

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAKURU

ELRC CAUSE NO. E010 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

GIDEON OCHIENG' OYAWA.....

CLAIMANT

VERSUS

**KENYA PLANTATION & AGRICULTURAL
WORKERS UNION.....**

.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein instituted this cause vide Statement of Claim dated 8th November 2018 and later filed an amended Statement of Claim dated 8th August 2025.

2. The Claimant is seeking the following reliefs:

1. A declaration that refusal to pay the Claimant his full dues and/or salary arrears is unfair and unlawful

a. Declaration that the Claimant's employment service was unlawfully and unfairly

terminated on 16th January 2016 by the Respondent in violation of the Kenya Constitution 2010 and the Employment Act 2007.

b. Declaration that in all circumstances, the Respondent acted unconstitutionally, unlawfully and by tint, treated the Claimant inhumanly, intimidatingly, coercively and arbitrarily in the whole process of ending his employment service and therefore cannot absolve himself from paying the Claimant all unpaid terminal dues owed to the Claimant on the basis that the Claimant signed the Discharge Form dated 12th February 2016.

2. The Claimant be paid his full terminal dues and/or terminal benefits arrears amounting to Kshs.761,166/=.

3. The Honourable court to issue such orders and give such directions as it may deem fit to meet the ends of justice.

4. The Respondent to pay the costs of the Claim.

5. Interest on the above at court rates.

6. The Respondent be ordered to issue the Claimant with the certificate of service as required by the provisions of section 51 of the Employment Act.

Claimant's case

3. The Claimant avers that he was employed by the Respondent as the Union Area Secretary at the Respondent's Makuyu Region, Murang'a County vide a letter of appointment dated 18th February 2013 with effect from 1st March 2013.
4. The Claimant avers that he was earning a salary of Kshs 17,000/= which rose to Kshs.27,000/=.
5. The Claimant contends that despite assurances his terms would be improved after probation, the Respondent failed to provide him with the union constitution, accommodation, or fair employment conditions contrary to sections 20, 31 and 74(1)(i) of the Employment Act.
6. The Claimant avers that he worked diligently without disciplinary issues until 16th January 2016, when his employment was terminated abruptly through a letter that misrepresented facts about his predecessor, without notice, valid reasons, or a hearing, contrary to

Sections 41, 43, and 45 of the Employment Act, 2007 and Articles 41, 43, and 47 of the Constitution of Kenya, 2010.

7. The Claimant further avers that he was denied annual leave for 2013 and 2014, unpaid overtime across several years, and other entitlements, and that upon termination, he was only paid Kshs. 87,300/= instead of his full dues.

8. Despite sending demand letters and involving the Ministry of Labour, the Claimant avers that the Respondent refused to settle his claims.

Respondent's memorandum of response

9. In opposition to the amended Statement of Claim, the Respondent filed a memorandum of response dated 17th December 2018.

10. The Respondent admits that the Claimant accepted employment on the stated terms but denies allegations that he was denied a copy of the union constitution, arguing it was publicly available and never requested.

11. The Respondent contends that the Claimant failed to recruit members or establish a viable area office as required under the union rules and Labour Relations Act, and therefore, his termination was justified.

12. The Respondent avers that a notice to show cause was issued, which the Claimant ignored, and that he was paid his full terminal dues of Kshs.87,300/=, including notice pay, leave allowance, gratuity, and salary for days worked.

13. The Respondent avers that claims of unpaid overtime, denial of annual leave, and further entitlements are dismissed as afterthoughts, since the Claimant accepted a consolidated salary and had already received leave.

14. The Respondent disputes the validity of letters from the Labour Office and the Claimant's advocates, noting that a certificate of service was issued but the Claimant refused to take it.

15. The Respondent argues that the Claimant is seeking double payment of benefits already settled, and

therefore, the suit is frivolous, vexatious, and an abuse of court process that should be dismissed with costs.

Claimant's evidence in court

16. The Claimant, CW1, adopted his witness statement dated 8th August 2025 together with the list of documents dated even date and a further list of documents dated 16th May 2025 marked as exhibits 1 to 14 as his evidence in chief.
17. CW1 testified that he was appointed on 18th February 2013 at a starting salary of Kshs.17,000/=, later rising to Kshs.27,000/=, and that his work hours ran from 7:00 a.m. to 6:00 p.m. on weekdays and 7:00 a.m. to 4:00 p.m. on Saturdays, yet he was never compensated for overtime.
18. CW1 stated that his termination on 2nd February 2016 was effected without a disciplinary hearing or notice to show cause, and that the termination letter did not reference any such process. He further explained that he reported the matter to the Labour Office, where the Director wrote to the Respondent but received no reply.

