

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

CAUSE NO. 506 OF 2018

TERENCE MUTESHI KHALEMBI.....
.....CLAIMANT

VERSUS

LANTANA GARDENS.....
.....RESPONDENT

JUDGMENT

Introduction

1. Before Court is the Claimant's Memorandum of Claim dated 21st February, 2018 and filed on 11th April, 2018. The Claimant seeks an order for payment of a sum of Kshs. 464,860 in terminal dues comprising salary in lieu of notice, annual leave, house allowance, service pay, leave allowance, compensation, and issuance of a certificate of service.
2. The Respondent entered an appearance dated 20th September, 2022, and subsequently filed the Respondent's Memorandum of Reply dated 27th September, 2022, in response to the Claimant's claim.
3. The Claimant's case was heard on 24th November, 2025, when the Claimant (CW1) testified in support of his case. He adopted his witness statement dated 21st February,

2018, and produced his document as an exhibit in the matter.

4. The Respondent's case was heard on even date. One Shadrack Ngare Nyaga (RW1) testified in support of the Respondent's case. He adopted his witness statement as his evidence in chief.
5. Submissions were received from both parties and have been duly considered.

The Claimant's case

6. The Claimant's case is that he was engaged by the Respondent in April 2012 as a gardener at a monthly salary of Kshs. 14,800. He avers that he was not issued a written contract of service and that he worked between 8 am and 5 pm throughout the week.
7. It is his case that he was neither housed by the Respondent nor paid a house allowance. He states that he exerted his effort and skills in the service of the Respondent to the best of his ability.
8. The Claimant states that on or about 1st December, 2017, his service was terminated without notice or any justifiable reason, and he was not paid his terminal dues.
9. He avers that he was not given an audience before the abrupt termination. He avers further that the termination was effected verbally.

10. The Claimant avers that he did not utilize his annual leave days and that at termination, he had worked a total of 68 months.
11. It is his case that the Respondent refused to register him and contribute to the NSSF and NHIF.
12. The Claimant further states that he was terminated without a hearing against the principles of natural justice and Section 41 of the Employment Act.
13. The Claimant avers that he was not paid his terminal dues, which he now claims, and was also not issued a certificate of service.
14. He avers that the termination caused him financial embarrassment as he could not meet his financial obligations.
15. On cross-examination, the Claimant stated that he did not know a worker named Oduor.
16. The Claimant prays that the court allow his claim as drawn.

The Respondent's Case

17. The Respondent's case is that it employed the Claimant until termination, but argues that his dismissal was justified due to gross negligence and admitted actions amounting to a criminal offense.

18. The Respondent denies that the Claimant was honest in its dealings, alleging that he was involved in theft. The Respondent states that the Claimant was bound by company rules upon signing the employment contract.
19. The Respondent further contends that there is no credible evidence to support the claim of unfair dismissal, arguing that there is no whiff of admissible evidence, save for impermissible conjecture and unfounded suspicion.
20. The Respondent states that the Claimant was responsible for the loss of scaffold shoes, as the said shoes were reported missing on the 3rd September 2017, a few days after they were returned to the Lantana Gardens, and received by the Claimant, and that the Claimant admitted receipt of the shoes.
21. The Respondent avers that the issue was reported to both Securex Security and Kilimani Police Station under OB 46/03/11/2017. It avers that the Claimant was called for a hearing at which he contradicted his earlier admission that he had received the scaffold shoes and kept them in the water tank room.
22. The Respondent states that the Claimant and another guard, together with Securex Security, had their services terminated regularly, and none of this has raised any issue.
23. The Respondent states that the Claimant was duly paid what was due to him at that time. It avers that during all

the times that he worked, there was no overtime, and that the Claimant only worked within the regulated hours.

24. The Respondent avers that the claimant was even paid the salary for December 2017, even though he was not at work.
25. The Respondent avers that there was sufficient basis for disciplinary action, and the Respondent has not wronged the Claimant in any way, arguing that there is proof that the issue was addressed fairly and the Claimant was advised of the outcome of the hearing in writing.
26. The Respondent denies owing the Claimant the sum of 464,860.00 or any sum at all.
27. On cross-examination, the Respondent's witness (RW1) told court that the Respondent had Securex Security providing security at its premises and that they were at work on the date the scaffolding shoes are said to have been stolen.
28. RW1 confirmed to the court that none of the Securex employees is a witness in this matter. He further confirmed that a Mr. Oduor, who was said to have handed the shoes to the Claimant, is also not a witness in the matter.
29. RW1 confirmed that the Claimant was neither charged with theft nor issued notice. He states that the Claimant was heard in a disciplinary hearing, but the minutes of the hearing have not been produced before the court.

30. RW1 further told the court that the Claimant was paid one month's salary in lieu of notice, but did not have proof of the payment before the court.

31. It is his testimony that the Claimant took his leave days, but the leave forms were similarly not produced in evidence before the court. He admitted that the claimant was not provided a house by the Respondent.

