



**Chikutwa v Ineet Millers (Cause 181 of 2018)
[2025] KEELRC 121 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 121 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 181 OF 2018
MA ONYANGO, J
JANUARY 23, 2025**

BETWEEN

CHEMIA CHIKUTWA CLAIMANT

AND

INEET MILLERS RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 11th May 2018 seeking compensation from the Respondent on allegation that the Respondent unfairly and unlawfully terminated his employment.
2. The Claimant averred that he was employed by the Respondent in February 2014 as Ungraded Artisan. That on 8th November 2017, his employment was terminated without any notice or legal justification.
3. It is the Claimant’s case that owing to the unfair and unlawful termination of his employment, he is entitled to compensation which he itemized as follows:
 - i. One month pay in lieu of notice.....Kshs 16,102
 - ii. Unpaid leave dues.....Kshs 48,306
 - iii. Severance pay.....Kshs 24,153
 - iv. Unpaid public holidays.....Kshs 32,204
 - v. Unpaid rest days.....Kshs 193,224
 - vi. Overtime dues.....Kshs 481,572
 - vii. Pending salary of 1 month 8 days.....Kshs 23,455.2
 - viii. Underpayment of wages.....Kshs 272,866.9



- ix. 12 months compensation for
unfair termination.....Kshs 222,207.6
Total.....Kshs 1,314,090.7

- 4. He also prayed for costs of the suit and interest.
- 5. The Respondent filed a Response to Memorandum of Claim dated 16th November 2018 denying the allegations made by the Claimant in the Memorandum of Claim.
- 6. In its defence, the Respondent averred that the Claimant was not terminated from employment but he deliberately failed to turn up for duty after being suspected of stealing from the Respondent where he and other suspects were arrested and charged in court vide Criminal case no. 2526 of 2018.
- 7. The Respondent prayed that the suit be dismissed with costs.

The Evidence

- 8. The Claimant testified on 30th September 2023 as CW1 and adopted his written statement dated 6th May 2019 as his evidence in chief. He also relied on his affidavit sworn on 6th May 2019 and the documents filed with the affidavit.
- 9. In brief, the Claimant stated that he was employed by the Respondent on 12th March 2014 at a monthly salary of Kshs 6,500 where he worked for over 3 years. He stated that he used to work from 7.30 am to 7.30 pm from Monday to Monday. He also stated that he never took leave and was not paid leave allowance.
- 10. According to the Claimant, his employment was terminated verbally by the Respondent’s manager on suspicion that he had stolen from the Respondent on 8th November 2017. He further stated that he was not given an opportunity to defend himself before his employment was terminated.
- 11. The Claimant stated that he reported his illegal termination from employment to the Labour Office and after the conciliation yielded no fruits, he filed the instant suit on 11th May 2018. According to the Claimant, it was after he filed the instant suit that he was arrested and arraigned in court on 19th June 2018.
- 12. On being cross-examined by Counsel Kenei, the Claimant stated that he did not sign any employment contract with the Respondent. Upon being referred to the Employment Contract attached to the Respondent’s list of documents dated 16th November 2018, the Claimant admitted that the ID number and telephone number appearing on the contract was his but denied appending his signature to the said contract.
- 13. The Claimant told the court that before he was terminated from employment, he was accused of theft, arrested and released but after he filed the instant suit, the Respondent maliciously caused him to be arrested and arraigned in court where he was charged and convicted for the offence of theft.
- 14. In re-examination, the Claimant stated that although the Employment Contract produced in court by the Respondent indicated that it was to run from December 2016, he had all along been at work since his employment in February 2014.
- 15. The Claimant called Josephat Amachika Ojoo who testified as CW2. CW2 introduced himself as the immediate former Branch Secretary of KUCFAW Eldoret Branch. He adopted his witness statement recorded on 6th May 2019 as his evidence in chief. Mr Amachika stated that the Claimant reported



to the union about the termination of his employment and reported the dispute to the Labour Office whereupon the Labour Office organized for a conciliatory meeting and invited both parties. According to CW2, the Respondent through its representative agreed on some issues save for the item on compensation due to the Claimant.

