

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 17 OF 2018

MERCY NZESYA KAVITHE.....CLAIMANT

VS

CECIL GUYANA MILLER  
T/A MILLER AND COMPANY ADVOCATES.....RESPONDENT

Coram

Before Lady Justice J. W. Keli

C/A Otieno

JUDGMENT

Introduction

1. By a statement of claim dated 11<sup>th</sup> January 2018, the Claimant sued the former employer and seeking for the following relief: -

- a) A declaration that the termination of employment was unfair and contrary to expected labour practice.
- b) Payment for the following:
  - i) Kshs.227,500 being the total unpaid overtime for 28 months.
  - ii) Kshs.168,000 being the total unpaid amount for washing the car.
  - iii) Kshs.300,000 being total salary for 12 months.
- c) Costs of the cause.
- d) General damages for mental anguish and suffering and loss of income.
- e) Any other relief that this honorable court may deem fit to grant.

2. The Claimant's claim was accompanied by her list of documents with the bundle of documents attached dated 11<sup>th</sup> January 2028; list of witnesses of even date; and witness statement of even date.
3. In response to the claim, the Respondent entered appearance through the law firm of Lilian Amere Machio & Company Advocates, and filed a reply to statement of claim dated 16<sup>th</sup> February 2018. In support of his response, the Respondent filed a list of witnesses dated 16<sup>th</sup> February 2018, and a witness statement of the same date.

#### Hearing and evidence

4. The claimant's case was heard on the 21<sup>st</sup> May 2025, when the claimant testified on oath and adopted her witness statement dated 11th January 2018 and produced the documents under the list of even date as her evidence in chief. The claimant was cross -examined by counsel for the respondent Ms. Machio and re-examined by own counsel.
5. The respondent's case was heard on the 31<sup>st</sup> October 2025 when Miller Advocate testified as the employer. The witness adopted his witness statement dated 16<sup>th</sup> February 2018 as his evidence in chief. He was cross-examined by counsel for the claimant, Mr. Isinta and re-examined by Ms. Machio.

#### The Claimant's case in summary

6. The Claimant's case is that she was employed by the Respondent on or about 15th June 2015 as a cleaner, to carry out duties including cleaning the office and maintaining general cleanliness.

Her employment was confirmed vide a letter dated 31<sup>st</sup> March 2016. On 14<sup>th</sup> November 2017,

the Claimant was summoned by the Respondent's accountant who informed her that her employment had been terminated by the Respondent. Following the termination, the Claimant states that she was coerced to sign a discharge voucher acknowledging receipt of a cheque for final dues of Kenya Shillings Thirty Seven Thousand Five Hundred (Kshs.37,500) only, in the presence of the Respondent's accountant as aforesaid. The accountant then issued her with the cheque and a copy of the discharge voucher.

7. The Claimant's complaint is that the termination of her employment lacked substantive justification or valid reasons, and was unprocedural, wrongful, inhuman and unfair since she was neither issued with a termination letter nor subjected to a disciplinary hearing. The Claimant emphasizes that she was not the subject of any disciplinary proceedings/cases during the course of her employment; and performed her duties beyond expectations going as far as cleaning the Respondent's managing partner's motor vehicle on a daily basis, and working extra hours, without additional wages.

#### Respondents' case in brief

8. The Respondent admits that the Claimant was its employee, having been employed on 14th May 2015 on a probationary basis and her employment confirmed on 14th November 2015. She was subsequently issued with a letter of confirmation as a cleaner on 31st March 2016. The Claimant's express and implied terms of employment were set out in the said letter, including that: either party was entitled to terminate the said employment by giving one month's notice or paying one month's salary in lieu of notice; and the Claimant would act towards the Respondent as the employer and other employees in good faith, fidelity and loyalty and would not take any actions that were detrimental to or in competition with the Respondent's law firm's interests.

