



**WKR v Timaflo Limited (Employment and Labour Relations Cause E002 of 2024) [2025] KEELRC 97 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 97 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E002 OF 2024  
ON MAKAU, J  
JANUARY 24, 2025**

**BETWEEN**

**WKR ..... CLAIMANT**

**AND**

**TIMAFLOR LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent until May 2023 when his services were terminated for gross misconduct. He then brought this suit alleging unfair termination and praying for the following reliefs: -
  - a. A declaration that the Respondent's actions of terminating the claimant's employment contravenes the claimant's rights and fundamental freedoms guaranteed under Articles 41 (1) &(2) (a), and 47(1) & (2) of *the Constitution* of Kenya and the statutory rights to fair labour practices secured under sections 43 and 45 of the *Employment Act*, Cap 226, Laws of Kenya as well as rules of natural justice and is therefore, unconstitutional, unlawful, contrary to the rules of natural justice, un-procedural, null and void ab initio and of no legal effect.
  - b. An order compelling the respondents to pay the claimant a 12 month's compensation for wrongful and unfair termination.
  - c. An order compelling the respondents to pay the claimant General damages for wrongful and unfair termination.
  - d. Three month's salary in lieu of notice.
  - e. Payment in lieu of accrued leave days.



- f. Payment of N.S.S.F and N.H.I.F dues
  - g. An order compelling the Respondent to pay the claimant all his unpaid and with-held dues with effect from May 2023.
  - h. Interest accrued thereon.
  - i. Unpaid overtime dues.
  - j. Any further or better relief that this Honourable court may deem fit and just.
  - k. Costs of the claim and interest at court's rates.
2. The Respondent filed a Statement of Response on 21<sup>st</sup> February 2024 admitting that it employed the claimant from 21<sup>st</sup> November 2017 to 16<sup>th</sup> May 2023 when it terminated his employment on grounds of poor performance and absenteeism. It averred that the said decision was reached after according the claimant a fair hearing. Finally, it averred that it paid him salary in lieu of notice plus his terminal dues, less outstanding liabilities. Consequently, it prayed for the suit to be dismissed with costs.
  3. The matter went to full hearing whereby the claimant testified and called one witness and then the respondent called three witness.

#### **Claimant's evidence**

4. Mr. Leonard Kaberia, a Clinician at Meru Level 5 Hospital testified as CW1. He stated that on 29<sup>th</sup> March 2023, he examined the claimant who complained of breathing problem on exposure to some sprays and also erectile dysfunction. He prescribed medication to him and wrote a letter to the employer (Exhibit 1) recommending for redeployment to another work where he would not be exposed to allergic condition.
5. On cross examination he admitted that his report did not specify which chemical was affecting the claimant. He further admitted that he never performed any test but merely relied on what the claimant told him. He also admitted that there are many things that can cause Bronchitis.
6. In re-examination, he stated that Meru Level 5 Hospital had no capacity to confirm whether the claimant's allergic condition was caused by a specific chemical. However, he contended that it was not necessary to do chemical tests since the problem could be confirmed through clinical diagnosis. He contended that the diagnosis he did on the claimant's chest was consistent with the allegations made by the claimant.
7. The claimant testified as CW1. He adopted his written statement dated 23<sup>rd</sup> January 2024 and produced 13 documents as exhibits. He then stated that he was employed from 20<sup>th</sup> November 2017 and went through the safety training. In 2021, he started feeling sickly and he went to see a doctor at the respondent's clinic but he never got well.
8. On 29<sup>th</sup> March 2023 he went to Meru General Hospital for checkup. He was then given a report showing that he was suffering from Allergic Bronchitis. A further test was recommended which would cost Kshs.15,000 and he brought both the said report and a letter to the respondent.
9. However, he was not given the Kshs.15,000 for the recommended test but instead he was sent to Nanyuki Neo X-ray at Imaging Centre. The results for the test were sent to the respondent directly and thereafter the employer gave him resignation documents to sign but he declined.



