



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

(ON Makau J on 26th February, 2026)

CAUSE NO. 197 OF 2016

MATHEW KILONZO
KIEMA.....CLAIMANT

-VERSUS-

PARAPET CLEANING SERVICES.....
RESPONDENT

JUDGMENT

Introduction

1. By an Amended Memorandum of Claim dated 28th November 2018, the Claimant sought the following reliefs:-
 - a) Kshs. 5,649,285.45 inclusive of medical costs, accrued leave, salary underpayment, 35 years***

salary before retirement, service pay and terminal dues.

b) Payment of future medication.

c) Costs and interest.

d) Any other relief the court may deem fit to grant.

2. The Respondent opposed the Claim through its Statement of Response dated 18th August 2016 in which it averred that the Claimant's claims have no legal basis, It further averred that the Claimant suffered injuries while in the course of employment and his compensation was assessed at Kshs. 617,760 and it was paid as required under WIBA. Therefore it prayed for the suit to be dismissed with costs.

Facts

3. The Claimant was employed by the Respondent as a cleaner on 9th June 2011 and worked until 17th March 2012 when he fell down while in the course of employment and sustained bodily injuries. He was treated and his permanent incapacity was assessed at 70%. Thereafter his compensation was assessed at Kshs. 617,760 by the Director of Occupational Safety and Health (DOSHS). The total sum was paid by the Respondent's insurer and the Claimant executed a discharge voucher dated 28th January 2015.

4. After the accident the Respondent maintained the Claimant in the payroll until 1st April 2015 when it terminated his employment on medical grounds. Thereafter the Claimant instituted this suit claiming reliefs set out above. The Respondent disputed the new Claims and the suit went to hearing.

Evidence

5. The Claimant testified as CW1, and adopted his statement dated 18th October, 2018 as his evidence in chief. He then produced documents as exhibits as exhibits 1-14 respectively. In brief he stated that his salary was Kshs. 7800 until March 2012 when it was increased to Kshs. 10,750 but remained the same until the end of his services. His employer deducted and remitted for him National Social Security Fund and National Hospital Insurance Fund.

6. He further stated that, on the fateful day he was assigned duty to clean a premises where he fell down and suffered injuries. He was not provided with safety gear but he had been trained on how to do the job.

7. He was treated and his incapacity was assessed at 70%. The doctor recommended that he be given light duties and he reported back to work in crutches. In 2015 he was compensated Kshs. 617,700 following a DOSH award under WIBA..

8. H admitted that he was given 17 days notice before termination but he was not paid his terminal dues. He contended that he never took any leave and he was not compensated for the same. He was also not reimbursed the money he spent for medical expenses after the accident. He reiterated the prayers in the suit.
9. The Respondents Group Head of Human Resource, Mr. Dominic Otieno testified as RW1. He adopted the written statement dated 9th November 2022 as his evidence in chief and produced 9 documents as exhibits. He admitted that the Claimant was employed by the Respondent and he was paid all his salaries. As at the time of termination he was earning Kshs. 9831 basic plus Kshs. 1469 housing allowance totaling Kshs. 11300 per month. He was also paid in lieu of 17 days notice.
10. He further stated that after the accident, the Claimant's doctor recommended for light duties but he did nothing for three years. He never reported to work regularly and when he reported he just sat down even after being allocated light duties. Despite the condition, he was retained in the payroll until April 2015 when his services were terminated on medical grounds.
11. He contended that the reason for the termination was valid considering doctors assessment and that for three years he

was paid salary for no work done. He contended that the compensation under WIBA catered for everything including Medical Bills. He testified that the claim for medical expenses only came after the termination of employment.

12. He contended that the claim for leave lacks merits because after the accident the Claimant remained away from work. Besides, as at the time he suffered injuries his leave had not matured. He maintained that the termination of employment was justified because the Claimant could not perform any duties including light duties.

13. After the hearing, both sides filed written submissions. Having carefully considered the pleading, evidence and submissions, the following issue fell for determination:-

- a) Whether the termination of the Claimant's employment was unfair and unlawful.
- b) Whether he is entitled to the reliefs sought.

Analysis

Unfair and unlawful termination

14. Section 45 (2) of the Employment Act provides that:-

“ 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.”

15. The above provision is clear that two factors must be considered in determining whether or not termination of employment contract is unfair/unlawful, that is, the reason for the termination and the procedure followed. If any of the above two factors are absent, the termination is unfair.

Reason for termination

16. There is no dispute that the reason for terminating Claimants services was medical grounds. The termination letter dated 1st April 2015 cited the permanent disablement assessed by the Directorate of Occupational Safety and Health to find him unfit to continue working as a steward. Both parties agreed that the Claimant’s permanent incapacity was assessed at 70% and the doctor recommended for light duties.

17. The Respondent contended that its business involves cleaning in various places and it tried to allocate Claimant light duties but he failed to do them. For three years he rarely

attended work and whenever he did, he just spent the day sitting down.

18. The Claimant did not rebut the above evidence. In fact he corroborated it when he acknowledged that he reported back in crutches. He acknowledged in paragraph 11(A) of his pleadings that he could not continue doing meaningful work anywhere and prayed for loss of future earnings.
19. Having taken into account the medical evidence on record and the unrebutted evidence by the Respondent that the Claimant could not do light duties for a period of three years after the accident, I find that the reason for the termination was valid. Section 45 (2) (b) of the Employment Act recognizes incapacity as a fair reason for terminating an employee's employment and especially where, like in this case, there is evidence that the employer gave reasonable accommodation to the Claimant for three years.

