



REPUBLIC OF KENYA



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**Nyambu v Consolbase Limited (Cause 62 of 2019)
[2025] KEELRC 260 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 62 OF 2019
AK NZEI, J
JANUARY 31, 2025**

BETWEEN

BALDWIN MWANYALO NYAMBU CLAIMANT

AND

CONSOLBASE LIMITED RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent vide a Memorandum of Claim dated 17th September, 2019 and filed in this Court on 18th September, 2019, and sought the following reliefs:-
 - a. A declaration that the Claimant was employed on permanent basis.
 - b. [Payment] in lieu of termination notice ... Kshs.116,100/=.
 - c. Unpaid leave for ten years @ Kshs.116,100/= Kshs.1,393,100/=.
 - d. Gratuity Kshs.116,100/2 x 10 years Kshs.580,500/=.
 - e. Unpaid overtime (Sundays & holidays) Kshs.3,214,080/=.
 - f. 12 months' pay for unfair termination @ Kshs.116,100/= Kshs.1,393,100/=.
 - g. General damages for unfair termination.
 - h. Recommendation letter.
 - i. Costs of the suit and interest.
 - j. Any other relief as the Court may deem just.
2. The Claimant pleaded:-



- a. that he was employed by the Respondent on 1st January, 2008 as a Machine Operator/Reach Staker (loading and off-loading trucks), earning a monthly salary of Kshs.116,000/=, and worked from the said date upto 30th April, 2019 when he was summarily dismissed without any prior warning or notice.
 - b. that while on off-duty on 28th April, 2019, which was a Sunday, the Claimant was asked to report on duty, which he did; and that this changed his following day's shift (29th April, 2019) to night shift.
 - c. that on 29th April, 2019, the Claimant was called and asked to report to the Human Resource Office; and that when he reported to the said office, he was accused of having left his place of work unattended, and of damaging a company vehicle (Reg. No. KCG 535E) on 28th April, 2019.
 - d. that when the Claimant reported on his night shift on 29th April, 2019, at 7.00 pm, he was denied access, and was asked to report back on 30th April, 2019.
 - e. that on 30th April, 2019, however, the Claimant was given a dismissal letter dated 30th April, 2019, a show cause letter dated 29th April, 2019 and a dues letter dated 30th April, 2019; and was asked to leave the Respondent's premises.
3. The Claimant further pleaded that termination of his services by the Respondent without notice was contrary to the laid down procedure, was based on vendetta and peddled falsehoods, was unfair, and was without justification.
 4. Documents filed alongside the Claimant's Memorandum of Claim included an affidavit in verification of the claim, the Claimant's written witness statement and a list of documents dated 17th September, 2019, listing 11 documents. The listed documents included copies of a certificate of service (dated 30th April, 2019), a notice to show cause letter (dated 29th April, 2019), a summary dismissal letter dated 30th April, 2019, a summary dismissal and dues letter dated 30th April, 2019, a payslip for January 2019, a letter by the National Commission on Human Rights dated 23rd July, 2019, a letter from the Ministry of Labour dated 24th July, 2019, a demand letter dated 29th July, 2019, reply to the demand letter dated 8th August, 2019 and the Claimant's national identity card.
 5. The Respondent entered appearance on 22nd October, 2019 and subsequently filed Response to the Claimant's claim on 9th January, 2020, admitting having employed the Claimant as a Machine Reach Staker at a consolidated monthly salary of Kshs.116,000/=, but denying his claim herein.
 6. The Respondent pleaded that on or about 28th April, 2019, the Claimant in the company of one Sammy George Simiyu and one Ezra Mugaisi, using the Respondent's motor vehicle [Registration Number] KCG 535E, left the Respondent's work place without authority, returned with the said vehicle severely damaged and failed to explain how the said damage had occurred. That the Claimant was on 29th April, 2019 issued with a show cause letter dated 29th April, 2019 and was invited to a disciplinary hearing on a specified date, time and place; and was informed of his right to be accompanied by a colleague to the disciplinary hearing.
 7. The Respondent further pleaded:-
 - a. that the Claimant did not respond to the show cause letter, but duly attended the disciplinary hearing with Ezra Mugaisi as his witness; but failed to exonerate himself, leaving the Respondent with no choice but to terminate him.