10. On 16<sup>th</sup> May 2023, he was called to the Boardroom where he found the Manager, HR Manager and his three colleagues (appearing as witnesses). He was then charged with poor performance but he was not given any chance to defend himself. He tried to talk but he was told that his services were terminated and he should do clearance.
11. During the clearance, the company doctor demanded that he should clear the medical part, but because he was sick he refused, and he was forcefully removed from the gate. He concluded by stating that the termination of his employment was unfair and therefore the reliefs sought are warranted.
12. Upon cross-examination, he denied that from 21<sup>st</sup> November 2017 to 20<sup>th</sup> May 2018, he was under seasonal contract of six months. He contended that he never signed any contract then and his salary was Kshs.14,000 per month. However, he confirmed that he saw the letter dated 20<sup>th</sup> March 2018 by which his salary was reviewed.
13. He admitted that he received a warning letter and he signed an undertaking not to repeat the offence but stated that he was not given any hearing on 16<sup>th</sup> March 2023 before the warning letter. He further stated that the signatures on the letter dated 16<sup>th</sup> May 2023 was not his, and he totally disowned it. He also denied service of the letter dated 15<sup>th</sup> May 2023.
14. He admitted that there was regular performance review in which the supervisor would make comments. He further admitted that he signed the evaluation report in page 79 of the respondent's bundle. However, he disowned the signature on his verifying affidavit filed with his claim.
15. He further stated that due to his ill-health, he requested for redeployment to another working area. He confirmed that on 14<sup>th</sup> April 2023 he requested for Kshs.15,000 for specialized tests and also because he had erectile dysfunction. He gave the test request letter from Meru Hospital to the respondent and he was referred to Neon X-ray hospital.
16. In re-examination, he contended that he was not given time to prepare his defence on 16<sup>th</sup> May 2023. He was also not allowed to call witness. He was just told that he was dismissed and that he should do clearance.
17. He clarified that the Evaluation Report in page 78 of the respondent's bundle lacks date and therefore not possible to tell which year it refers to. However, he admitted that he was given three warning letters in 2019, and one in 2022 for absence from work. In 2023 he was given a warning letter for failure to take instructions and absence from work twice.
18. He maintained that his performance was good and he explained himself in every incidence that led to the warning letters. He was never given Kshs.15,000 for specialized test upon request from the hospital and instead he was referred to Neon X-ray.

### **Respondent's Evidence**

19. Purity Nyawira Ngatia testified as RW1. She is a Clinical Officer employed by the respondent. She adopted her written statement dated 16<sup>th</sup> March 2024 as her evidence in chief. In brief, she confirmed that the claimant was a former employee of the respondent. She then contended that the claimant never complained about difficulties in his breathing system; that as a matter of policy, he was taken through a spirometry test after every six months; that the last spirometry test was done on the claimant on 19<sup>th</sup> July 2022 and a certificate of fitness was issued by Dr.Kenneth W.Munyi.
20. She further stated that the claimant was provided with Personal Protective Equipment (PPE) and when he failed to wear the same on 23<sup>rd</sup> June 2020 he was served with a warning letter. Besides, in January



2023, the claimant was transferred to another work station (Pack House) where he was not exposed to spray chemicals. Before the said deployment, he was examined by Dr. Kenneth W. Munyi on 23<sup>rd</sup> January 2023 and a certificate of fitness was issued.

21. At the pack house, he performed poorly and he was issued with a third warning. As a result, he was re-deployed to the green house where there is no exposure to spray chemicals because a special team was tasked with that role. She admitted that the claimant was never given Kshs.15,000 for tests on kidneys and bladder and instead he was referred to Neon X-ray and Imaging Centre for the same test at Kshs.30XXXX. she maintained that the tests done on the claimant confirmed that he was fit and certificate were issued.
22. On cross-examination, she admitted that she never conducted any spirometry test on the claimant and clarified that it was done by external doctors every six months. She further admitted that the pack house was a cold place for storing rose flowers and the claimant worked there since 2022. She further admitted that the claimant visited the clinic severally but he never complained of chest problem, but food poisoning and hyper acidity.
23. She stated that there was no dust in the green houses because showering is done before sweeping the floor. She admitted that she had not filed X-ray report to show that the claimant's chest was always clear, but clarified that a Stethoscope is the one used to do so.
24. RW2 was the Production Manager Mr. Morris Kimathi M'Imanene. He also adopted his written statement dated 16<sup>th</sup> March 2024 as his evidence. He further produced 28 documents as exhibits to fortify the respondent's defence. His evidence in brief was that the claimant was employed by the respondent from 21<sup>st</sup> November 2017 to 16<sup>th</sup> May 2023 during which time he was given many warning letters.
25. The warnings were given for the offence of failing to meet the set targets, failure to properly carry out his tasks, loss of flowers which were destined for the pack house, ignoring his supervisor's instructions and absence from work without permission. Before giving him the said warnings, the claimant was accorded an opportunity to respond and he acknowledged his wrong doing.
26. He went on to state that the claimant knew his job description and was trained on how to perform his duties but did not perform as expected. He further stated that the claimant never reported any incidence of injury or breathing problems.
27. He stated that the claimant was not meeting the prescribed work out put and would be assisted by his colleagues. The excuse he gave was that he was sick and he would then be referred to the Farm's Clinic. However, it was never recommended that he was unfit to work in the Green house.
28. On 5<sup>th</sup> May 2023, the claimant did not report to work. He neither sought leave of absence nor did give satisfactory explanation for his absence. He wrote a statement explaining that he had issues at home and a warning letter was issued to him. In the same month of May, Performance Review was done and it was noted that the claimant's performance was consistently poor. He was also absenting himself from work without leave and a decision was made to terminate his employment.
29. RW1 stated that the claimant was served with a disciplinary hearing notice stating the charges but he declined to acknowledge. The charges were;
  - a. Failure, refusal and/or negligence in performance of duties, resulting to loss to the respondent.
  - b. Absenting himself from the place of duty.