16. The court was told that after the Respondent became uncooperative necessitating the filing of this suit by the Claimant.
17. On cross examination, CW2 admitted that the minutes of the conciliatory meeting are not signed by any representative of the Respondent and also, that the settlement agreement annexed to the Claimant's bundle of documents was not signed and neither did the Respondent affix its seal.
18. The Respondent on its part called two witnesses in furtherance of its case. Kennedy Kipngetich Mutai testified as RW1 and introduced himself as one of the Respondent's Directors. He adopted his witness statement recorded on 16th November 2018 and the affidavit sworn on 26th February 2019 as his evidence in chief. He also relied on the documents filed by the Respondent in its defence.
19. On cross-examination by Counsel Oyaro, RW1 stated that the Respondent employed the Claimant in February 2014 as a casual employee and that he never worked for more than 3 months. He further stated that the Claimant was subsequently employed under a fixed term contract of 6 months in December 2016 where he worked for 12 hours a day at a monthly salary of Kshs 10,800.
20. The Respondent's witness stated that the Claimant was never paid overtime because he was absent on some days and was paid an all-inclusive salary inclusive of house allowance.
21. RW1 averred that he never issued the Claimant with a termination letter and neither was he invited to a disciplinary hearing because he absconded duty and switched off his phone.
22. Mr Mutai admitted to meeting the union officials at the Labour Office to discuss the termination of the Claimant from employment and stated that parties did not reach an agreement.
23. RW2 was Joseph Kiprono Tarus, the Respondent's former manager. He adopted his witness statement and his affidavit dated 16th November 2018 and 26th February 2019 respectively as his evidence in chief.
24. On cross examination, RW2 confirmed that he attended the Conciliation meeting at the Labour office on behalf of the Respondent. He however denied signing the minutes of the meeting held on 17th November 2017.
25. With that evidence, the Respondent closed its case and the court directed parties to file written submissions. The Claimant's submissions were filed on 4th December 2023 while the Respondent's submissions were filed on 7th February 2024.

The Claimant's submissions

26. In his submissions, the Claimant identified the issues for determination to be:
 - a. Whether the Claimant was a permanent employee of the Respondent
 - b. Whether the Claimant's employment was unfairly terminated by the Respondent
 - c. Whether the Claimant is entitled to remedies, and if so, which ones.
 - d. Who should bear the costs of the suit
27. On whether the Claimant was a permanent employee of Respondent, it is the Claimant's submission that there was no pre-existing contract before the cause of action herein arose. He thus submitted



that in the absence of an employment contract, and in view of the fact that the Claimant was earning income in monthly payments and that statutory deductions were being made on his account, he was an employee to the Respondent on permanent terms.

28. On the second issue, the Claimant submitted that he was dismissed for refusing to sign an employment contract that was presented to him in June 2018 and also that he was dismissed on grounds of misconduct. It is the Claimant's submission that the act of terminating the Claimant's employment on the basis that he refused to sign the unilateral contract amounted to an unfair termination of employment.
29. Further, it is the Claimant's submission that even if his employment was to be terminated on grounds of gross misconduct, section 41 of the *Employment Act* prescribes that before the summary dismissal of an employee, there has to be a notification and hearing before termination.
30. It is the Claimant's submission that reporting the incident of theft to the police is an unrelated criminal law process that cannot substitute the requirements of Section 41. In this regard, the Claimant submitted that the termination of his employment was unfair for lack of procedural fairness.
31. As regards the third issue identified by the Claimant for determination, it is submitted that having been terminated unfairly from employment, he is entitled to compensation under Section 49(1)(c) of the *Employment Act*. In sum, the Claimant sought to be awarded the reliefs he pleaded in his Memorandum of Claim.