Procedure followed

20. Section 41 of the Employment Act provides that:-

“ (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.”

21. The above provision is mandatory that before terminating an employee's services on account of physical incapacity, the employee is entitled to a hearing in presence of another employee of his choice. In this case, the Claimant was never accorded any hearing before the termination letter was issued to him. Despite the fact that there was a clear reason for the termination, the employer was bound by section 41, above and the rules of fair play to accord the Claimant a hearing before the termination.

22. The Respondent contended that it paid the Claimant salary for 17 days in lieu of notice and the Claimant admitted. However payment of salary in lieu of notice does not sanitize an otherwise, unfair procedure. **In Kenfreight EA Limited v**

Benson K. Nguti [2016]eKLR, the Court of Appeal held that:-

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...”

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service.”

23. Likewise in this case, I hold that payment of salary in lieu of notice did not absolve the employer from the duty to comply with a clear statutory obligation, namely, to accord fair hearing before dismissing an employee for physical incapacity. In the

circumstances, I find that the failure to follow fair procedure in dismissing the Claimant rendered the termination unfair within the meaning of section 45 of the Employment Act.

Reliefs

24. In view of the above conclusion, I find that the Claimant is entitled to compensation for the unfair termination and salary in lieu of notice under section 49(1) of the said Act. The Claimant only worked for less than a year and the rest of the time he was just in the payroll earning for no work done. However considering that he did not contribute to the termination through misconduct and that his capacity to work for a leaving was compromised by the injuries suffered while working for the Respondent, I award him ten (10) months gross salary as compensation for the unfair termination. He is also awarded one month salary in lieu of notice less the 17 days paid earlier.

25. The claim for service pay is declined since the Claimant admitted in evidence that the employer deducted and remitted contributions to the National Social Security Fund. In the circumstances he is disqualified under section 35 of the Employment Act from claiming service pay.

26. The claim for medical expenses and lost future earning spring from the work injury case that falls outside the mandate of this court. They fall within the jurisdiction of DOSH under WIBA and not before this court. It is evident from the WIBA that

the parliament intended to take way litigation of work injury claims from courts of law and restrict the same to the alternative process under the mandate of the Directorate of Occupational Safety and Health. Consequently, I decline to award the same as prayed.

27. As regards the claim for leave, the Claimant earned leave on prorata basis before he was injured and stopped regular services. The leave earned during the 9 months of continuous service was 1.75 days x 9 months equaling to 15.75 going by section 28(1)(b) of the Employment Act. Under section 28(4) leave cannot accrues beyond 18 months without consent of the employer. In this case the Claimant never applied for any leave and therefore he is deemed to have forfeited it. As regards the period after the accident, the Clamant did not attend work regularly and as such it would be unfair to award him leave for that period. Consequently the claim for leave must fail.

28. Turning to the claim for underpaid salary, I will treat as a continuing injury which was filed within 12 months after the termination. He claimed salary underpayment from June 2011 to April 2015.

29. Under the General Wage Order 2011, 2012 and 2013, the minimum basic wage for a cleaner was Kshs. 7586, 8579.80, and Kshs. 9,780.95 respectively. The Claimant was also entitled to house allowance at 15% of the basic salary under

the said General Wage Orders being Kshs. 1,137.90, Kshs. 1,286.97 and Kshs. 1467.14 respectively. His gross pay under the said wages orders was therefore, Kshs. 8,723.90, Kshs. 9866.77 and Kshs. 11,248.09 respectively.

30. From June 2011 to February 2012 his salary was Kshs. 7800 representing an under payment of Kshs. 923.90 per month. Hence 9 months x 923.90 equals to Kshs. 8,315.10 From March 2012 his salary was increased to Kshs. 10,750 and therefore there was no underpayment during the period covered by General Wages Order (2012). The Respondent also filed pay slips showing that the Claimants salary as at 2015 had been increased to Ksh. 11300 which was above the minimum gross of Kshs. 11,249.09 prescribed by the 2013 General Wages Order

31. The Claimant did not discharge the burden of proving the figures tabulated in his statement of claim as salary under payment from March 2012 to April 2015. He did not adduce any evidence to prove the alleged salary underpayment during that period. The only underpayment proved was during June 2011 to February 2012 being Kshs. 8,315.10.

Conclusion

32. I have found that the termination of the Claimant was justified but it was rendered unfair by the Respondent's failure to follow fair procedure. I have further found that the claim related to Claimant's work injuries do not lie to this court.

Finally I have found that the Claimant is entitled to some of the employment related claims. Consequently, I enter judgment for him against Respondent as follows:-

a) Notice balance Kshs. $11300 \times 13/30 =$ Kshs. 4,896.66

b) Compensation Kshs. 113,000

c) Salary underpayment Kshs. 8,315.10

Total **Kshs. 126,211.76**

33. The award is subject to statutory deductions but in addition to costs and interest at courts rate from the date of this Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2026.

**ONESMUS MAKAU
JUDGE**

Appearance:

Babu for the Claimant

Munene for the Respondent