

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KEYA AT
MOMBASA**

CAUSE NO. E065 OF 2025

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS

AND HOSPITAL WORKERS (KUDHEIHA) CLAIMANT

VERSUS

BOARD OF MANAGEMENT,

MTONGWE PRIMARY SCHOOL..... RESPONDENT

JUDGMENT

The claimant filed the claim on behalf of the grievant, Emma Ondiek. The respondent is a public school where the grievant was employed as a cleaner. The issue in dispute is the alleged unfair termination of the grievant's employment.

The grievant was employed by the respondent under an oral contract as a cleaner as of 18 June 2013. Her wage was Ksh. 5,000 per month. The wage increased to Ksh. 6,000 in January 2017. In 2021, the salary was increased to Ksh. 10,000, and in 2022, the respondent unilaterally reduced the wage to KSh. 7,000 per month.

The respondent neither issued a payment statement nor made payments to the NSSF.

The claim is that the respondent, through a letter dated 10 September 2024, unfairly terminated the grievant's employment. The claim is that there was no notice, justifiable cause or disciplinary hearing. There was no payment of terminal dues. This violated the grievant's rights.

The claimant's case is that wages were underpaid for 3 years. There was no notice of a disciplinary hearing.

The claimant is seeking the following:

- a) Noetic pay Ksh. 17,481.

- b) 12 months' compensation Ksh. 209,772.
- c) Service pay for 11 years Ksh. 96,195.
- d) Underpayment of wages, May 2021 to May 2022, for 12 months, Ksh. 13,572 + house allowance Ksh. 2,035 – Ksh. 10,000 = 67,248.
- e) Underpayments May 2022 to August 2024 for 25 months Ksh. 15,201 + house allowance Ksh. 2,280 = 17,481 – 7,000 = Ksh. 262,025.
- f) Costs of the suit.

The grievant testified that the respondent employed her as a toilet cleaner. She worked diligently until September 2024, when her employment was unfairly terminated. She reported to work daily, but the respondent refused to pay her wages. The wage had been increased to Ksh. 10,000, but in 2022, this was unilaterally reduced to Ksh. 7,000 per month.

The grievant testified that the respondent accused her of blocking the toilet water, which allegedly affected the entire school, but this was not true. She was summoned and handed over to the police for seeking the payment of her due wages. The school head claimed that she had threatened her, but all she did was ask to be paid her salary. She had a sick child, her rent was due, yet the respondent refused to pay for work done.

The grievant testified that the respondent had alleged that she caused a disturbance at school and then deserted duty. However, in the letter terminating her employment, these allegations were not stated. This resulted in wrongful and unfair termination of employment.

In reply, the respondent denied the claims and stated that there was no unfair termination of employment as alleged. The grievant was dismissed lawfully and in accordance with due process. She refused to carry out assigned duties and disrupted school operations through verbal confrontations and incitement of colleagues. She openly disrespected school leadership and defied lawful instructions. The grievant created a hostile environment for staff and learners.

The grievant was subjected to a transparent disciplinary process in line with the Public Service Code of Conduct and school policy, which included:

- a) Verbal warning issued on 30 March 2023.
- b) First written warning issued on 26 June 2023.
- c) Final warning issued on 10 September 2024.

- d) Invitation to attend a disciplinary hearing where the grievant remained defiant despite being granted a salary increase.

The response is that following the above procedures, the respondent Board of Management held consultations and lawfully dismissed the grievant on 10 September 2024. The notice terminating employment was sent to the Sub-County Director of Education and the TSC representative.

The respondent paid the grievant in accordance with the Wage Orders and made remittances to the NSSF.

The summary dismissal was justified under section 44(4) of the Employment Act (the Act). Notice pay, service pay, compensation, and alleged underpayments are not due. These claims should be dismissed with costs.

The respondent called Joyce Kwiringa the head teacher. She testified that the grievant worked for the respondent for many years and her wages were increased pursuant to the Wage Orders.