Further, the Claimant would obey the reasonable and lawful directions of the Respondent; not act in a manner that would damage or destroy the trust and confidence between the Respondent and her or other employees; act with all due skill, care and competence, amongst other duties and responsibilities.

9. It is the Respondent's case that the Claimant breached her contract of employment by: failing to conduct and execute duties in a reasonable manner that would contribute to the firm's success; knowingly failing and/or refusing to adhere to the Firm's rules and policies; and failing to comply with the Respondent's lawful and proper commands within the context of the performance of her duties. In particular, the Claimant was involved in several disciplinary issues that caused disharmony amongst her colleagues at work by propagating malicious rumours about various employees concerning their personal lives, that nearly led to a physical fight in February 2017 or thereabouts.
  
10. It is averred that the Respondent held a disciplinary meeting and warned the Claimant about her conduct. The incident recurred in November 2017 or thereabouts, making it difficult for other employees to work with the Claimant and creating a hostile work environment likely to adversely affect the law firm's image, prompting the Respondent to summarily dismiss the Claimant from employment.
  
11. Regarding the claim that the office accountant dealt with the Claimant at the time of her dismissal, the Respondent states that the office accountant had no authority, as an employee of the firm, over staff. At the time of the Claimant's summary dismissal, the accountant was authorized only to handle accounting matters, including but not limited to the payment of

employee dues, on the Respondent's instructions as the employer. The Respondent denies coercing the Claimant or causing anyone to coerce the Claimant into executing the discharge voucher, and takes the position that she did so of her own volition. By signing the discharge voucher, the Claimant acknowledged receipt of her terminal dues and admitted that she had no further claims against the Respondent's law firm.

12. The Respondent insists that the Claimant's dismissal from employment was not unfair and was carried out in compliance with the Employment Act 2007. The Claimant underwent a disciplinary hearing, was granted an opportunity to respond to the allegations of gross misconduct, but intentionally refused to provide a reasonable explanation. The Claimant received her full terminal dues following her termination. The Respondent further states that the Claimant failed to raise any complaints about the duties allocated to her during the course of her employment. Regarding overtime, while denying that the Claimant worked any extra hours, the Respondent provides a disclaimer that the Claimant was made aware of the office hours, hence any extra hours worked were of her own free will.

#### DETERMINATION

13. The parties filed written submissions.

14. It is not in dispute that the Claimant was an employee of the Respondent, having been employed on 14th May 2015, and that she was summarily dismissed from employment on 14th November 2017, without notice, for gross misconduct and breach of her employment contract. This is expressly stated by the Respondent in his Response to the claim, in witness statements, and in oral testimony before the court.

15. Summary dismissal is permitted under Section 44 of the Employment Act 2007 on grounds of gross misconduct or breach of contract of employment. The said Section provides that:

*“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*

*(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*

*(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.*

*(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—*

*(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*

*(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*

*(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

*(d)an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;*  
*(e)an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;*  
*(f)in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*  
*(g)an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”*

16. However, Section 41 of the Act provides that even in cases of summary dismissal on grounds of gross misconduct, the employer must adhere to the tenets of procedural fairness. It provides:

*(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.”*

17. The foregoing was confirmed by the Honourable Supreme Court, in the case of *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment)*, when it held that: “*After careful consideration of the appellant’s letter of appointment, clause 11 on notice of termination, provided that appellant’s employment was terminable without prior notice if found guilty of unsatisfactory conduct.*”

75. However, the procedure followed to terminate the contract was in breach of section 41 and 45 2(c) of the Employment Act for the reason that the appellant was not accorded a chance to defend himself or respond to the allegations against him. Although the letter of appointment provided for no prior notice when terminating the employment due to gross misconduct, that stipulation of the contract cannot be used to oust a mandatory and express statutory provision in section 41 of the said Act. Consequently, the failure to follow fair procedure rendered the termination of the appellant's employment unfair within the meaning of section 45 of the Act.

