

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT ELDORET

CAUSE NO. E006 OF 2025

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF COMMERCIAL, FOOD
AND ALLIED WORKERS**
CLAIMANT

VERSUS

KENMART SUPERMARKET LIMITED
RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Labour Relations Act to represent employees engaged in the commercial sector as more specifically set out in the membership clause of its constitution.
2. The Respondent is a company registered under the laws of Kenya carrying out the business of a retail shop within Eldoret town.
3. The suit herein was filed by the Claimant on behalf of its member Ms. Hilda Nandako Wekesa, herein after referred to as ***the Grievant***.

4. It was the Claimant's case that the Grievant was employed by the Respondent on 28th July, 2020 as a cashier earning a gross salary of Kshs. 14,000.
5. In the Memorandum of Claim dated 28th January, 2025, the Claimant avers that on 14th November, 2023 the Grievant reported for work as usual at 7.00 am. That at about 8.00 am the Respondent's Director Mr. Uday Khetiya informed her not to report on duty from the following day, the 15th November, 2023 as her services had been terminated.
6. The Claimant avers that the Grievant reported the issue to the Claimant and it engaged the Respondent at shop level without success as the Respondent insisted that the Grievant was not its employee. It is the Claimant's averment that the Respondent had earlier on 10th August, 2023 issued a warning letter to the Grievant and it could not therefore deny that the Grievant was its employee.
7. The Claimant states that it was compelled to report a trade dispute to the Cabinet Secretary for Labour and Social Protection by letter dated 1st November, 2023 as provided under section 62 of the Labour Relations Act.

8. The Minister accepted the dispute and appointed Ms. Millicent Oyolla of Eldoret County Labour Office as conciliator. The conciliator invited the parties for joint conciliation meetings on 27th March, 2024 and 4th April, 2024 but the Respondent neither wrote a memorandum nor attended the meetings. On 12th April, 2024 the conciliator issued a Certificate of Unresolved Dispute to the parties, paving the way for the Claimant to move to this court.
9. It is the Claimant's averment that the Grievant was not involved in any misconduct and neither was any issue raised about her performance or character. That the Grievant worked for the Respondent for 3 years and 4 months with a clean record, with only one written warning dated 10th August, 2023, referred to above. That the Grievant therefore deserves to be paid her terminal dues.
10. The Claimant prays for the following reliefs on behalf of the Grievant:

Notice pay	32,280.00
3 years severance pay	48,420.00
12 days worked in November 2023	18,648.00
3 years accrued leave	67,88.00

3 years public holidays	41,958.00
3 years underpayment	303,720.00
12Months compensation	168,000.00

b) Certificate of service.

c) Cost of the suit awarded to the Claimant.

d) Any other order the Honourable Court deems fit to address the cause of justice.

11. The Respondent filed a Response to Statement of Claim dated 17th March, 2025 in which it denied all the averments in the Statement of Claim. It denied that the Grievant was its employee and specifically that it employed her on 28th July, 2020 as a cashier earning a gross salary of Kshs. 14,000 per month. The Respondent further denied that its Director Mr. Uday Khetiya told the Grievant not to report to work from 15th November, 2023 as alleged by the Claimant. It denied issuing a warning letter to the Grievant dated 10th August, 2023.
12. In the witness statement of Khetiya Uday Anant, a Director of the Respondent filed together with the Response to Statement of Claim, Mr. Anant states that the Grievant was not an employee of the Respondent, that the Respondent

had a contract with Impala Security and Private Investigations Limited for supply of services of general workers. Mr. Anant states that the Respondent never signed any contract with the Grievant who was an employee of Impala Security and Private Investigations Limited as per outsourcing contract between the Respondent and the said company.

