

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

ELRC CAUSE NO. E070 OF 2024

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF COMMERCIAL AND
FOOD ALLIED WORKERS CLAIMANT**
VERSUS

NYAORI & ASSOCIATES
RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Labour Relations Act and is mandated in its constitution under Rule No. 5 to represent employees in the commercial and food sector.
2. The Respondent is a registered firm carrying on business as auditors in Eldoret City.
3. The Claimant filed the instant suit on behalf of Sarah Jepkorir Ruto, its member, herein after referred to as “the Grievant”. The Claimant filed a copy the Grievant’s membership Card and receipts for payment of union dues as evidence of membership.

4. It is the Claimant's case that the Grievant was employed by the Respondent as a secretary on 5th July, 2001 at a salary of Kshs. 7,500. Her employment was terminated on 2nd August, 2023. At the time of termination her salary was Kshs. 11,000 per month.
5. The Grievant was not registered under NSSF, NHIF or Income Tax-Pay as You Earn (PAYE). No deductions were made from her salary.
6. It is the Grievant's case that she was paid in cash and signed in a payroll which was kept by the Respondent.
7. The Grievant was neither issued with a contract of employment nor a letter of termination of her employment.
8. It is the Claimant's case that on 31st July, 2023 the Grievant worked as usual until 5 pm when she was called by the Director Mr. James Otieno and informed that she should not report to work on 1st August, 2023. She was told to report on 2nd August 2023.
9. The Grievant avers that when she reported to work on 2nd August, 2023 the Director Mr. Otieno verbally terminated her employment on grounds that the Respondent could no longer afford to pay her salary.

10. The Grievant immediately reported the termination of her employment to her trade union, the Claimant herein, who tried to resolve the matter amicably at shop level. No amicable resolution was achieved forcing the Claimant to report a dispute to the Minister for Labour and Social protection by letter dated 24th October, 2024.
11. The Minister accepted the dispute and by letter dated 1st November, 2023 appointed Ms. Josephine Tenya of Eldoret County Labour Office as Conciliator.
12. The conciliator invited the parties for conciliation meetings on 14th November, 2023 and 21st November, 2024 which were attended by the Claimant but the Respondent failed to attend. On 5th January, 2024 the conciliator issued a Certificate of Unresolved Dispute paving way for the filing of the instant suit, as provided under the Labour Relations Act.
13. In the statement of Claim dated 27th August, 2024 the Claimant avers that the termination of the Grievant's employment by the Respondent was unfair and seeks the following remedies:
 - (i) Pay the grievant as follows: -

(a) Notice pay	
	21,778.00
(b) 3 years severance pay	
	198,828.00
(c) Two days worked in August 2024	
	1,820.00
(d) 8 months pro rata leave	12,958.00
(e) 3 years underpayment	
	1/5/2020 - 30/4/2022 202,656.00
	1/5/2020 - 30/4/2023 129,336.00
(f) 12 months compensation	<u>227,232.00</u>
Total	<u>794,608.00</u>

- (ii) Certificate of service
- (iii) Cost of the suit to the Claimant
- (iv) Any other order the Honourable Court deems fit to address the cause of justice.

14. The Respondent initially did not file a response to the Claim and the suit was heard as an undefended suit on 29th September, 2025. The Respondent however successfully applied for setting aside of the ex-parte proceedings and leave

to defend the suit vide its application dated 26th September, 2025.

15. The Respondent filed a Response to Statement of Claim dated 16th May, 2025 in which it denied employing the Grievant in 2001, contending that the Respondent was not in existence then as it was registered on 29th May, 2023.
16. It is the averment of the Respondent that the Grievant was an independent contractor engaged by James Nyaori, an employee of the Respondent on a non-exclusive, task-specific basis, to offer typing and document preparation services as and when need arose. The Respondent further denied that James Nyaori was its director.
17. The Respondent further averred that the Grievant did not work regularly and was only called to work between the 1st and the 9th day of the month for filing of KRA Tax Returns. That the Grievant was therefore not on the pay roll of the Respondent as she received payments per assignment and had control over how and when the services were rendered.
18. The Respondent denied terminating the services of the Grievant. It further avers that it had a right to discontinue the

services of independent contract providers and such discontinuation did not amount to dismissal or redundancy under the Employment Act.