On 10 September 2024, the grievant reported to work after being absent for two days. She came with her child, alleging she was sick. She had not called or indicated that she would be absent from work. The grievant remained in the Head teacher's office and refused to leave until her wages were fully paid.

Ms Kwiringa testified that the grievant's wage had been delayed due to capitation. For five days, all employees had not received their pay. However, the grievant came to her office, demanded payment, and refused to leave, instead issuing threats. The Deputy Head Teacher had to intervene, but the grievant refused to budge.

The matter was reported to the police, who arrested the grievant. The board of management convened and agreed to dismiss the grievant due to gross misconduct.

The respondent called Lilian Achieng, Deputy Head Teacher. She testified that on 10 September 2024, the grievant followed her to her office and remained outside the Head Teacher's office, refusing to leave. She demanded payment of her wages, and her efforts to explain that there was no money that day were not successful. The grievant denied others access to the office, as she remained at the door all day.

The respondent called Fennie Adhiambo, the assistant secretary, who testified that she witnessed the grievant refusing to leave the head teacher's office and continuing to shout, demanding payment of her wages. This disrupted the learners and guests visiting the head teacher. The grievant had also been involved in other incidents of misconduct. She had refused to work as a cleaner and was issued with oral and written warnings.

The respondent called Celine Wambura, a teacher at the school, who testified that on 10 September 2024, while at her residence, which is near the school, a student came running and called her back to the school to assist since the grievant wanted to beat up the head teacher. She walked to the school and found the grievant outside the office.

At the conclusion of the hearing, both parties agreed to submit written statements.

Only the claimant complied. The respondent did not file written submissions.

Determination

The employment of the grievant by the respondent is not challenged. She started working on 18 June 2013. The respondent did not file any work records as required under section 10(6) and (7) of the Act. There is no written contract or payment statements. This is a serious legal lapse, as held in **Phoenix Decorz Limited, formerly known as Huzeifa Glass and Hardware v Mwambao [2025] KEELRC 1945 (KLR)**.

The court is bound by the employment particulars as stated by the claimant.

Through a notice dated 10 September 2024, the respondent terminated the grievant's employment via summary dismissal. She was accused of violating school policy, which led to disruptions in safety and school operations.

The grievant testified that her September 2024 wage was delayed; she was distressed because her child was sick and she had not paid rent. She went to the office to request her wages, but instead was arrested by the police; she did not cause any disruptions as alleged.

Ms Kwringa confirmed that the grievant had not been paid her wages. She refused to leave the office until this was paid in full. Efforts to explain to her that there was no money in the office and that she should wait, as other employees did, were unsuccessful. She refused to leave the office.

An employee who disputes operations on the shop floor, leading to the stoppage of work, commits workplace misconduct. However, before an employee is dismissed, due process of law is imperative. Even where the employee is dismissed for gross misconduct, the due process outlined in sections 41 and 44 of the Act must be adhered to, as held in **Muthaiga Country Club v Kudheih Workers [2017] KECA 282 (KLR)**.

In the case of **Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR)**, the court held that before termination of employment, the employer must adhere to the mandatory provisions of section 41 of the Act. 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;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.

Even in cases of gross misconduct, the provisions under Section 41 of the Act are mandatory.

Where the respondent alleges that the grievant failed to attend work for two days and then participated in work, made threats, refused to adhere to policy, and created a disturbance, the motions of section 41 of the Act were not adhered to. There is no effort to invite the grievant to address any allegations.

The alleged warnings that had earlier been issued to the grievant did not justify failure to adhere to the mandatory provisions of section 41 of the Act, as held in **Standard Group Limited v Jenny Luesby [2018] KECA 353 (KLR)**. The basic minimum procedure that every employer should adopt before termination of employment is to issue a notice to the employee, allow her to attend with another employee, and allow her to make her representations.

In this case, the respondent filed a notice dated 30 May 2024, notifying the grievant of a board meeting to be held the following day. However, the incident that led to the summary

dismissal occurred in September 2024. The notice dated 30 May 2024 cannot have formed the basis of such a future event.

