



REPUBLIC OF KENYA



**Njehia & 2 others v Naivas Limited (Cause 282 of 2017)
[2025] KEELRC 633 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 282 OF 2017
MA ONYANGO, J
FEBRUARY 27, 2025**

BETWEEN

DAVID CHEGE NJEHIA 1ST CLAIMANT

DAVID NJOROGE MWANGI 2ND CLAIMANT

HASSAN GITHAHI WARUINGI 3RD CLAIMANT

AND

NAIVAS LIMITED RESPONDENT

JUDGMENT

1. The three Claimants, David Chege Njehia, David Njoroge Mwangi and Hassan Githahi Waruingi sued the Respondent herein vide a Memorandum of Claim dated 22nd October 2013, alleging that the termination of their employment by the Respondent was unfair and unlawful.
2. The 1st Claimant averred that he was employed by the Respondent as a cashier in 2009 and worked until 27th April 2012 when his employment was unfairly terminated. He stated that at the time of termination he was earning Kshs. 8,470 and a house allowance of Kshs 1270.50 per month.
3. The 2nd Claimant stated that he was employed as a cashier by the Respondent in January 2003 a position he held until September 2012 when his employment was terminated unfairly. He avers that at the of termination he was earning a salary of Kshs. 38,054.50 and a house allowance of Kshs. 6,715.50 per month.
4. The 3rd Claimant on his part contended that he was employed by the Respondent on 17th July 2005 as a cashier and worked diligently until 20th March 2012 when his employment was terminated. He stated that at the time of termination he was earning a monthly salary of Kshs 32,725 and a house allowance of Kshs 5775.



5. The Claimants averred that the termination of their employment was unfair because they were not given an opportunity to defend themselves of any misconduct necessitating the termination of their employment.

6. The Claimants prayed for compensation for unfair and unlawful termination and particularized their terminal dues as hereunder:

1st Claimant

- i. One month pay in lieu of notice Kshs. 18,525
- ii. Service benefits Kshs 16,109
- iii. Salary for April 2012 Kshs 18,525
- iv. Overtime dues Kshs 106,319.4
- v. Underpayments of wages Kshs 217,045.8
- Total Kshs. 376,524.20

2nd Claimant

- i. One month pay in lieu of notice Kshs. 44,770
- ii. Leave dues Kshs 325,443.46
- iii. Service benefits Kshs 171,245.25
- Total Kshs. 541,458.71

3rd Claimant

- i. One month pay in lieu of notice Kshs. 42,349.50
- ii. Leave dues Kshs 205,128
- iii. Service benefits Kshs 107,910
- iv. Underpayments of wages Kshs 105,863.40
- Total Kshs. 461,250.90

7. In reply, the Respondent filed separate Memoranda of Reply in respect of each Claimant, all dated 23rd February, 2016, denying that it unfairly terminated the services of the Claimants.

8. With respect to the 1st Claimant, it is contended that he was summarily dismissed by the Respondent after he neglected to perform his duties as required of him. With respect to the claim by the 2nd Claimant, the Respondent in response averred that he was summarily dismissed from employment after he absconded duty following his transfer from Eldoret Sokoni Branch to Ronald Ngala Branch, Nairobi. Regarding the 3rd Claimant, it is the Respondent's case that he was lawfully terminated in accordance with the laid down legal provisions after he absconded work following discovery that he was colluding with another cashier to steal money from the Respondent using his password to fraudulently abort sale transactions at the point of sale.

9. Regarding the reliefs sought by the Claimants, the Respondent contended that the Claimants are not entitled to any of the prayers they are seeking as they failed to adhere to the rules stipulated under their terms and conditions of employment.