...It is evident that no hearing was demonstrated to have been conducted and the only inference one can draw is that the dismissal was unfair and unlawful for failing to accord the appellant a fair hearing.

The respondent was required to facilitate the termination in accordance with section 41(1) of the Employment Act in order to come within the ambit of fairness. The allegations that the appellant faced would have well been explained if granted the opportunity so as to avoid the harsh sanction of a summary dismissal as contemplated under section 41 of the Employment Act.

79. Moreover, section 44(4) of the Employment Act does not give an employer a blanket right to dismiss an employee at will. However, grave the circumstances of the employee's misconduct, he was entitled to be heard before he was dismissed."

18. Under Section 45 of the Act, in cases where unfair termination is alleged, the court must answer two questions: whether there was substantive justification and whether procedural fairness was complied with in the termination.

19. Under Section 47 (5) of the Act, a burden of proof is imposed on the Claimant to prove an unfair termination of employment has occurred. Section 47 (5) provides that:-

*“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”*

20. Once a Claimant has discharged his or her burden of proof, Section 47 (5) shifts the burden to the employer to prove that they had valid and fair reasons for the termination. This is in line with Section 43 of the Employment Act 2007 which provides that:

*“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.”*

21. Other than the reason for termination Section 45 (2) imposes on the employer an additional burden of proving that the procedure followed during the termination was fair. It provides:

*“(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.”*

22. Fair procedure is contextualized under the Section 41 of the Act to mean that the employer must 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, the employer must hear and consider any representations which the employee make, and the employer must consider those representations while making a final decision.

23. There is no doubt in my mind that the Claimant herein discharged her prima facie burden of proving that she was an employee of the Respondent; that she was terminated from employment; and that the termination of her employment was unfair, by producing her contract of employment and the discharge voucher executed by her on 14<sup>th</sup> November 2017.

24. The burden of proof then shifted to the Respondent to demonstrate that he had valid reasons for the Claimant's summary dismissal and that he followed fair procedure during her termination. It is quite surprising that the Respondent, as the custodian of employment records, did not see fit to produce any documents before this court to support his response.
25. Regarding the reason for termination, the Respondent avers that the Claimant breached her employment contract by: failing to perform and execute her duties in a reasonable manner that would contribute to the firm's success; knowingly failing and/or refusing to adhere to the Firm's rules and policies; and failing to comply with the Respondent's lawful and proper commands in the performance of her duties. However, the Respondent does not specify which duties the Claimant failed to perform, which rules and policies she flouted, or even which lawful commands she failed to obey. In fact, the Respondent's defense is presented in extremely vague and ambiguous terms.
26. Further, the Respondent states that the Claimant was involved in several disciplinary issues that caused disharmony amongst her colleagues at work by propagating malicious rumours about various employees concerning their personal lives, which nearly led to a physical fight in February 2017 or thereabouts. No details are provided of which employees were affected by the Claimant's alleged malicious rumours, and who was involved in the purported physical fight. The affected employees also did not testify as witnesses on behalf of the Respondent to corroborate his account of events. The court warned itself of the danger of a single witness as the testimony of Mr. Miller Advocate was not supported by documentation or corroborated by another employee who witnessed the said incidents.

27. After considering the Respondent's testimony, evidence or lack thereof, and failure to file supporting documents in totality, this Court finds that the Respondent did not discharge his burden of proving that he had valid reasons to summarily dismiss the Claimant from employment.