Even in a case where the claimant disrupted office operations by demanding her due wages, there is a breach of contract under Section 44(3) of the Act, as the respondent refused to pay her the due wages for the work done. In the case of **Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] KEELRC 1242 (KLR)**, the court held that;

There is something that a salary does to a man. It gives him job satisfaction. Payment of a salary comes with that spring and gait towards the office to accomplish tasks. The job, therefore, gives one a dignified self and a purpose to return each day to accomplish more.

When then a salary is not paid for work done, the opposite takes place. An employee becomes anxious; demoralised; each day comes with bills and distress; and eventually, with delays and no pay at all, panic comes in, and an employee is reduced to begging, scavenging from fellow workers, friends and well-wishers.

Hence, refusal to pay an employer is a serious violation of section 44(3) of the Act, and the employee is justified in withdrawing labour. The employer is the one in breach of the law. That breach caused distress for the grievant, as evidenced by her demands to remain at the head teacher's office until her wages were paid, as she needed to take her child to the hospital and pay her rent. See **Pathenol v Indian Ocean Forwarders and Logistics Company (K) Ltd [2023] KEELRC 3453 (KLR)** and **Transport Workers Union (K) v Lochab Brothers Limited [2019] KEELRC 1965 (KLR)**. The non-payment of salary to the employee is a fundamental breach of the employment relationship. An employee who offers their labour and does not receive a salary is reduced to inhuman conditions. See **Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others [2021] eKLR**.

In this instance, the respondent failed to follow due process. This resulted in the unfair termination of employment, in violation of Section 45 of the Act.

Notice pay and compensation are due.

The claimant's case is that there was underpayment. The respondent did not file any work records to confirm the wages paid to the grievant.

The respondent filed a payment voucher dated 24 November 2022. The wage paid is Ksh. 7,000.

Under the Wage Orders applicable from May 2022, a cleaner working in Mombasa was entitled to a minimum wage of Ksh 15,201.65, plus a housing allowance of Ksh 2,280, for a gross pay of Ksh 17,481.

The due notice pay is Ksh. 17,481.

The claimant worked from 2013 to 2024. There are various work records of warnings. This takes into account, pursuant to section 45(5) of the Act, a compensation for 5 months is hereby found justified based on the gross pay of Ksh. 17,481 x 5 = Ksh. 87,405.

On this basis, there was an underpayment of wages over the years. However, under section 90 of the Act, the continuing injury of non-payment of the minimum due salary should have been addressed within 12 months. The claimant can only claim for the last 12 months upon cessation of employment as held in **The German School Society & another v Ohany & another [2023] KECA 894 (KLR)**.

The grievant was paid Ksh. 7,000 per month instead of Ksh. 17,481. There was an underpayment of Ksh. 10,481 x 12 = Ksh. 125,772 in underpayments.

On the claim for service pay for 11 months, service pay is due under section 35(5) and (6) of the Act where the employer fails to remit statutory dues. The voucher dated 24 November 2022 only indicates the wage of Ksh. 7,000 without additional remittances to the NSSF, NHIF or PAYE.

For the 11 years worked, the grievant is entitled to 15 days' pay based on the last due wage of Ksh. 17,481. This is Ksh. 96,145.50 in service pay.

Regarding the claim for costs, it is successful, and costs are therefore due. The claimant is a trade union, and under Section 12(4) of the Employment and Labour Relations Court Act and Rule 73 of the Employment and Labour Relations Court (Procedure) Rules, the court is authorised to assess costs. In this regard, the respondent shall pay all-inclusive costs of KSh. 50,000 to the claimant.

Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

- a) **Employment terminated unlawfully and unfairly.**

- b) Compensation Ksh. 87,405.**
- c) Notice pay Ksh. 17,481.**
- d) Underpayments ksh. 125,772.**
- e) Service pay Ksh. 96,145.50.**
- f) Costs ksh.30, 000.**

Delivered in open court at Mombasa, this 15th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant:

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