10. The Respondent urged the court to dismiss the Claimants' suits with costs.



11. The suit was heard on 9th November 2023 when the 3rd Claimant testified as CW1 in furtherance of his case. He adopted his witness statements recorded on 14th December 2018 and 18th December 2018 as part of his evidence in chief.
12. CW1 denied absconding duty as alleged by the Respondent. He testified that at the time of termination of his employment he was the supervisor. That cashiers whom he was supervising misappropriated funds and he was made a witness in the criminal case. He was later told to stop working until the case was finalized. He testified that he was orally suspended from employment. That he wrote several letters to the Respondent enquiring about the reason for his suspension but the Respondent never responded. CW1 stated that in 2016 he was told that he was no longer a witness but a suspect. That he was charged in a criminal case which was dismissed in 2017. CW1 stated that the Respondent did not contact him even after the criminal case was dismissed.
13. According to CW1, he used to report to work at 7am and leave work at 9pm. He was paid overtime at times. He never went on annual leave during the period he worked for the Respondent. He worked from Monday to Sunday as well as on public holidays. He was never given a termination letter.
14. On cross examination, CW1 stated that he was suspended by the Respondent following a theft incident involving four cashiers namely Mr. Keino, Mr. Wainaina and 2 others whose names he could not remember. He explained that he did not know how the theft occurred.
15. CW1 stated that he never disclosed his password to the cashiers. That there were several people who had passwords.
16. The 2nd Claimant testified as CW2 and adopted his witness statement recorded on 14th December 2018 as his evidence in chief. CW2 stated that he reported to work on 12th September 2012 and was orally told by the Human Resource Manager, Aggrey Naju that he had been suspended. He stated that he was later told to report to Ronald Ngala Branch which he did and worked for one day but in the evening he was told by the branch manager that he should not report to work after that date as investigations were still ongoing. CW2 testified that he wrote several letters to the Respondent inquiring about the status of his employment but the Respondent never responded. He stated that he was never taken through a disciplinary hearing and neither was he told the reason for the termination of his employment.
17. CW2 maintained that he never went on leave; that he reported to work at 7am and left at 9pm and was only given 2 days off per month. He stated that he worked from Monday to Sunday including public holidays. CW2 denied the allegation made by the Respondent that he absconded duty upon his transfer to Ronald Ngala branch and stated that he was issued with a letter of transfer which he handed over when he reported to Ronald Ngala branch
18. On cross examination, CW2 maintained that when in Nairobi he was told not to report to work as investigations were ongoing. He stated that he was not told what was being investigated and that he does not know why his services were terminated. CW2 stated that he was sent to Ronald Ngala before the end of August 2012 and he reported to Ronald Ngala and worked for one day and at the end of the day, he was told not to report to work the following day as he was being investigated.
19. David Chege Njehia, the 1st Claimant, testified as CW3. He adopted his witness statement filed with the Memorandum of Claim as his evidence in chief. CW3 stated that he was terminated from employment on accusations that he had refused to serve a customer. He explained that he was serving a customer when the manager came with another customer asking that the customer be served. That when he told the manager that he would serve the said customer after serving the customer in the queue, he was told to go home. He stated that after 2 weeks, he was called back and issued with a termination letter.



CW3 stated that he was not taken through a disciplinary process before he was terminated. He further stated that he used to report to work from 7am to 9pm, worked from Sunday to Sunday including public holidays and was never paid overtime although he was given 2 days off per month. He prayed for compensation for the unfair termination and for payment of his terminal dues.

20. During cross examination, CW3 maintained that he was never paid overtime
21. The Respondent did not file a witness statement within the requisite period and the court suo moto closed the Respondent's case after noting that the suit was filed in 2013.
22. Parties were directed to file written submissions. The Claimants' submissions were filed on 6th February 2024 while the Respondent's submissions were filed on 13th February 2024.

The Claimant's submissions

23. The Claimants identified the issues for determination to be:
 - i. Whether the Claimants were employees of the Respondent.
 - ii. Whether the termination of the employment of the Claimants was wrongful, unfair and unlawful in the circumstances.
 - iii. Whether the Claimants are entitled to the reliefs as prayed for in the statement of claim.
 - iv. Whether the Claimants are entitled to compensation for unlawful termination of employment.
 - v. Who should bear the costs of this claim
24. On the first issue, the Claimants submit that as per the Respondent's Reply to Memorandum of Claim in paragraph 3, the Respondent admits that the Claimants were employees over the stated period and therefore there is no dispute as to the existence of an employment relationship.
25. On the second issue, in relation to the 1st Claimant, it is submitted that the Respondent vide its reply in respect to CW1's claim stated that CW1 was dismissed summarily. While citing the case of Prof. Macha Isunde v Lavington Security Guards Limited [2017] eKLR, it is submitted for the 1st Claimant, that the Respondent failed to comply with section 41 of the Employment Act, 2007 as he was not issued with a notice and taken through a hearing before the termination of his employment. It is further submitted that the reasons for termination of the 1st Claimant's employment were also not proved. Accordingly, the Claimant submitted that the Respondent failed to comply with the substantive and procedural aspects of termination of employment as required by sections 43 and 41 of employment Act, 2007 and therefore the termination was wrongful, unfair and unlawful.
26. With regard to the 2nd Claimant, it is submitted that CW3 in his testimony stated that he was summoned by the chairman of the company one Mr. Simion Gashwe who informed him by word of mouth that he had been terminated indefinitely and that he was not given a reason for the termination. The 2nd Claimant submitted that Section 74 of the Employment Act confers responsibility on the employer to keep employee records. According to the 2nd Claimant, the failure by the Respondent to keep up to date records of the Claimant and proof that indeed the Claimant absconded his duties confirms the allegation to be false.
27. With regard to the 3rd Claimant, CW2 told the court that he was informed that his password was used to steal ksh.700,000/=from the company and that four cashiers were arrested. He stated that after the incident, he was asked by the Respondent to be its witness only for him to be terminated the next



day without a reason. It was submitted that CW2 in his testimony told the court that no disciplinary meeting was conducted and neither was he issued with a show cause letter. He therefore contended that he was unfairly and wrongfully dismissed from employment in contravention of Sections 41, 43 and 45 of the *Employment Act*.