- b. that the Claimant was formally terminated, and his final dues were paid and a certificate of services issued.
 - c. that the Respondent would, at the trial of the suit, seek the Court's leave to avail CCTV footage showing the said incident and damage to the Respondent's motor vehicle.
8. Documents filed alongside the Respondent's said Response included a show cause letter dated 29th April, 2019, a one page hand-written document titled "disciplinary hearing for Baldwin Nyambu on 30/4/ 2019", a summary dismissal letter dated 30th April, 2019, the Claimant's payslip for April 2019, final settlement sheet dated 30th April, 2019 and a certificate of service dated 30th April, 2019.
9. On 4th October, 2021, the Respondent filed a written witness statement of Suad Said dated 30th September, 2021 and an undated hand-written statement of one Ezra Mugaisi. The Respondent's Notice of Motion dated 12th May, 2022, seeking leave to file further documents after the Claimant had testified and closed his case, was dismissed by this court vide a Ruling that was delivered on 3rd November, 2022.
10. Trial commenced before me on 1st February, 2022. The Claimant adopted his filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 4 of this Judgment. The Claimant further testified:-
 - a. that he worked for the Respondent for eleven years, and that his reporting [time] depended on the shift as there were both day and night shifts. That he earned a monthly salary of Kshs.91,100/= and Kshs.25,000/= house allowance, a total of Kshs.116,100/=.
 - b. that the Claimant was never given leave during the eleven (11) years that he worked, and was never paid any money in lieu of leave; and was never paid overtime although at times he got into night shift at 7.00 pm and worked until 7.00 am.
 - c. that while on off on 28th April, 2019, the Claimant was telephoned by the Respondent's Assistant Terminal Manager (at around 8.00 am) and was asked to report to work, which he did; and that on his way back home after finishing the work that he had been called to do, the Respondent company's van caught up with him, and that inside the car were the Assistant Terminal Manager (Ezra) and the vehicle's driver. That the two asked the Claimant to show them a place where they could eat something.
 - d. that after eating, the Claimant and the said two other persons went back to the Respondent's premises, and as they found trucks waiting to deliver containers, the Claimant worked until 3.00 pm when a colleague, (a Machine Operator) relieved him; and he signed off and went home. That the Claimant went to work on 29th April, 2019.
 - e. that on 30th April, 2019, the Respondent's Human Resource Officer telephoned the Claimant and asked him to report to his office, whereat he was asked to sign a blank paper and to wait outside. That he was later called back and given a summary dismissal letter dated 30th April, 2019, a certificate of service dated 30th April, 2019 and a show cause letter dated 29th April, 2019. That the Claimant was not given any money.
 - f. that the Claimant had not been invited for any meeting, and had not been informed to be accompanied by a witness/interpreter, although the purported minutes [produced by the Respondent] are shown to be in a language that the Claimant did not understand. That the purported notice to show cause was given to the Claimant together with the dismissal letter.