19. The Respondent denied that the Grievant is entitled to any of the orders sought in the Statement of Claim and prayed that the Claim be dismissed with costs.

Evidence

20. The suit was heard on 8th December, 2025 when the Grievant, Ms. SARAH JEPKORIR RUTO testified as CW1 on behalf of the Claimant and Mr. HESBORN ODHIAMBO NYAORI testified as RW1 on behalf of the Respondent. Both witnesses adopted their witness statements and the documents filed in court as their respective testimonies. By and large, they reiterated what had been pleaded in the Statement of Claim and the Response to Statement of Claim. The parties thereafter filed and exchanged written submissions.

Analysis and Determination

21. Having considered the pleadings and evidence on record and having considered the evidence adduced by both the

Claimant's and Respondent's witnesses, the issues for determination are the following:

- i. Whether there existed an employment relationship between the Grievant and the Respondent.
- ii. Whether the termination of the Grievant's employment was unlawful and unfair
- iii. Whether the Claimant is entitled to the reliefs sought in the Statement of Claim.

Whether there existed an employment relationship between the Grievant and the Respondent.

22. On the first issue, the Grievant testified that she was employed by the Respondent from 5th July 2001 until 2nd August 2023 when her employment was terminated by the Director of the Respondent, one James Otieno. She produced a copy of her union membership card and receipts showing payment of union dues to the Claimant.
23. The Respondent, through Hesbon Nyaori testified that it was registered on 29th May, 2003 under the Business Names Act and could not have employed the Grievant on 5th July, 2001. It

was further the Respondent's position that the Grievant was an independent contractor called upon to offer typing and document preparation services as and when need arose. The Respondent denied paying the Grievant a salary and insisted that she was compensated as an independent contractor for tasks undertaken.

24. The Respondent further insisted that the Grievant did not work daily but was called to work between the 1st and 9th day of the month when the Respondent was filing KRA tax returns. That the Grievant was therefore not on the Respondent's payroll.
25. During examination in chief RW1 stated that he was the proprietor of Nyaori & Associates and he was the only one with mandate to employ staff. He denied knowing the Grievant or authorizing anybody to employ her on his behalf.
26. The Respondent did not adduce any evidence to support its position that the Grievant was an independent contractor. No invoice or payment chit was produced in support of the averment that the Grievant was an independent contractor.
27. The Grievant on the other hand denied ever working with or for Hesbon Odhiambo Nyaori, RW1 or receiving payment from him.

She insisted that she was employed and paid by James Otieno Nyaori, whom she knew to be a Director of the Respondent.

28. When asked the location of the Respondent's office in Eldoret, RW1 was unable to pinpoint the building, only responding vaguely that it was somewhere near a chemist, meaning that he did not know the location of the office, which by his admission, was run by James Otieno Nyaori. RW1 stated that James Otieno Nyaori was his employee.
29. It is on record that in an application dated 28th February, 2025 seeking stay of further proceedings in this suit, James Nyaori swore an affidavit dated 28th February, 2025 in support of the application in which he described himself as the proprietor of the Respondent and well conversant with the facts of this matter.
30. RW1 on the other hand averred that the said James Otieno Nyaori was his employee.
31. From the evidence on record the court is convinced that the Grievant was an employee of the Respondent, having been engaged by James Otieno Nyaori who was running the Respondent's Eldoret office.

Whether the termination of the Grievant's employment was unlawful and unfair

32. The Grievant's evidence is that she was called by the Director on 31st July 2023 and told not to report to work on 1st August 2023 but to report on 2nd August, 2023. That when she reported to work on 2nd August, 2023 as advised she was told that the Respondent could no longer afford to pay her salary and that her employment was thus terminated.
33. The Respondent did not either admit or deny this averment. The Respondent did not explain how the relationship between it and the Grievant came to an end.
34. Section 41 and 43 of the Employment Act require an employer to prove the reason for termination and take the employee through due process. If the Grievant's averments are true that the Respondent's Director informed her it could no longer afford her salary, and I have no reason to doubt the same in the absence of a rebuttal by the Respondent, then the separation was a redundancy as defined in section 2 of the Act

with the procedure for disengagement provided for in section 40 of the Act.