The Respondent's submissions

32. The Respondent on its part framed the issues for determination to be:
 - a. Whether the Claimant has proved unfair termination
 - b. Whether the Claimant should benefit from his illegal acts
 - c. Who should bear costs
33. On the first issue, the Respondent submitted that although the Claimant averred that he was verbally terminated from employment, he did not tender any evidence to prove the alleged termination.
34. While submitting that the Respondent cannot be called upon to justify grounds for termination when the termination itself has not been proved, the Respondent placed reliance on the case of *Kioko Ngila v Vishak Builders Limited* (2020) eKLR.
35. Regarding the second issue, it is the Respondent's submission that the Claimant was suspected of theft, prosecuted for the said offence and ultimately convicted. According to the Respondent, the finding of guilt by the criminal court is conclusive of the commission of the offence and that the Claimant cannot argue his innocence before this court when the proper court seized of the criminal trial had found him guilty.
36. The Respondent contended that the Claimant ran away from its premises upon discovery of the theft for fear of being arrested. The Respondent submitted that it would be unfair for the Claimant to run away from work due to a criminal offence he committed and later return to seek compensation for unfair termination. In support of the position that it would be unfair for the processes of this court to be employed to sanitize a misconduct, reliance was placed on the case of *Peter Njuguna Chege v Timsales Limited* (2020) eKLR and *D. Njogu & Co. Advocates v National Bank of Kenya* (2009) eKLR.
37. The Respondent urged the court to return a finding that the Claimant cannot benefit from his own illegalities.



38. Lastly, on who should bear the costs of this suit, the Respondent submitted that the Claimant did not tender sufficient evidence to prove the allegations against the Respondent that he was dismissed unfairly from employment. On this basis, the court was urged to be dismiss the claim with costs.

Determination

39. From the pleadings, the evidence before court, the submissions of the parties and the authorities cited therein, the issues for determination are:
- a. What was the nature of the Claimant’s terms of employment;
 - b. Whether there was indeed a termination of employment of the Claimant by the Respondent, and if so, whether the termination was unfair;
 - c. What reliefs should issue.

What was the nature of the Claimant’s terms of employment?

40. The Claimant has averred that he was employed on permanent terms by the Respondent. The Respondent on the other hand maintained that the Claimant was initially employed on causal terms until 3rd January 2017 when he was issued with a 6 months fixed contract to run from 1st Dec 2016 to 31st May 2017.
41. The *Employment Act* defines a casual employee under Section 2 as an individual whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.
42. Section 37 of the *Employment Act* on the other hand provides that;
- (1) Notwithstanding any provisions of this Act, where a casual employee—
 - (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
 - (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
 - (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
 - (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.



- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.
43. From the above provision of the law, it is clear that the Claimant having worked for the Respondents for a period of over 2 years before the Respondent introduced the fixed term contract, he was no longer a casual employee but his engagement had automatically converted from casual engagement to term contract by operation of law.

Whether there was indeed a termination of employment of the Claimant's employment by the Respondent

44. The Claimant has in support of his case averred that he was unfairly dismissed from employment after he was suspected of stealing from the Respondent. CW1 on cross examination stated that the Respondent's manager terminated his employment verbally in the presence of other workers. The Respondent has however maintained that the Claimant deserted duty upon discovery of the theft fearing arrest and subsequent prosecution.
45. The burden of proof in employment claims is provided for under section 47 (5) of the Employment Act to wit:
- “47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
46. Although the Respondent's evidence is that the Claimant was subsequently charged and convicted on the charge of stealing by servant, the Respondent in its defence did not allege that the Claimant was dismissed from employment on grounds of gross misconduct. According to the Respondent, the Claimant deserted duty and could not be reached on phone.
47. It is now trite that an employer pleading desertion of duty by an employee in its defense must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration. In the case of Chiguba Zuma Chiguba v Njuca Consolidated Company Limited [2018] eKLR, the court held that –

“Desertion of Duty or Unlawful Termination

8. The Claimant told the Court that his employment was terminated after he reported an attempted theft at his assignment site. In its Reply, the Respondent admits that there had been incidents of theft at the site but states that the Claimant deserted duty on the heels of reassignment of duty.
9. Desertion of duty is a serious offence which may attract summary dismissal. It must however be proved. The Court was referred to the decision in James Ashiambi Namayi v Menengai Oil Refineries Ltd [2016] eKLR where my brother, Radido J. held that an employer relying on desertion as a ground for termination of employment must demonstrate attempts made to reach out to the employee, to establish their whereabouts. This is the legal position as I



understand it. It is therefore not enough for an employer to simply state that an employee has deserted duty.