- g. that the Claimant did not know anything about the Respondent's alleged damaged vehicle, and had not been shown any inspection report, a police abstract or photographs of the alleged damaged vehicle.
 - h. that although the Claimant was on 30th April, 2019 given a tabulation of dues, stating his dues as Kshs.17,861.5, the said sum was never paid to him, and that the said document was not signed.
 - i. that Ezra Mugaisi is shown to have sat at the purported meeting of 30th April, 2019; and yet he was the one who authorised the company van to get out of the company [premises]. That the Claimant and Simiyu were terminated at the same time, while Ezra is still working.
 - j. that the allegation that the Claimant called Ezra to accompany him to the [disciplinary] meeting is untrue, as Ezra was the Claimant's senior/boss, and that the Claimant could not have called him [Ezra] to accompany him.
11. Cross-examined, the Claimant testified:-
- a. that while on off on 28th April, 2019, which was a Sunday, he was called to the office to open the gate; that there was no work going on then.
 - b. that at the Restaurant, they (Ezra and Simiyu) ordered for a goat head and whiskey, which they ate and drank as the Claimant went to his sister's place near-by. That after they finished eating, the Claimant and the said two persons went back to work.
 - c. that the show cause letter stated that the Claimant had left his work unattended; and that the Claimant had signed for the said letter, which was given to him on 30th April, 2019.
 - d. the Claimant denied having neglected his work, absconded, or having gotten intoxicated.
 - e. that according to the Claimant's payslip for April 2019, the Claimant had been paid leave travelling allowance, and was a member of both NSSF and a pension scheme. That upon termination, the Claimant collected is pension.
 - f. that according to the Respondent's tabulation, the Claimant had 4 pending leave days.
 - g. That the Claimant did not attend a disciplinary meeting, and that the minutes paper, which is hand-written, was blank when he signed it, save for the names written thereon. That the Claimant signed against his name.
12. Re-examined, the Claimant testified that he was employed in January 2008, and that the Respondent had not demonstrated leave payment for the other years from 2008. That all the documents exhibited by the Respondent were given to the Claimant on 30th April, 2019. That the signature on the show cause letter dated 29th April, 2019 did not belong to the Claimant, that the letter does not state the date and time when it was delivered to the Claimant, and that no delivery book had been exhibited to demonstrate delivery of the letter.
13. The Respondent called one witness, Sauda Said (RW-1), the Respondent's HR Administrator, who adopted his filed witness statement dated 30th September, 2021 as his testimony; and produced in evidence the Respondent's documents referred to at paragraph 8 of this Judgment. RW-1 further testified that the Claimant was employed by the Respondent as a Machine Operator – removing cargo from containers. That on 28th April, 2019, the Claimant, Sammy George Simiyu and Ezra Mugaisi left work in the morning hours without permission (in the company vehicle) Registration No. KCG



535E, went out and got drunk. That the company vehicle was driven by Sammy Simiyu, and that the vehicle got damaged.

14. RW-1 further testified:
 - a. that the three (3) employees (the Claimant, Ezra and Sammy Simiyu) got drunk, and that the Claimant and Sammy Simiyu were dismissed while Ezra was demoted.
 - b. that the Claimant's dues, which included 4 pending leave days, were calculated and were paid. That the Claimant had taken all his leave days. That the Respondent had exhibited the Claimant's payslip for April 2019 and a settlement sheet to demonstrate that.
 - c. that the Claimant was an NSSF contributor, and that his contribution for April 2019 was paid.
 - d. that the issue of overtime did not arise because if an employee worked overtime or worked on a non-working day, the employee applied for compensatory off-day and did not have to go to work the following day.
 - e. that the Respondent had valid reasons to terminate the Claimant's employment.
 - f. that the Claimant was given an opportunity to express himself, but was not ready to either talk or listen, and left when the disciplinary meeting was ongoing. That the Claimant's claim was not valid.
15. Cross-examined, the Respondent (RW-1) testified:-
 - a. that the Claimant had been employed in 2008 as a machine operator, and used a machine to move containers.
 - b. that both RW-1 and Ezra, who was a junior supervisor in the Respondent's terminal department, sat in the disciplinary hearing on 30th April, 2019. That the Respondent felt that it was right for Ezra to attend the disciplinary meeting because he was among the 3 people who got drunk and damaged the [Respondent's] van. That no Machine Operator attended the meeting.
16. Having considered the pleadings filed by both parties and evidence presented thereon, issues that fall for determination, in my view, are as follows:-
 - a. Whether termination of the Claimant's employment by the Respondent was unfair.
 - b. Whether the Claimant is entitled to the reliefs sought.
17. On the first issue, unfairness in termination of an employee's employment may be either procedural or substantive; and for fairness to be attained, there must be both procedural and substantive fairness in the termination. It was held as follows in the case of *Walter Ogal Anuro – vs – Teachers Service Commission (2013) eKLR*:-

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
18. It was a common ground that the Claimant, a Machine Operator, was on duty on 28th April, 2019. It was the Claimant's evidence that although the said date (28th April, 2019) was supposed to be his off-day, he received a telephone call in the morning of that day (at 8.00 am) asking him to report on



duty, which he did. It was a common ground that the Claimant, in the company of Ezra (the Assistant Terminal Manager) and Sammy Simiyu (a driver) left the Respondent Company's premises in search of food/breakfast. The evidence on record shows that the said persons, or at least two of them, left the Respondent's premises in the Respondent's motor vehicle Registration Number KCG 535E, which was driven by Sammy Simiyu (the driver). According to the evidence on record, the trio ate and drank some whiskey, and later went back to work.