19. In cross-examination, CW1 admitted his salary was consolidated and not itemized, that his appointment letter did not expressly provide for overtime, and that he never raised complaints about overtime during employment. He confirmed receiving Kshs.87,300/= as terminal benefits in March 2016, but maintained that he was not issued a certificate of service.

Respondent's evidence in court

20. RW1, Joseph Alouch, the Respondent's administrative secretary, adopted his witness statement dated 11th December 2018 together with the list of documents dated even date marked as exhibits 1 to 3 as his evidence in chief.

21. RW1 testified that CW1's appointment letter, issued in February 2013 and signed by the union's general secretary, provided for a consolidated salary and required him to recruit at least 1,000 members in line with the union's constitution, failing which the office would be dissolved. RW1 stated that despite being guided several times, CW1 failed to recruit members, and after ignoring a show cause letter dated 11th January 2016, his services were terminated. He maintained that CW1 was paid his terminal dues

under the termination letter of 2nd February 2016 and was not entitled to house allowance since his salary was consolidated.

22. In cross-examination, RW1 explained that both the show cause letter and certificate of service were sent to CW1's address, and his payslip reflected a consolidated salary of Kshs.17,000/= plus a travelling allowance of Kshs.3,400/=. He admitted there was no formal disciplinary hearing because CW1 failed to respond to the show cause letter, though they communicated by phone.

23. In re-examination, RW1 added that CW1 collected his cheque, signed for it, and raised no objections at the time.

24. Parties were directed to file their respective written submissions.

Claimant's submissions

25. The Claimant submitted that his employment with the Respondent was unlawfully and unfairly terminated on 16th January 2016 without notice, hearing, or valid

reason, contrary to **sections 41, 43, and 45 of the Employment Act, 2007**. He seeks compensation for unfair termination, unpaid overtime, and house allowance of Kshs.114,000/= under *section 31 of the Employment Act*, annual leave, leave travelling allowance, eleven days' salary, and a certificate of service, totalling Kshs.761,166/=.

26. The Claimant maintains that the discharge form he signed after receiving Kshs.87,300/= in terminal dues was procured under coercion and cannot absolve the Respondent of its statutory obligations. The Claimant placed reliance on ***Ragira V Ombi Rubber Rollers Limited [2024] KEELRC 2533 (KLR)***, where the court held that signing a discharge voucher does not bar an employee from pursuing statutory entitlements. In ***Thomas De La Rue (K) Ltd V David Opondo Omutelema [2013] KECA 492 (KLR)***, the Court of Appeal emphasized that termination must be both substantively justified and procedurally fair.

27. In conclusion, the Claimant submitted that the Respondent's actions were unlawful and that he is

entitled to the reliefs sought, including the unpaid house allowance.

Respondent's submissions

28. The Respondent submitted that it lawfully dismissed the Claimant for failing to meet his core mandate of recruiting union members despite being inducted and supported in his role. The Respondent argued that his salary was consolidated, thus excluding overtime, house allowance, or additional perks, and that he was paid full terminal dues of Kshs.87,300/=, with a certificate of service still available for collection. The Respondent placed reliance on ***KNVJMT [2018] KEHC 6670 (KLR)***, where the court emphasized that the burden of proof lies on the party alleging a fact under sections 107 and 112 of the Evidence Act. In ***Selle V Associated Motor Boat Co. [1968] EA 123***, the court held that appellate courts must re-evaluate evidence but are not bound by trial court findings if material circumstances were overlooked. In ***Gekone V Embassava Sacco Society Ltd [2024] KEHC 9391 (KLR)***, which reiterated that parties are bound by their contracts and pleadings, and courts should not rewrite

agreements unless coercion, fraud, or undue influence is proved.

29. The Respondent therefore contends that the Claimant's suit is a fishing expedition aimed at double recovery and should be dismissed with costs.

Analysis and determination

30. The court has considered the pleadings and the rival submissions by both counsels. The issues for determination are as follows:

- i. Whether the Claimant was unlawfully terminated by the Respondent;
- ii. If (i) above is in the affirmative, whether the Claimant is entitled to the relief sought; and
- iii. Who should bear the costs of the suit.

31. **Sections 41, 43 and 45 of the Employment Act** provide for substantive justification and procedural fairness when it comes to fair termination. The court will reiterate the case of ***Thomas De La Rue (K) Ltd V David Opondo Omutelema(supra)***, where the Court of Appeal stated that for termination to be fair, there must be substantive justification and procedural fairness.