30. The notice further indicated his right to be accompanied by an employee of his choice, right to call witness and give evidence. The claimant attended the hearing on 16<sup>th</sup> July 2023 at the TIMA 6 Boardroom at 10:30am and his defence was considered before the decision was made to terminate his employment. He clarified that the claimant's offences justified summary dismissal but the company opted to terminate his contract and pay him 45 days' salary in lieu of notice plus other terminal benefits.
31. On cross-examination, RW2 contended that he personally served the claimant with the notice for disciplinary hearing dated 15<sup>th</sup> May 2023 and he acknowledged receipt by signing. He contended that the claimant was served with the termination letter and declined to acknowledge receipt by signing.
32. He admitted that the claimant was absent for two days in a period of five and half years. He also confirmed that between September 2022 and January 2023, the claimant was working in the spraying Department and he knew how to perform his duties.
33. In re-examination, RW2 clarified that, after serving the claimant with a notice for disciplinary hearing, he declined to sign the same.
34. RW3 was Lilian Naitore Mwongera, respondent's Production Supervisor. Her evidence was that she attended claimant's disciplinary hearing on 16<sup>th</sup> May 2023 and gave evidence as per the minutes appearing on page 88-89 of the respondent's bundle.
35. On cross-examination, she confirmed that she was the direct supervisor of the claimant for two months and she reported poor performance. A warning letter was given to him for the said performance. On 16<sup>th</sup> May 2023, she was the one who called the claimant from his place of work to attend his disciplinary hearing. However, she admitted that the performance rating in page 78 of the respondent's bundle is not dated.

### **Submission**

36. The claimant submitted that the termination of his employment was unlawful and unfair because the allegations against him were not supported, and no fair hearing was accorded to him. He contended that the hearing notice was never served upon him as alleged and that RW3 confirmed that he was just called from his work place on 16<sup>th</sup> May 2023 to be informed of the decision to dismiss him.
37. He submitted that, even if the hearing notice had been served as alleged, 24 hours would still not be adequate for him to respond to the show cause letter and prepare for the disciplinary hearing. He urged the court to find that the procedure followed to terminate his services was not fair and award the reliefs sought.
38. For emphasis, he cited several decisions which agree that section 41 of the *Employment Act* makes it mandatory for the employer to accord an employee a fair hearing before terminating his employment. See Dr. George Jalango Midiwo v National Hospital Insurance Fund (2016) eKLR, Munir Sheikh Ahmed v National Bank of Kenya (2020) eKLR and Boniface Mzungu v Base Titanium Limited (2020) eKLR.
39. On the other hand, the respondent submitted that it terminated the claimant's services on account of poor performance and absenteeism. It contended that RW1 did not do any scientific tests to establish that the claimant had allergic bronchitis but only relied on what the claimant told him.
40. The respondent further submitted that it had adduced evidence to prove that the claimant was subjected to regular spirometry tests every six months and he was always certified fit to serve. Further, he was provided with PPE and when in one occasion he failed to wear goggles he was given a warning



letter. Consequently, it urged the court to find that the claimant did not prove that the termination was on account of ill-health.