13. Mr. Anant states that the claim by the Claimant that it unfairly terminated the Grievant's employment is unfounded and lacks basis. He prays that the claim against the Respondent be dismissed with costs.
14. Among the documents filed by the Respondent is a contract between the Respondent and Impala Security and Private Investigations Limited dated 1st August, 2020 which states at paragraphs 3 and 4 that:
 - a. *I/we have read and understood that the purpose of this contract is to provide service to us. In case of any issue a notice of one month to be provided to Impala Protective Security Limited*
 - b. *Matters or issues such as labour, workers, Union, NSSF and NHIF of workers one referred to us.*

15. Also attached is a list of names titled **Impala Staff List**. The list has 12 names among them HILDA N. Wekesa, the Grievant herein. It is for payment of advance salary of Kshs.1000 per employee on 22nd August, 2020. There is second list dated 5th September, 2020 for salary for August, 2020 of Kshs.12,000 per employee with a deduction of salary advance of Kshs. 1000 against each name. No other documents were filed by the Respondent.
16. At the hearing the Grievant testified as CW1 on her own behalf. She adopted her witness statement dated 28th January, 2025 as her evidence in chief. She further adopted as part of her evidence all documents filed in the Claimant's bundle of documents. She testified that the Respondent was her employer from 28th July, 2020. She testified that she was not given any contract and that her employment was verbal. That she worked as a cashier and was paid Kshs. 14,000 per month. She testified that on 14th November, 2023 she reported to work as usual. That in the evening she was told to remain behind by the boss who told her not to appear again the following day. She was however not given any letter on that day.

17. She testified that she was a member of the Claimant union as per attached receipts for union dues. She prayed for the remedies as set out in the prayers in the Statement of Claim.
18. Under cross examination by Satia for the Respondent the Grievant stated that she was employed by Kenmart Supermarket but was not issued with a letter of appointment. She stated that she does not know Impala Private Security and Investigations Limited. She further testified that she was paid at the shop through a voucher which she signed at the time of payment. She stated she worked as cashier and her supervisor was Mr. Uday. She stated her salary was Kshs. 14,000 which she was paid at the end of every month.
19. The Grievant testified that she was issued with a warning letter by Kenmart but did not respond to the same. She said she did not have any contract with Impala Private Security and Investigations Limited.
20. Under re-examination the Grievant stated that the warning letter was issued to her by Mr. Uday and she was not asked to Respond.

21. The Respondent called Mr. Khetiya Uday Anant who testified as RW1. Mr. Uday stated that he was a director of the Respondent and the owner of the Supermarket. He adopted his witness statement dated 17th March, 2025 as his evidence in chief. He also adopted the documents filed by the Respondent on 17th March, 2015 as part of his evidence.
22. RW1 stated that Impala supplies staff to the Respondent. That the Grievant was not its direct employee.
23. Under cross examination RW1 reiterated that the Grievant was employed by Impala, that the Respondent had about 20 staff, none of whom are its employee.
24. RW1 stated that he issued a warning letter to the Grievant so that she could give it to Impala. That after that the Respondent informed Impala about the incident. He stated he did not know if the Grievant signed a contract with Impala.
25. On re-examination, RW1 stated that the Respondent made all payments to Impala which in turn pays the Grievant. That he issued a warning to the Grievant because that is the agreement the Respondent has with Impala.

Submissions

26. After close of the hearing parties filed and exchanged written submissions.
27. In the Claimant's submissions dated 30th May, 2025 it is submitted that the Grievant was not taken through the disciplinary process as set out in section 41 of the Employment Act. The Claimant relied on the decision in ***Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*** where the court stated that for termination of employment to pass the fairness test it must be shown that there was not only substantive justification for termination but also procedural fairness.
28. It was submitted that the termination of the Greivant's employment was by the Respondent's Managing Director who told her not to report to work the following day without giving any reasons. It was submitted that the termination was defective, substantively unjustified and procedurally unfair. The court was urged to declare the termination unfair.
29. On the issue whether or not the Grievant was an employee of the Respondent, it was submitted that the Grievant confirmed to the court that it was the Respondent who paid

her salary through the Director and that she signed a petty cash voucher. It is submitted that the outsourcing agreement between the Respondent and Impala Security and Private Investigations Limited dated 1st August, 2020 was to commence in August 2020 while the Grievant was employed on 27th July, 2020.

30. It was further submitted that RW1 confirmed to the court that he is the one who issued the warning letter dated 10th August, 2023 to the Grievant. The Claimant submitted that rights should not be realized through coercion, intimidation or outright illegalities as seen in the Respondent's actions. For emphasis the Claimant relied on the Court of Appeal assertion in ***Kenya Airways Limited v Satwant Singh Flora [2013] eKLR*** that "*No person can claim any right or remedy whatsoever under an illegality in which it has participated*".
31. On the remedies that Claimant submitted that the Grievant is entitled to pay in lieu of notice as provided under section 35 of the Employment Act as she was verbally terminated.
32. It was submitted that the Grievant is entitled to 3 years leave as the Respondent did not adduce any evidence that the

Grievant went on leave relying on the decision in **Stephen Karisa Jefwa v Elsek & Elsek (K) Ltd [2014] eKLR** where the court stated *“Under sections 10(3) and (7) and section 74 of the Employment Act the Respondent should have records to ascertain the Claimant’s pending leave days. None was produced and the court finds in favour of the Claimant”*.

33. The Claimant submits that the Grievant also worked during public holidays since the Respondent is a supermarket which operates every day of the week.
34. The Claimant further submitted that the Grievant was entitled to overtime as the Respondent did not adduce evidence to show what time the Grievant reported or left work. That she worked for 4 hours overtime per day.
35. It was further submitted that the Grievant is entitled to maximum compensation of 12 months’ salary for unfair and unprocedural termination of her employment and for the immeasurable suffering she endured during all the years she worked for the Respondent.
36. It was further submitted that the Grievant was underpaid as she was paid Kshs. 14,000 while the minimum wage for her

grade should have been Kshs.32,280 as per **Regulation of Wages (General) (Amendment) Order, 2017**.

37. The Claimant further prayed for costs.
38. For the Respondent it was submitted in the submissions dated 21st June, 2025 that the issues for determination are whether the Grievant was an employee of the Respondent, whether the Grievant's employment was unfairly terminated, whether the Grievant is entitled to the reliefs sought and who should be awarded costs of the suit.
39. On the 1st issue the Respondent submitted that there was no contract between the Grievant and the Respondent, relying on the decision in **Charles Okungu Odhiambo & 28 others v Juja Cofee Exporters Limited [2021]** wherein the court cited with approval the decision in **Joseph Otieno Ogutu & 24 others v Allied Wharfage Ltd & another [2016]** where the court stated that *"The existence of an employment relationship is a matter of evidence and where it is in contention, the burden of proof is on the party alleging its existence."*
40. The Respondent further relied on the decision in **Everett Aviation Limited v Kenya Revenue Authority [2013]**

eKLR endorsed in Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR where the court opined:

“... In determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer’s care business are no longer conclusive. In my view the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.”

41. The Respondent submitted that there is no direct evidence of employment by the Respondent; there is existence of a subcontractor, Impala Protective Security and Private Investigations Limited; that the Grievant received payment from Impala Protective Security and Private Investigations Limited and not the Respondent; that the warning letter issued by the Respondent was pursuant to the clause in the contract between the Respondent and Impala Protective Security and Private Investigations Limited which permitted

rotation of staff and that the Grievant was replaced by another employee.

42. On the issue whether the termination of the Grievant's employment was unfair the Respondent submitted that there is no evidence adduced during the proceedings that the Grievant was an employee of the Respondent and the decision on termination lay with Impala Protective Security and Private Investigations Limited.
43. On the reliefs sought in the Statement of Claim the Respondent submitted that the Grievant is not entitled to any as she did not prove any, that in the absence of an employment contract the claim against the Respondent fails.

Analysis and Determination

44. Having considered the pleadings and evidence on record and having considered the evidence adduced by the parties through the witnesses who testified, the issues for determination are the following:
 - a. Whether the Grievant was an employee of the Respondent
 - b. Whether the employment of the Grievant was unfairly terminated, and

- c. Whether the Claimant is entitled to the prayers sought on behalf of the Grievant and to costs.

Whether the Grievant was an employee of the Respondent

45. The Respondent insisted that the Grievant was not its employee but an employee of Impala Protective Security and Private Investigations Limited who had been subcontracted by the Respondent to supply labour. The Respondent however did not adduce evidence of the existence of a contract between it and the subcontractor at the time the Grievant stated she started working for the Respondent. There was no contestation that the Grievant was working in the supermarket owned by the Respondent. there was further no evidence adduced by the Respondent that at the time of termination of her employment the Grievant was an employee of a Impala. The Grievant denied any knowledge of the alleged subcontractor. The contract adduced as evidence by the Respondent for the subcontracting agreement is dated 1st August, 2020 and was for a duration of only one year. The Grievant was employed 28th July, 2020 according to the pleadings which the Respondent did not deny, before the contract with the subcontractor was signed.

46. An employer is defined in the Employment Act as ***any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company***
47. The Grievant was working for the Respondent. It is the Respondent who sent her away. The documents submitted as evidence by the Respondent being salary payment are only for one month being salary for August, 2020. There is no evidence to show any employment relationship between the Grievant and the said subcontractor.
48. An employer who wishes to subcontract labour must demonstrate proper and credible evidence of such subcontracting without which an employee found working for the employer in the employer's premises must be presumed to be that employer's employee.
49. In the instant case I find no evidence of an employment relationship between the Grievant and the subcontractor at the time the Grievant's employment was terminated by the Respondent. it is further the Respondent who issued a letter

of warning to the Grievant and who terminated her employment. It is therefore my finding that the Grievant was an employee of the Respondent at the time material to this suit.

Whether the employment of the Grievant was unfairly terminated

50. The second issue is whether the termination of the Grievant's employment was fair. Section 41 provides that:

41. Notification and hearing before termination on grounds of misconduct

(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.

51. The Grievant testified that on 14th November, 2023 she reported to work as usual and in the evening the boss, RW1, told her not to report to work the following day. She was never given any reason for the termination and was never subjected to any disciplinary process. She was further not issued with a letter of termination.
52. RW1 Mr. Khetiya Uday Anant testified that he issued a warning letter to the Grievant. He further did not deny terminating her employment by telling her on 14th November, 2023 not to report to work after that date.
53. From the foregoing it is clear that the termination of the Grievant's employment did not comply with the requirements of section 41 and 43 of the Act. Section 43 provides:

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

54. Where termination does not comply with sections 41 and 43 the same is unfair in terms of section 45(2) which provides:

45. Unfair termination

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

55. For the foregoing reasons I find the termination of the Grievant's employment was both procedurally and substantively unfair.

Whether the Grievant is entitled to the prayers sought

56. Having found the terminations unfair, I have to determine if the Grievant is entitled to the prayers sought. I now consider the remedies sought.

a. Pay in lieu of notice

Having been unfairly terminated the Grievant is entitled to one months' pay in lieu of notice. Her salary was paid at the rate of Kshs. 14,000. According to the Grievant she was employed as a cashier. It was submitted that the Grievant was underpaid as she was paid Kshs. 14,000 while the minimum wage for her grade was

Kshs. 32,280 as per Regulation of Wages (General) (Amendment) Order, 2017.

I therefore award the Grievant pay in lieu of notice of Kshs. 32,280.

b. Service Pay

Service pay is payable per completed year of service at 15 days provided the employee is not a member of NSSF or other gratuity or pension scheme. There is no evidence that Grievant was registered as a member of NSSF or any gratuity scheme. She is therefore entitled to service pay.

c. Leave not taken

The Grievant is entitled to leave earned but not taken at 21 days per year or 1.75 days per month worked for the period she worked for the Respondent.

d. Public holidays

The Grievant did not adduce any evidence to prove that she worked on public holidays. This prayer is declined.

e. Underpayments

Having found that the Grievant was underpaid, she is entitled to underpayments. I award her Kshs. 303,720 as

Prayed having confirmed the tabulation to be correct.

f. Compensation

The Grievant prayed for compensation. Taking into account the length of service of the Grievant of just over 3 years and considering all relevant factors under section 49(4) of the Act I award her 4 months' salary as compensation in the sum of kshs. 129,120.

57. In conclusion, I find that the termination of the employment of the Grievant's employment was unfair and declare accordingly. She is awarded the following:

- i. Pay in lieu of notice Kshs. 32,280
- ii. Service Pay for 3 years Kshs. 48,420
- iii. 12 days worked in November, 2023 Kshs. 18,648
- iv. Accrued Leave for 3 years Kshs. 67,788
- v. Underpayments Kshs. 303,720
- vi. Compensation 4 months gross pay Kshs. 129,120

58. The Respondent shall pay the Claimant's costs which I assess at Kshs 50,000 as the same is not subject to taxation under

the Advocates Remuneration Order as the Claimant was represented by an officer of the union.

59. Interest shall accrue at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON
THIS 21ST DAY OF NOVEMBER, 2025**

**MAUREEN ONYANGO
JUDGE**