32. The evidence in this case is that the Claimant was issued with a Notice to show cause dated 11th January 2016. It was posted through P.O. BOX 582 - 01200 Kenol. Claimant was the area Secretary of Makuyu Region Respondents County office. The Respondent claims the Claimant did not respond to the notice to show cause.

The Respondent witness Mr. Joseph Allouch in his evidence in court informed the court that he sent the letter through ordinary email. Claimant was given 48 hours to respond to the same. The Claimant was served with the termination notice on 18th January 2016 and with immediate effect.

33. The court cannot be certain the Claimant received the notice to show cause letter which he was accused of not responding to before he was terminated. Of course, Makuyu is a number of Kilometres from Kenol. Probably he should have been served with the notice letter physically so that it would be abundantly clear that he received the same.

34. The Respondent then was legally bound by **Sections 45(1) of the Employment Act** to issue the Claimant with a valid reason to terminate Claimant's

employment. The reason for termination seems to be poor performance as per the Notice to show cause letter.

When an employer is terminating employment of an employee due to poor performance the employee must be informed of the evaluation tool used to assess his performance. He must also be given an opportunity to defend himself in the presence of a fellow worker of his choice to be present at his hearing.

Section 41(1) of the Employment Act provides: -

“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.”

35. Furthermore, this court is persuaded by the ruling in the case of **JANE WAIRIMU MUCHIRA -VS MUGO WAWERU & ASSOCIATES (2012) eKLR** where court stated: -

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In the Kenya Science case, the court held that 2-3 months is a reasonable period for an employee to improve.

In addition, the Court in the instant case also held that an appraisal of the performance of an employee must of necessity involve active participation of the employee and that a credible performance appraisal process must be evidently participatory.”

36. Also, in **MAINA MWANGI -VS- THIKA COFFEE MILLS LIMITED (2012) eKLR** the court held: -

“Where the Employee fails to meet the standards, the first duty of the Employer is to let the Employee know that his performance has failed below the set standards. The Employer should then propose training, guidance and fresh instructions to the Employee. The Employer is required to allow the Employee time to improve. If no improvement is noted after a reasonable passage of time, the Employer should issue a formal warning to the Employee, and advise the Employee that he may be separated from the Employer on account of poor performance. The next phase involves investigations by the Employer and consideration if the Employee could fit better in another role within the organization. At the investigation, the Employer should engage the Employee, and if at the end of these steps, dismissal of the Employee is the course that commends itself to the Employer, then

***Section 41 of the Employment Act 2007,
must come into play.”***

37. The Claimant was paid Kshs.87,300/= as his terminal dues and signed the discharge voucher. The court finds and holds that even if the Claimant signed the discharge voucher to acknowledge receipt of Kshs.87,300/= the court cannot turn its face from the fact that the Claimant was terminated without proof of a valid reason by the Respondent as well provided in Section 45(1) of the Employment Act. The said ***Section 45(1) of the Employment Act*** states as hereunder: -

“No employer shall terminate the employment of an employee unfairly.”

38. The Claimant was not also given a hearing and that means there was violation of his procedural fairness against ***Section 41(1) of the Employment Act.***

39. The court therefore holds the Claimant was unlawfully, unfairly and unprocedurally terminated from his employment. Judgment is therefore entered in his favour.

40. As to the reliefs that the Claimant should be awarded the court states as hereunder: -

(a) Overtime -

The Claimant accepted his appointment letter and the working hours were indicated. He signed for the same. He does not have evidence of such overtime hours worked during his period of employment. The prayer for overtime is declined.

(b) The 2 years unpaid leave is not proved and is a mere claim and hence is declined.

(c) The house allowance is also not granted as it was clear the Claimant's salary was consolidated. He accepted it and cannot now claim for the same at this point.

(d) Travelling allowance is also not proved that it was not paid and he who alleges must prove. The same is declined as well.

(e) The 11 days claimed to have worked after issuance of termination notice is also not proved and so is also declined.

(f) Considering the way the Claimant was terminated and the period he worked for

***the Respondent the court awards him 5 months equivalent of his salary
Kshs.27,000 x 5 = Kshs.135,000/=.***

(g) Claimant is to receive costs of this suit. Interest will be paid at 14% per annum on the judgment debt from this day upto full payment.

(h) Claimant can be issued his certificate of service within 14 days.

Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 23rd Day of January 2026.

**ANNA NGIBUINI MWAURE
JUDGE**

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 has 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE