month notice. RW1 testified that he was unaware if the Claimant had received the notice to show cause nor the letter of summary dismissal. The Claimant denied having received both letters.

The court finds that the Respondent terminated the employment of the Claimant without notice, hearing, or any justification in violation of sections 41, 43 and 45 of the Employment Act, 2007.

The court relies on the case of **Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Patco Industries Limited & another [2025] KEELRC 3073 (KLR)** where the Court held that;

“From the evidence on record, the grievant’s termination was initiated by the 1st Respondent. His further evidence is that he was simply asked to leave work and not return, ending his contract with the Respondents. Having initiated the termination, the 1st Respondent was under duty to adhere to the law on termination, which it did not. It is evident that the grievant did not receive any

communication from either of the Respondents on the termination of his employment,”

to find that the verbal termination was unlawful and unfair and the Claimant is entitled to compensation in terms of section 49(1)(c) and (4).

This is not a case suited for reinstatement sought by the claimant the court having made consideration under section 49(4) that the relationship between the Claimant and the Respondent would be untenable given the circumstances of the termination. The Claimant has also been out of employment since 23/4/2019 and a lot of water has passed under the bridge, today being November 2025.

The Claimant lost good career prospects in human resource management. The Claimant had just gotten a child and was from paternity leave before the sudden termination. The Claimant had served the Respondent diligently and without any adverse record for a period of seven (7) years since January 2012. The Claimant did not contribute to the termination in the considered finding by the court.

There is no written letter to the effect that the Claimant had declined to establish a new office at Nairobi yet RW1 told the court that all decisions by the Respondent were in writing and not made verbally at all. A transfer from Nakuru to Nairobi from the high office of Head of Personnel must have been in writing. Having not seen any such letter, the court finds that evidence to be without basis.

The court considers the case of **Nation Media Group Limited v Munene (Civil Appeal E603 of 2021) [2025] KECA 114 (KLR) (24 January 2025) (Judgment)** in which it was held:

“Having been removed from work for no valid reason, the respondent was entitled to compensation for the unfair termination. In addition, taking into account the manner and circumstances in which the employment was terminated, not only without reasonable notice, but also in a most cavalier mode, we are of the view that the award of 10 months’ salary in compensation was reasonable. It is also notable that the trial Judge did clearly state the basis of the award, which was that the respondent was “unfairly terminated without notice”.

The Court has considered the case in assessing suitable compensation of the Claimant together with the circumstances cited above and award the Claimant the equivalent of ten (10) months’ salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. (240,000 x 10) 2,400,000.00

Special damage

(i) Notice pay

The court is satisfied that the Respondent paid the Claimant one month salary in lieu of notice and so this claim is spent and has no merit.

(ii) Gratuity

The court finds that the Claimant was paid pension under a pension scheme provided by the Respondent and was also paid

for NSSF and is not entitled to service gratuity since the same is not provided for in the contract of employment between the parties.

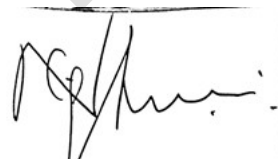
(iii) Leave pay

The Claimant had from his own testimony taken annual leave and paternity leave just before termination. The court finds that the Claimant has not proved that he is entitled to payment in lieu of untaken leave days. This claim is dismissed for want of merit.

Accordingly, judgment is entered in favour of the Claimant against the Respondent as follows:

- (a) Compensation for unlawful and unfair termination in the sum of Kshs. 2,400,000.00**
- (b) Interest at court rates from date of judgment till payment in full.**
- (c) Costs of the suit.**

Dated at Nairobi this 13th Day of November 2025.



Mathews Nduma

JUDGE

Appearance:

Mr. Mwenesi for Claimant

M/s. Oteo for Respondent

Mr. Kemboi – Court Assistant

ORIGINAL