35. If it was a normal termination then the procedure should have been that provided for in sections 41, 43 and 45 of the Act.
36. The Respondent having not controverted the evidence of the Grievant, it is clear that she was neither taken through the redundancy process under section 40 or due process under sections 41 and 43. The separation therefore was an unfair termination of her employment by way of redundancy, going by the reason for the termination. I find and declare accordingly.

Whether the Grievant is entitled to the reliefs sought in the Statement of Claim.

37. The final issue is whether the Claimant is entitled to the remedies sought in the Statement of Claim.
38. Having found that the termination of the Grievant's employment was unfair, and that it was a redundancy, the Court will now consider whether the Grievant is entitled to the remedies sought in the Statement of Claim. I will consider the prayers under separate heads.

39. Before considering the prayers I must first deal with the issue of the correct salary of the Grievant, noting that the remedies are dependent on the same.
40. Sections 3(6) and 26 of the Employment Act and Section 48 Labour Institutions Act provide as follows:

Employment Act

Section 3(6)

Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

Section 26.

Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or

enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

Section 48 Labour Institutions Act

Wages Order to constitute minimum terms of conditions of employment.

48.(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of

employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to—

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order,

commits an offence.

41. Guided by the foregoing provisions of the law, the Grievant was entitled to the minimum wage prevailing at the time of the termination of her employment.

42. Remedies:

i. Notice Pay

The Claim under this head is for Kshs. 21,778.00. According to section 49(1) pay in lieu of notice is consolidated meaning that it is composed of basic pay plus house allowance which under the General Order for

2022 applicable at the time of termination of the Grievant's employment was Kshs. 18,936.85 + 15% (18,936.85 x 15/100) = 21,778.00.

I award the Grievant pay in lieu of notice in the said sum of Kshs. 21,778.00.

ii. Severance pay

The termination of the Grievant's employment having been due to lack of funds to retain her in employment, it was a redundancy. She is thus entitled to severance pay at 15 days per year worked as provided under section 40(1)(g) of the Act. Having worked from 2001 to 2023, she served for 22 years. The Grievant is awarded Kshs. 198,828 as claimed.

iii. 2 days worked in August, 2023

The Grievant having been terminated on 2nd August, 2023, she is entitled to pay up to 2nd August, 2023 which I award her at (21,778/26 working days in a month) x 2 = 1675.20)

I award her Kshs. 1,675.20 under this head.

iv. 8 months prorated leave

The Claimant is entitled to pro-rata leave at 1.75 days per month as provided in section 28(1) of the Act. Having left employment on 2nd August, 2023, she is entitled to annual leave for the 7 completed months at $(7 \times 1.75 = 12.25 \text{ days} \times \text{daily rate of pay } (18,936.85/26) = 8,922.20$.

I award her Kshs. 8,922.20 under this head.

v. 3 years' salary underpayment

The Grievant was underpaid based on the Regulation of Wages (General) (Amendment) Order, 2018 which was applicable in 2023. The Grievant having been entitled to Kshs. 21,778 and having been paid Kshs. 11,000 per month, she is entitled to the difference as underpayments.

I award her the same at $(21,778 - 11,000 \times 36) = 338,008$.

I award the Grievant underpayments in the sum of Kshs. 338,008.

vi. Compensation for Unfair Termination

Taking into account the Grievant's length of service of 22 years, the grounds for termination and all relevant factors under section 49(4) of the Act, I award the Grievant 12 months' salary as compensation in the sum of Kshs. 261,336.

43. The Respondent is directed to issue the Grievant a Certificate of Service within 30 days from the date of this judgment.
44. The Respondent shall pay the Claimants costs which I assess at Kshs. 50,000.
45. Interest shall accrue at court rates from date of judgment.
46. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET
ON THIS 7TH DAY OF MAY, 2026**

**MAUREEN ONYANGO
JUDGE**