41. On the contrary, the respondent submitted that the termination was on account of poor performance and absenteeism. It was submitted that the claimant admitted absence from work on 5<sup>th</sup> May 2023 by writing a statement on page 75 of the respondent's bundle. His poor performance was proved by the Performance Rating on page 78-80 which the claimant admitted to have signed. Consequently, it submitted that there were valid reasons for terminating the claimant's services.
42. It further submitted that the claimant was accorded a fair hearing before the termination since he was served with a hearing notice dated 15<sup>th</sup> May 2023 requiring him to show cause for failing, refusing and/or neglecting to perform his duties, and absenting himself from his place of work. The claimant responded to the charges on 16<sup>th</sup> May 2023 (see page 84 of the respondent's bundle).
43. It further submitted that the claimant attended the hearing as per the minutes on page 85 of its bundle. He admitted that he was called to the hearing. The respondent submitted that it had sufficient ground for dismissing the claimant but it chose to terminate the contract and pay him dues. In its view, a fair procedure was followed before terminating the claimant's employment. For emphasis, it relied on [\*Postal Corporation of Kenya v Andrew K.Tanui \(Civil Appeal 127 of 2015\)\*](#) (2019) KECA 489 (KLR) (Civ) (19 July 2019) (Judgment).
44. As regards the reliefs sought, it submitted that the claimant was offered all terminal dues. It was submitted that the termination was fair but should the court be of a different view, a compensation of two months salary would be adequate plus 45 days salary in lieu of notice.
45. Finally, it was submitted that save for the terminal dues set out in the termination letter, the rest of the prayers must fail for lack of particulars.

### **Determination**

46. The parties are in agreement that they were engaged in a contract of service from November 2017 to 16<sup>th</sup> May 2023 when the respondent terminated it, on account of claimant's poor performance and absenteeism. The issues for determination are: -
  - a. Whether the termination was unlawful and unfair.
  - b. Whether the reliefs sought are merited.

### **Unlawful and unfair termination**

47. Section 45 (1 & 2) of the [\*Employment Act\*](#) provides as follows:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (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 employee's 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.”

48. The legal principle in the above section is that for termination to pass muster, the employer must have a valid and fair reason, and fair procedure must be followed.
49. In this case, the reason for the termination and the procedure followed were captured in the termination letter dated 16<sup>th</sup> May 2023, thus: -

“ 16<sup>th</sup> May, 2023

WKR

PR No.30XXXX

ID No.226XXXX

Dear Sir,

Re: Termination of Employment

Reference is made to the incidences in the past months whereby your behavior towards work performance has completely deteriorated, it has been noted that you have not been performing your duties to the standard and you are a trained employee. Your section has undone activities: -rebeding, debudding, weeding and poor cut points which has resulted due to underperformance even after being accorded all the assistant and given ample time to complete. You have been issued with verbal and upto two third warning letters to give you ample time to improve but you have failed to change. Refer to our meeting held at Tima 6 production office in the presence of Human Resources, Production Manager, Production Supervisor, welfare representatives, a colleague and yourself whereby you were requested to give an explanation as to why your section has a lot of undone activities but you failed to give a justifiable reason.

The above actions/omissions amount to gross misconduct. However, the management on its own accord has decided to terminate your services with effect from 16<sup>th</sup> May, 2023.

Upon return of all company property in your possession, you will be paid your terminal dues as follows: -

Days worked from 21<sup>st</sup> April, 2023 to 16<sup>th</sup> May, 2023-26 days. Leave days earned and not taken- 20 days. Public holiday hours worked-15.32 hrs Any overtime hours worked @ 1.5 -9 hrs One-way travelling allowance-Kshs.170045 days’ notice paid Service gratuity for completed years of service-5 yrs.

Kindly note that terminal dues will be paid less any outstanding liabilities with the company and relevant statutory deductions.

Yours faithfully,

For: Timaflor Ltd

Thomas Fransen

General Manager



CC: Labour Office

Personal file

Accounts”

50. The reason cited was deteriorating work performance and the proof was the testimony given by his supervisor (RW3) during the disciplinary hearing. In the minutes of the hearing (page 85 of the respondent’s bundle), RW3 stated as follows: -

“...W has not been performing very well on his daily activities which has now resulted to a number of pending jobs such as rebending, removing debris, weeding, desuckering and also harvesting which he has to be assisted always. ... she is forced to ask W’s colleagues to assist him where at times they also left behind with their activities. ... even the few beds he attempts, are never done well. ...it has been hard to question other employees on their delayed activities as they claim to have been attending to W’s section. Additionally, W was absenting himself and was not giving supporting documents for his alleged ailment or other valid reasons.”

51. During the disciplinary hearing, the claimant cited ill-health and that no light duties were recommended despite seeing many doctors. The claimant repeated the same reason before this court and called a clinical officer to support his case.