19. Indeed, the Claimant testified that on getting back to work, they found trucks waiting; and that he worked until 3.00 pm when his shift ended and he was relieved by another Machine Operator, Tito Munywoki. The Claimant denied the alleged damage to the Respondent's aforesaid motor vehicle and testified that he had not been shown an inspection report on the alleged damaged motor vehicle, a police abstract or photographs of the damaged vehicle.

20. The Claimant's summary dismissal letter dated 30th April, 2019 states in part:-

“ . . . As per the witness statement, in the company of Sammy Simiyu and Ezra, you took the van and went out to eat breakfast in Changamwe area . . .

Being the only operator on duty that day, you could not answer why you abandon (sic) your duty station, leaving it unattended to attend to personal calls because as per the normal routine, the food was to be brought to you at the company's offices. Three trucks were waiting to be offloaded as you were outside the company's premises.

This is deemed to be negligence and as well drinking alcohol while on duty contrary to the company policy as well as endangering your safety, that of yard users and client's as well. This is a gross misconduct, and the management has consequently made the decision to issue a summary dismissal, as per the show cause and disciplinary hearing of 30th April, 2019 . . .”

21. Although the Claimant denied having taken alcohol/gotten intoxicated during working hours, and although no proof of him having taken alcohol during working hours was presented, the evidence on record shows, and the Claimant admitted in evidence, that he left his duty station and went out of his employer's premises during working hours. RW-1 testified that three trucks waited to be offloaded as a result of the Claimant's absence/neglect of duty. The Claimant himself testified that on getting back to his duty station, he found trucks waiting. This points to wilful neglect of duty on the part of the Claimant, which is a gross misconduct under Section 44(4)(c) of the *Employment Act*, and which attracts a summary dismissal.

22. It is my finding that on the basis of the foregoing, termination of the Claimant's employment was substantively fair.

23. On procedural fairness, the show cause letter dated 29th April, 2019 was not shown to have been given to/delivered to the Claimant before the alleged disciplinary hearing alleged to have been conducted on 30th April, 2019. In employment matters, a show cause letter plays the role of a charge sheet and/or a catalogue of accusations against an employee by his or her employer. There must always be clear and written communication of the charges facing an employee, which must be served on the employee and evidence of such service presented. Where an employee refuses/fails to acknowledge receipt of the charge sheet/show cause letter, the person serving it must demonstrate service. In my view, this may be by way of an affidavit. Such evidence must always be corroborated, to avoid injustices.

24. An employee on whom a show cause letter has been served must always be given reasonable time to formally respond to the charges. Reasonable time, in my view, should never be below 3 clear days, though the number of days in excess of 3 days will depend on the circumstances of each individual case.



