

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT  
NAIROBI**

**ELRC CAUSE NO E1088 OF 2023**

**KENNETH  
MWANGI.....CLAIMANT**

**VERSUS**

**MULTIGRAPH MACHINERY (K)  
LTD.....RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant instituted these proceedings against the Respondent to claim compensation for alleged unfair termination of his contract of service. He contends that the Respondent hired his services as an Engineer with effect from 5<sup>th</sup> May 2023 but terminated the contract on 30<sup>th</sup> November 2023.
2. The Claimant avers that the Respondent's decision to terminate the contract was unfair and unlawful. He contends that the Respondent did not give him valid reasons for the decision. Further, he contends that the Respondent did not accord him a chance to defend himself against whatever allegations it had against him. As such, he prays for the various reliefs which are set out in the Memorandum of Claim.

3. The Respondent has opposed the claim. Whilst admitting that the parties had an employment relationship, it contends that the Claimant did not discharge his duties satisfactorily.
4. The Respondent accuses the Claimant of having handled assignments which were allocated to him poorly and negligently thus occasioning it (the Respondent) and its clients losses. It has set out particulars of the incidents when the Claimant is accused of having improperly executed his duties. These include:-
  - a) Inputting a wrong fuse in a web printing machine belonging to English Press Ltd.
  - b) Failure to diagnose and fix basic electrical problems in the aforesaid web printing machine.
  - c) Failure to repair a drive card in a digital machine belonging to Capital Printers Ltd.
5. The Respondent asserts that due to the Claimant's negligence, the motor in the machine belonging to English Press Ltd got destroyed forcing it (the Respondent) to incur costs in repairing the machine. Further, it contends that it had to hire the services of engineers from Manugraph, India and pay for their travel to come and rectify the problem.
6. The Respondent avers that owing to the Claimant's inability to repair the clients' machines, the clients kept complaining about the poor services it (the Respondent) was rendering to them. It further contends that it was forced to buy wrong

parts after the Claimant made wrong diagnosis thereby incurring unnecessary losses.

7. The Respondent contends that it issued the Claimant with warnings but his services did not improve. It contends that as a result of his poor performance, it issued him with a notice to show cause before it terminated his services.
8. The Respondent contends that termination of the Claimant's contract was based on the notice clause in the contract between the parties. As such, it contends that the decision was lawful.
9. The Respondent contends that it notified the Claimant to collect his terminal dues. However, it avers that he declined to do so.
10. The Respondent has counter-claimed for the sum of Ksh. 1,452,112.12 being the amount it allegedly incurred to redress the Claimant's missteps. It has provided particulars of the expenditures which make up the amount.
11. The Claimant filed a response to the counter-claim denying the accusations of negligence against him. However, he did not file a witness statement to controvert the counter-claim. Neither did he testify on the matter during his oral testimony in court.

### **Issues for Determination**

12. After evaluating the pleadings, evidence and submissions by the parties against the applicable law, the following issues emerge for determination:-

- a) Whether the contract of service between the parties was improperly terminated.
- b) Whether the Claimant is entitled to the reliefs which he seeks in the claim.
- c) Whether the Respondent's counter-claim is merited.

### **Analysis**

- 13. It is not in dispute that the parties had an employment relationship. As such, the relationship was subject to the applicable employment law.
- 14. Sections 41, 43, 44, 45 and 47 of *the Employment Act* allow for termination of a contract of service on various grounds including poor performance. Section 41 of the Act obligates the employer to notify the employee of the reasons upon which he proposes to terminate his (the employee's) contract and to accord him (the employee) an opportunity to be heard before the decision to terminate his contract is made. Sections 43 and 45 of the Act place the burden of justifying the decision to terminate a contract of service on the employer.
- 15. Although sections 35 and 36 of the Act make provision for notice to terminate a contract of service and for payment in lieu of the termination notice, the position of the law in Kenya is that it is no longer permissible for the employer to invoke the termination clause in a contract of service to terminate the contract without providing justification for the decision and giving the affected employee and opportunity to

be heard before the decision is rendered. This is because the current legal architecture on employment law in Kenya has, in large part, done away with the concept of employment at will which entitled employers to terminate contracts of service with or without reason.

16. Speaking to this reality in the case of ***Kenfreight (E.A.) Limited v Benson K.Nguti [2016] KECA 688 (KLR)***, the Court of Appeal expressed itself on the matter as follows:-

*“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 a 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 is taken.”*

17. Having regard to the foresaid, the Respondent’s contention that it was entitled to terminate the Claimant’s services upon notice without more is flawed. In addition to issuing the Claimant with notice to terminate his contract, the Respondent was duty bound to provide him with an opportunity to be heard before the decision to terminate his contract was made.

18. From the evidence on record, the main reason why the Respondent terminated the Claimant's services was the alleged poor performance by the latter. As noted earlier, section 41 of *the Employment Act* recognizes this as one of the grounds to terminate a contract of service.
19. Poor performance denotes the inability by an employee to discharge his duties to the standard which is expected of him by the employer. This presupposes that the parties to the employment contract had set performance targets which the employee has failed to meet.
20. For poor performance to pass muster as a ground for termination of a contract of service, the following must be demonstrated:-
  - a) The employee was notified of the targets he was to meet within a specified timeframe beforehand.
  - b) The targets were reasonable and achievable.
  - c) The employer had developed an objective matrix for measuring attainment of the agreed targets.
  - d) The employee was evaluated on the agreed targets and his performance was found to have fallen short of expectation.
  - e) The employee was given an opportunity to improve with the support of the employer, usually by being placed on a performance improvement plan.
  - f) Despite this, the employee's performance still fell below the expected standard.