52. Having considered the evidence on record, I am satisfied that the claimant reported ill-health during his time of employment. There is however no evidence to prove that the illness was caused by his working condition or that it was the reason for his poor work performance. Such evidence can only be obtained after conducting the relevant medical investigations.

53. In the absence of the said evidence, this court has no otherwise but to find that the claimant’s poor work performance was not caused by ill-health on his part. If anything, the numerous warning letters point to a systemic attitude towards his work. In the circumstances, I am satisfied that the respondent has discharged its onus of proof that the termination of the claimant’s employment was grounded on a valid and fair reason.

54. As regards the procedure followed, section 41 of the Employment Act provides that:

“41. Notification and hearing before termination on grounds of misconduct

(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.

(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.”

55. There is evidence that a disciplinary hearing was conducted for the claimant on 16<sup>th</sup> May 2023 and the claimant attended. The question that begs is whether the hearing amounted to a fair procedure.
56. The claimant contended that it was an ambush and he did not have sufficient time to prepare his defence. He was also not able to call a fellow employee to accompany as witness. However, the respondent maintained that the claimant was served with a letter dated 15<sup>th</sup> May 2023 notifying him of his disciplinary hearing on 16<sup>th</sup> May 2023 to show cause why disciplinary hearing should not be taken against him for the two offences cited therein.
57. The claimant denied receipt of the said hearing notice and maintained that he was called to the meeting on the day of the hearing from his work station. There is also no evidence to prove that the hearing notice was served on 15<sup>th</sup> May 2023.
58. Having considered the foregoing evidence, I find that the claimant was ambushed with the disciplinary hearing on 16<sup>th</sup> May 2023. He was not accorded a fair opportunity to prepare for the hearing and to have another employee of his choice present during the hearing. I gather support from the case of *Munir Sheikh Ahmed v National Bank of Kenya*, supra where Ongaya J held that: -

“The court therefore finds that while the Respondent purported to comply with Section 41 of the *Employment Act*, 2007 on a notice and hearing prior to the termination, the petitioner was seriously prejudiced in view of the very short time allowed to prepare the defence and in view of the otherwise vague allegations devoid of due particulars...”

59. In this case, I am not satisfied by the evidence adduced by the respondent that the termination was done in accordance with a fair procedure as prescribed under section 41, supra. To cure the anomaly, the respondent purported to terminate the contract under the termination clause by offering a salary of 45 days in lieu of notice. However, the mess had already been done and the termination rendered unfair by the failure to accord the claimant a fair hearing.
60. I gather support from *Kenfreight (EA) Limited v Benson K.Nguti* (2016) eKLR where the Court of Appeal held that:-

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...”

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 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.”

### Reliefs sought

61. In view of the foregoing conclusion, I am satisfied that the claimant is entitled to compensation for unfair termination under Section 49 of the *Employment Act*. Considering that he served for about five



years and the fact that he contributed to the termination through misconduct and poor performance, I award him three months gross salary based on his pay slip of April 2023.

62. His basic pay was Kshs.12,202, housing allowance Kshs.2524, transport allowance of Kshs.2,228 and lunch allowance of Kshs.1,052 totaling to Kshs.18,006. The compensation for three months is therefore Kshs.54,018.
63. The rest of the claims for terminal dues lack particulars and are exaggerated and therefore I will not spend time on the same. Instead, I will award what was offered by the employer vide the termination letter dated 16<sup>th</sup> May 2023 and computed in the pay slip for May 2023 being a total of Kshs.94,598. The sum includes award for unpaid salary, overtime, gratuity and pay in lieu of notice.

### **Conclusion**

64. I have found that the termination of claimant's employment was unfair as it was not done in accordance with a fair procedure. For that reason, I have found that the claimant is entitled to compensatory damages plus terminal dues as outlined in the termination letter. Consequently, I enter judgment for the claimant as follows: -
  - a. Compensation for unfair termination...Kshs.54,018.00
  - b. Terminal dues.... Kshs.94,598.00  
Kshs.148,616.00
  - c. The award is subject to statutory deductions.
  - d. The claimant is awarded costs in the Lower Court scale where the suit ought to have been filed.
  - e. Interest at court rate from the date of filing the suit till payment in full.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**ONESMUS N MAKAU**

**JUDGE**

Order

**THIS JUDGMENT HAS BEEN DELIVERED TO THE PARTIES VIA TEAMS VIDEO CONFERENCING WITH THEIR CONSENT, 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.**

**ONESMUS N MAKAU**

**JUDGE**