- Where an employer decides to proceed with disciplinary proceedings after the time given to respond to a show cause letter lapses, the employee must be given an opportunity to be heard.
25. An invitation to attend a disciplinary hearing should never be combined with the show cause letter/ charge sheet, as the two are distinct and serve different purposes. An invitation to attend a disciplinary hearing must always inform an accused employee of his rights under Section 41 of the [Employment Act](#). An employee must always be given reasonable time to prepare for the disciplinary hearing and to get a witness pursuant to the said provision of the statute. Giving an employee a show cause letter today and vide the same letter ask him to “attend a disciplinary hearing tomorrow in the company of a witness” as the Respondent herein did is both casual and unfair. It is against the rules of natural justice.
 26. In the present case, the Claimant denied having been given the “show cause letter” dated 29th April, 2019 on the said date. He testified that the said letter was given to him on 30th April, 2019 alongside the summary dismissal letter dated 30th April, 2019. There is nothing on the alleged show cause letter to show, or to even suggest that the same was served on the Claimant as alleged by the Respondent. Even if it were to be assumed that there was delivery of the letter to the Claimant on 29th April, 2019 as alleged by the Respondent, there would still be unfairness in view of the short notice, and the combining of charges with an invitation to attend a disciplinary hearing without giving the Claimant reasonable time to formally respond to the charges levelled against him and to prepare for the disciplinary hearing.
 27. I find and hold that termination of the Claimant’s employment was procedurally unfair.
 28. On the second issue, and having made a finding that termination of the Claimant’s employment was procedurally unfair, I award the Claimant the equivalent of three (3) months’ salary in compensation for unfair termination of employment. The Claimant pleaded and testified that he was earning a gross monthly salary of Kshs.116,100/=. A copy of the Claimant’s payslip for April 2019 confirms this position. The equivalent of three (3) months’ salary is therefore Kshs.116,100/= x 3 = Kshs.348,300/=, which I award to the Claimant. I have considered the period of time that the Claimant had worked for the Respondent, and the fact that the Claimant substantially contributed to his being terminated.
 29. The claim for one month salary in lieu of notice is allowed under Section 35(1)(c) of the [Employment Act](#), and the Claimant is awarded Kshs.116,100/= in that regard. The Claimant was summarily dismissed, and the Respondent did not demonstrate payment in lieu of notice. Indeed, the Claimant’s payslip for April 2019 produced in evidence by the Respondent does not reflect such payment.
 30. On the claim for [service] gratuity, the Claimant testified that he was a member of, and a contributor to the NSSF; and that he was also a member of a pension scheme. That he collected his pension upon termination of his employment. Under Section 35(6)(a) & (d) of the [Employment Act](#), service pay (service gratuity) is not payable to terminated employees who are members of a pension scheme under the [Retirement Benefits Act](#) or the National Social Security Fund (NSSF). The Claimant’s claim for gratuity is, therefore, declined.
 31. The Claimant pleaded and testified that he did not take leave for the entire period that he worked for the Respondent. The Respondent disputed this allegation, and produced in evidence the Claimant’s payslip for April 2019, reflecting payment to the Claimant of some Kshs.4,600/=being leave travel allowance. There was no indication as to the leave earning year in respect of which the “leave travel allowance” was being paid. It is to be noted that the said payslip, as the evidence on record shows, was for April 2019. The Claimant’s employment was terminated on 30th April, 2019.
 32. Section 74(1)(g) of the [Employment Act](#) 2007 obligates an employer to keep a written record of all employees with whom he has entered into a contract under the Act, which shall contain particulars of an employee’s annual leave entitlement, days taken and days due. In the present case, the Respondent



- did not exhibit a written record of the Claimant's annual leave entitlement, days taken over the Claimant's period of employment and days due at the time of termination. No leave application forms by the Claimant were exhibited by the Respondent, who by law is the custodian of such documents. Further, the Respondent did not present any evidence pointing to leave travel allowance at any other time during the Claimant's employment; to at least corroborate the allegation that the Claimant took leave during the period of his employment. No evidence was presented in support of that allegation.
33. Under Section 28(1)(a) of the Employment Act, the Claimant was entitled to not less than 21 leave days after every consecutive twelve months of service. The Claimant was employed on 1st January, 2008 and his employment was terminated on 30th April, 2019, after serving for 11 consecutive years. His claim was, however, for 10 years. Parties are bound by their pleadings. The Claimant is entitled to payment for 21 leave days for each of the 10 years served. Non-payment for accrued leave days from one leave earning year to another was, in my view, a continuing injury which ceased upon termination of the Claimant's employment on 30th April, 2019.
34. The suit herein was filed on 18th September 2019, within twelve months from the date of cessation of the continuing injury. The claim was thus filed within time. Section 89 (formerly 90) of the Employment Act states as follows:-
- “Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof.”
35. Having stated that, I award the Claimant Kshs.812,700/= being payment for accrued and untaken leave for ten (10) years.
36. The claim for overtime, Sundays and holidays was not proved, and is declined. Such claims are in the nature of special damages, and must always be specifically pleaded and strictly proved, on a balance of probability. The Claimant did not even attempt to do that.
37. In sum, and having considered written submissions filed herein, Judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. Compensation for unfair termination of employment . . . Kshs.348,300/=.
 - b. Payment in lieu of notice Kshs.116,100/=.
 - c. Accrued but unpaid leave days ... Kshs.812,700/=.
- Total = Kshs.1,277,100/=.
38. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
39. The Claimant is awarded costs of the suit and interest on the awarded sum. Interest shall be calculated at court rates from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025

AGNES KITIKU NZEI

JUDGE

Order



This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Anaya holding brief for Mr. Otwere for the Claimant

Mr. Akanga for the Respondent