32. It is the Respondent's case that the Claimant is not entitled to the reliefs sought in the Claim and urges the Court to dismiss it with costs.

Analysis and Determination

33. The Court distills the following issues:-

- i. Whether the termination of the Claimant's services was fair.
- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the Claimant's services was fair

34. Termination of employment is considered fair and lawful where the employer adhered to the twin tenets of procedure and substantive fairness espoused under Sections 41, 43, 45, and 47 of the Employment Act, 2007.

35. Section 41 of the Employment Act states thus on procedural fairness:

"41(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."

36. By the foregoing provision, the Employment Act has made it mandatory for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated. ***(See Mary Mutanu Mwendwa v Ayuda [2013] eKLR).***
37. This position was affirmed in ***Angela Wokabi Muoki v. Tribe Hotel Ltd (2016) eKLR***, where the court held that the process of hearing and ensuring that an employee is given a fair chance to know the allegations against him is a mandatory requirement of the law.
38. The Respondent, through its witness RW1, confirmed the Claimant's assertion that he was not issued a written notice to show cause, and although he argued that a disciplinary hearing took place, no minutes of the said hearing were tendered in evidence. RW1 admitted that the Respondent had no documentation of the alleged hearing.

39. Further, the Claimant's assertion that the termination was verbal and without a hearing remains completely un rebutted. The Court of Appeal in ***Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR*** emphasized that procedural fairness is mandatory and must be demonstrated through evidence.
40. Similarly, in ***Loice Otieno v Kenya Commercial Bank Ltd [2013] KEELRC 271 (KLR)***, the Court held that failure to adhere to Section 41 renders termination unfair regardless of the reason.
41. In the end, I return that the Respondent failed to demonstrate compliance with the tenets of procedural fairness, rendering the termination procedurally unfair.
42. On substantive justification for the termination, the Respondent contends that the Claimant was terminated for theft of scaffolding shoes, which were handed to him by an employee named Oduor, and gross negligence. The Claimant denied knowledge of the theft and further denied knowing an employee named Oduor.
43. Under Sections 43 and 45 of the Employment Act, an employer must prove valid and fair reasons for termination of employment to be considered fair and lawful.
44. The Respondent did not produce a witness either from Securex security, or the said Oduor to testify to corroborate

the allegation of theft. It also did not produce any documentary evidence in support of the allegation.

45. It is also not disputed that the Claimant was not charged or convicted of any criminal offense, and the alleged “admission” was contradicted and not formally documented before Court.

46. In ***Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386 (KLR)***, the Court stated that for termination to pass the fairness test, it must be both substantively justified and procedurally fair.

47. In the final analysis, I find and hold that the Respondent failed to prove, on a balance of probabilities, that the Claimant committed theft or gross negligence to justify termination of his employment. The reason for termination is therefore neither valid, fair, nor reasonable.

48. I conclude by holding the termination of the Claimant’s employment both procedurally and substantively unfair and unlawful.

Whether the Claimant is entitled to the reliefs sought

49. Having found the Claimant’s termination of service unfair, I proceed to make the following awards:-

Notice Pay

50. The Respondent did not lead any proof that a payment in lieu of notice was made to the Claimant. Section 35 of the

Employment Act demands that an employer either issue one month's notice or pay in lieu.

51. The claim is merited and awarded as prayed.

House Allowance

52. RW1 admitted that no housing was provided to the Claimant. Under Section 31, house allowance is mandatory unless the salary is consolidated.

53. The claim succeeds.

Annual Leave

54. The Respondent did not produce any leave records despite the statutory duty placed on it under Section 74 of the Employment Act.

55. In the absence of contrary evidence, the Claimant's assertion stands, and the claim succeeds and is awarded as prayed.

Service Pay

56. The Respondent did not provide proof that it deducted and remitted contributions in respect of NSSF, giving merit to the claim of service pay, and the same is granted as prayed.

Compensation for unfair termination

57. The Claimant was in the service of the Respondent for about five (5) years. Considering his length of service and the chances available for him of securing alternative comparable employment, I deem an award of six (6)

months' salary sufficient compensation for the unfair termination.

58. In conclusion, the Claimant's claim succeeds, and orders granted as follows:-

- a) A declaration that the Claimant's employment was unfairly and unlawfully terminated.
- b) That the Respondent shall pay the Claimant:
 - i. One month's salary in lieu of notice at Kshs. 14,800/-
 - ii. House allowance at Kshs. 133,200/-
 - iii. Annual leave at Kshs. 74,000/-
 - iv. Service Pay at Kshs. 37,500/-
 - v. Six months' salary as compensation for the unfair termination at Kshs. 88,800/-
- c) That the Respondent shall issue the Claimant a certificate of service within 14 days of this Judgment.
- d) That the Respondent shall bear the costs of the suit and interest from the date of this judgment until payment in full.

59. It is so ordered.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 16TH DAY OF APRIL, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Khalwale present for the Claimant

Mr. Makori present for the Respondent

Ms. Esther S- C/A

ORIGINAL