- g) The employee was subjected to a performance hearing to justify his failure to meet the expected performance targets but failed to provide a reasonable account for the state of affairs.
21. These requirements are not codified in legislation. They have largely developed through case law (see for instance ***Mukala v Ol Tukai Lodge Ltd [2013] KEIC 634 (KLR) & Dayo v Ecart Services Kenya Limited [2025] KEELRC 139 (KLR)***).
  22. Although the Respondent has accused the Claimant of poor performance, there is no evidence to demonstrate that it accorded him an opportunity to improve with the necessary support before his contract was terminated. There is no evidence that the Claimant was placed on a performance improvement plan but still failed to perform. There is no evidence that he was subjected to a performance hearing before his contract was terminated.
  23. All the Respondent did was to issue the Claimant with a notice to show cause before it terminated his contract on notice. As has been demonstrated earlier, this was not sufficient to validate the impugned decision.
  24. The Respondent may have had valid grounds to terminate the Claimant's contract. However, it did not follow the laid down procedure in rendering its decision. As such, the decision is declared unfair and unlawful.

25. The next issue for determination is whether the Claimant is entitled to the reliefs which he seeks in the Memorandum of Claim. The Claimant prayed for a declaration that the Respondent's decision to terminate the contract of service between the parties was unlawful. This relief has already been granted.
26. The Claimant has also prayed for compensation for wrongful termination of his contract. He prays for an amount which is equivalent to his salary for twelve months.
27. The court notes that the parties had a one year fixed term contract which was to lapse through effluxion of time on 30<sup>th</sup> April 2024. At the time the contract was terminated, the Claimant had already served part of the term leaving a balance of five months only. As such, the claim for compensation equivalent to his salary for twelve months is misguided.
28. Under section 49 of *the Employment Act*, the court is required to take into account various factors whilst assessing the quantum of compensation to be awarded to an employee whose contract of service has been improperly terminated. These include whether the employee's conduct contributed to the decision to terminate the contract.
29. In this case, the Respondent has presented cogent evidence to demonstrate that the Claimant's poor performance contributed to the decision to terminate his services. But for the improper procedure which it (the Respondent) adopted

to terminate the contract, it is apparent that the decision was justified. Taking this into account, the court awards the Claimant compensation for unfair termination of his contract which is equivalent to his salary for two months.

30. According to the evidence on record, the Claimant's monthly salary was Ksh. 120,834.00. As such, the amount awarded to him as compensation for unfair termination of his contract is Ksh. 241,668.00.
31. The Claimant has prayed for one month's salary in lieu of notice to terminate his contract. However, the evidence on record shows that his contract was terminated on notice. As such, the claim for notice pay is declined.
32. The Claimant also prays for salary for the unexpired term of the contract. However, this relief is not available since it is contrary to public policy to compel an employer to pay salary for services which have not been rendered.
33. The law is that where a contract of service has a provision for notice to terminate it, the court should not order for payment of salary for the unexpired term under the contract unless the contract has provision permitting such relief (***Nduru v Avenue Service Station Ltd [2025] KEELRC 1939 (KLR)***). Clause four of the Claimant's contract provided for notice of one month to terminate the contract. As such, the Claimant is not entitled to claim for salary for the unexpired term of the contract.

34. The Claimant has prayed for interest on the sum awarded to him. The court awards him interest on the amount at court rates from the date of this decision.
35. The amount awarded to the Claimant is subject to the applicable statutory deductions at the time the contract between the parties was terminated.
36. The next question to be addressed is whether the Respondent is entitled to the reliefs it seeks in the counter-claim. As noted earlier, the Respondent claims for Ksh. 1,452,112.12 being the amount it allegedly lost owing to the Claimant's negligence. Besides pleading this amount, the Respondent provided evidence to support the claim. This is contained in the written witness statement by its witness which was adopted during trial and the various defense exhibits which were tendered in evidence.
37. As noted earlier, although the Claimant disputed the claim by filing a defense against it, he did not tender evidence on the matter. He did not file an addendum witness statement to controvert the claim. Neither did he address the matter during his oral testimony in court.
38. The foregoing being the case, the court finds that the Claimant did not controvert the counter-claim. As such, the counter-claim stands proved on a balance of probabilities. Accordingly, the court enters judgment for the Respondent for Ksh. 1,452,112.12 as claimed in the counter-claim.

39. The Respondent is granted interest on the aforesaid amount at court rates from the date of this decision.
40. Since the parties have succeeded on their respective claims, the costs due to each of them offset each other with the consequence that there is no order as to costs.

### **Summary of the Decision**

41. After evaluating the pleadings and evidence on record against the applicable law, the court makes the following findings and attendant orders:-

a) On the Primary Claim:-

- (i) The court finds and declares that the Respondent improperly terminated the contract of service between the parties.
- (ii) The court awards the Claimant compensation for unfair termination of his contract in the sum of Ksh. 241,668.00.
- (iii) The court declines to grant the Claimant's plea for salary for the unexpired term of his contract.
- (iv) The court declines the claim for notice pay.
- (v) The court awards the Claimant interest on the amount awarded at court rates from the date of this decision.
- (vi) The award to the Claimant is subject to the applicable statutory deductions at the time the contract between the parties was terminated.

b) On the Counter Claim:-

- (i) The court allows the Respondent's counter-claim in the sum of Ksh. 1,452,112.12.
- (ii) The court grants the Respondent interest on this amount at court rates from the date of this decision.
- (iii) Since the parties have succeeded on their respective claims, the costs due to each of them offset each other with the consequence that there is no order as to costs.

**Dated, signed and delivered on the 30<sup>th</sup> day of April, 2026**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having**

**waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**