28. I now turn to the issue of procedural fairness. The Respondent is emphatic that he held a disciplinary meeting/hearing, which the Claimant attended, and she was granted an opportunity to respond to the claims of gross misconduct, but intentionally refused to give a reasonable explanation. The date of the said disciplinary meeting/hearing is not disclosed. The court is unable to decipher whether the Respondent is referring to the purported disciplinary meeting of February 2017 or thereabouts when the Claimant was allegedly warned against spreading malicious rumours against her colleagues, or the meeting purportedly held at the accountant's office in November 2017 or thereabouts prior to the summary dismissal. In any event, no minutes of any disciplinary hearing are produced by the Respondent. In addition to the above, the Respondent has not demonstrated that he issued the Claimant with a letter/notice to show cause why she should not be dismissed from employment particularizing the charges against her, and allowing her to respond to the same; that she was subjected to a disciplinary hearing where he offered an explanation, in a language that she understood, the reason why he was considering termination and that she was entitled to have another employee or a shop floor union representative of her choice present during this explanation; that he heard any representations which she made; and that he considered those representations prior to terminating her employment by way of summary dismissal. Consequently, the court finds that the Respondent has not proved that he complied with Section 41 of the Act on procedural fairness.

29. The Claimant's summary dismissal from employment was therefore unlawful and unfair.

Whether the claimant was entitled to relief sought

30. The Claimant sought payment of overtime and for performing extra duties. I note that the Claimant has not particularized her overtime claim by pleading with specificity the days she worked overtime and the number of extra hours she worked. She has also not indicated how long it took her to wash the motor vehicle of the firm's managing partner, which specific days she was engaged in cleaning the same, and/or how she has arrived at the claimed figure of Kshs. 168,000/- for this extra duty. For the foregoing reasons, the claims for overtime and pay for extra duties fail.

31. Under Section 49 (1) (c ) of the Employment Act 2007, upon making a finding that the termination of a Claimant's employment/summary dismissal was unfair, the court is clothed with power to award any of the remedies under section 49 (1)of the Employment Act. In considering the quantum of the award for compensation, the Court is required to take into account the following under Section 49 (4):

*“(a)the wishes of the employee;*

*(b)the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and*

*(c)the practicability of recommending reinstatement or re-engagement;*

*(d)the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;*

- (e)the employee's length of service with the employer;*
- (f)the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;*
- (g)the opportunities available to the employee for securing comparable or suitable employment with another employer;*
- (h)the value of any severance payable by law;*
- (i)the right to press claims or any unpaid wages, expenses or other claims owing to the employee;*
- (j)any expenses reasonable incurred by the employee as a consequence of the termination;*
- (k)any conduct of the employee which to any extent caused or contributed to the termination;*
- (l)any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and*
- (m)any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”*

32. The Claimant prays for the maximum compensation for unfair termination, that is, 12 months salary, while the Respondent urges the court to dismiss the Claimant's claim in its entirety as she was not unfairly dismissed. The respondent relied on the discharge voucher dated 14<sup>th</sup> November 2017 and produced by the claimant as her evidence and submitted that the claimant had discharged him from further claims. The court finds that the discharge voucher could only have been on terminal dues at time of termination which were paid of notice pay of 1 month and 14 days worked. Only the court can determine the fairness of termination, and thus the

right of access to court was not extinguished by the said discharge voucher, which was prepared by the respondent after the decision of termination.

33. Given the Claimant's length of service, approximately two and a half years; the callous manner in which the Respondent cut short her employment; the payment of notice and salary dues; and the fact that the Claimant was not at fault, as discussed herein, I hereby award the Claimant 4 months' salary as compensation for unfair termination. The Claimant's salary, as pleaded, was Kshs. 25,000/- per month, as evidenced by the payslips produced by her. She is therefore awarded Kshs. 100,000/- as compensation for unfair termination.

34. The prayer for general damages is declined as the same are not awardable for wrongful termination.

35. In the upshot the claim is allowed. Judgment is entered for the claimant against the respondent as follows-

a) A declaration is hereby issued that the Claimant's summary dismissal was unfair and unlawful.

b) The Respondent is ordered to pay the Claimant 4 months' salary as compensation for unfair termination, totalling Kshs. 100,000/-.

c) The Respondent is ordered to pay costs of the suit, plus interest at court rates from the date of judgment until payment in full.

36. 30 days stay is granted

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF  
FEBRUARY, 2026.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Isinta

Respondent: Ms. Lumbasio h/b Ms. Machio