10. In the instant case, the Respondent did not show any attempts made to reach out to the Claimant with a view to establishing why he had not reported to work. In light of this, the Court rejects the Respondent's line of defence and thereby adopts the Claimant's testimony that his employment was unlawfully and unfairly terminated.

48. In his testimony before court, RW1 stated during cross examination as follows, "The Claimant involved the union at some point and I met union officials. The Claimant was present. The issue discussed was the termination of the Claimant. We did not reach an agreement...". This line of evidence by RW1 contradicts the Respondent's defence that the Claimant deserted duty and could not be traced.

49. In the absence of proof that the Claimant deserted duty or that a fair disciplinary process was followed, it is the finding of the court that termination of the claimant's employment was both substantively and procedurally unfair and thus unfair within the meaning of section 45 of the *Employment Act*, 2007 and the Claimant is entitled to compensation.

What reliefs should issue

50. The Claimant in his Memorandum of Claim prayed for payment of Kshs 1,314,090.7 as terminal dues comprising 1 month's salary in lieu of notice, unpaid leave dues, severance pay, unpaid public holidays, unpaid rest days, overtime dues, pending salary, underpayments and 12 months' compensation for unfair termination. I will address these prayers in separate heads.

a. One-month pay in lieu notice

Having found that the termination of the Claimant's employment was unfair, he is entitled to pay in lieu of notice. I therefore award the Claimant Kshs 16,102 as per the Regulation of Wages (General)(Amendment) Order 2017.

b. Unpaid leave dues

The Claimant stated he was not granted leave for the entire period he worked for the Respondent. An employee is entitled to a full salary while on leave and the Claimant is awarded Kshs 39,016.40 in lieu of unpaid leave based on 21 days leave per year for 3 years.

c. Severance pay

This prayer is declined as severance pay is only applicable under section 40 (f) of the *Employment Act* to an employee whose employment has been terminated on account of redundancy.

d. Unpaid public holidays

The Claimant stated that he worked during all Public Holidays and was not paid double salary as is required by law. In the absence of any rebuttal from the Respondent the court finds the claim to have been proved on a balance of probabilities and the court awards the Claimant Kshs 32,204

e. Overtime dues

The Claimant in his testimony stated that he worked from 7:30am to 7:30pm for 7 days a week. RW1 on cross examination stated that the Claimant, while under the contract worked for 12



hours per day. In his testimony, he was categorical that the Claimant was never paid overtime as he was absent on some days. He worked for 7 hours a week instead of 54 provided for in the Regulation of Wages (General) Order. On this basis, the Claimant is entitled to an award of overtime for 20 hours per week for 52x3 weeks being 156 weeks prayed at Kshs 386,448.

f. Unpaid rest days

The Claimant having been awarded overtime is not entitled to any award under this head as it would amount to double compensation.

g. Pending salary

The Claimant did not tender any evidence to the effect that he was not paid any salary. The prayer is dismissed for want of proof.

h. Underpayments

The Respondent in both its defence and in the evidence of RW1, its director, stated that the Claimant was paid a salary of Kshs 10,800 per month. By virtue of section 26 of the Employment Act as read with section 48 of the Labour Institutions Act he was entitled to the minimum wage as per the relevant legal notices. For instance, as at November 2017, the Regulation of Wages (General) (Amendment) Order 2017 provided for a salary of Kshs 16,102 for an ungraded artisan exclusive of housing allowance. I award the Claimant the claim for underpayments at Kshs 272,866.90

i. 12 months' compensation for unfair termination

The Claimant prayed for maximum compensation for the unlawful termination. Considering that the Claimant was convicted for stealing from the Respondent, I do not think it would be fair to reward him with compensation even if the termination of his employment was unfair. I decline the prayer for compensation on this ground.

51. In the end, Judgment is entered for the Claimant in the following terms:

- a. One months' pay in lieu of notice Kshs 16,102
 - b. Unpaid leave dues Kshs 39,016.40
 - c. Unpaid public holidays Kshs 32,204.00
 - d. Overtime dues Kshs 386,448.00
 - e. Underpayments Kshs 272,886.90
- Total Kshs 746,657.30
- f. Each party shall bear its costs
 - g. Interest shall accrue from date of Judgment

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 23RD DAY OF JANUARY 2025

MAUREEN ONYANGO

JUDGE