28. In sum, it is the submission of the Claimants that the termination of their employment was unfair because the Respondent failed to justify the reason for the termination as required by section 43 and 47 of the Act and to prove that the Claimants were accorded a fair hearing as required by Section 41 of the *Employment Act*.
29. On the issue whether the Claimants are entitled to the reliefs sought, it was submitted that having established a case of unlawful termination of their employment, the Claimants are entitled to all the reliefs sought in their respective claims.
30. The Claimants also urged the court to condemn the Respondent to pay the costs of this suit.

The Respondent's submissions

31. The Respondent identified the only issue for determination to be whether the Claimants' Claims for terminal dues are meritorious.
32. On the claim for service benefits, it was submitted that the Claimants are not entitled to service pay as they were members of NSSF as evidenced in their pay slips annexed to their Memorandum of Claim.
33. On the Claim for overtime dues, the Respondent submitted that only the 1st Claimant prayed for the same in the sum of Kshs. 106,319.4/=. According to the Respondent, the 1st Claimant pleaded that he worked for an extra 26 hours for 33 months but did not provide any proof that he indeed worked overtime for the 33 months. It is the Respondent's submission that the burden of proof was upon the 1st Claimant to demonstrate through pleadings and evidence the exact overtime hours worked and how he arrived at the sum claimed.
34. Further, while relying on the case of James Kyama v Muthaiga Golf Club [2022] eKLR, the Respondent submitted that the claim by the 1st Claimant is time barred. According to the Respondent, from the documents filed by the 1st Claimant in court, his service with the Respondent was terminated on 28th April, 2012 and as such any claim for overtime payment ought to have been filed by 28th April, 2013 and the instant claim was filed on 1st November, 2013, seven months after it had already abated.
35. It is submitted that the 1st Claimant failed to plead the particulars and provide evidence to prove the claim for overtime worked and not paid and also that the claim is time barred.
36. On the claim for leave dues by the 2nd and 3rd Claimants, the Respondent submitted that the claim for leave dues is statute barred. with regard to the 2nd Claimant, it is submitted that he was employed by the Respondent on 17th July, 2005 and terminated on 20th March, 2012. The Respondent submitted that the 2nd Claimant's claim for leave dues for 2005, 2006, 2007, 2008 and 2009 are not payable since they are time barred and that he can only claim for leave dues for the year 2010, 2011 and 2012.
37. With regard to the 3rd Claimant, it is submitted that he claimed for leave dues from 2003 to September, 2012 which is a total of nine years. The Respondent submitted that all the claims between 2003 and 2008 are statute barred, and that the 3rd Claimant can only claim for leave days from 2009 to 2012. The Respondent relied on the case of Matsesho v Newton (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) (29 July 2022) (Judgment) in support of this position.



38. On the claim for underpayments by the 1st Claimant, the Respondent submitted that the 1st Claimant produced two pay slips for May 2011 and February 2012. It is submitted that the claim for underpayments in 2010 cannot hold since the Court does not have evidence showing how much the 1st Claimant was earning in 2010.
39. The Respondent submitted that in 2011, from the 1st Claimant's pay slip, the 1st Claimant was earning Kshs. 16,164 which is well within Legal Notice 70 which provides for Kshs.13,833 for cashiers.
40. With regard to the 3rd Claimant, it is submitted that he seeks for underpayments for the year 2006 relying on Legal Notice No. 38 of 1st May, 2006 which prescribes Kshs.11,723/= as the payment for a cashier. The Respondent submits that the 3rd Claimant was earning well above the limit and did not provide any pay slip for the year 2006 that would enable the court make an accurate conclusion that he was indeed underpaid.
41. In conclusion the Respondent submitted that that the Claims herein are not meritorious and should be struck out with costs to the Respondent.

Determination

42. I have considered the respective pleadings filed by the parties, the testimonies and evidence produced by their witnesses as well as the submissions and identified the following as the issues for this Court's determination:
 - i. Whether the summary dismissal of the 1st Claimant was procedurally and substantially fair.
 - ii. Whether the 2nd and the 3rd Claimants were unfairly and unlawfully dismissed from employment or they absconded duty
 - iii. Whether the Claimants are entitled to grant of the Orders sought?

Whether the summary dismissal of the 1st Claimant was procedurally and substantially fair.

43. Before an employer terminates an employee's employment, the employer must not only prove that it has valid reasons for the said termination but must also ensure that the procedure set out in section 41 of the Act is complied with.
44. Section 43 of *Employment Act* 2007 provides inter alia:
 43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee
45. The burden of proof in termination of employment is on the employer who is required to prove that the reasons for the termination are valid and the procedure was fair.
46. Section 45(1) of the *Employment Act* provides that:

“No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -



- a) That the reason or reasons 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 was that the Employment was terminated in accordance with fair procedure".

47. From the termination letter issued to the 1st Claimant, the reason for termination is given as his refusal to serve a customer. The letter reads:

28th April 2012

Mr. David Chege Njehia-P/No 1477

Thro

The Manager

Sokoni Branch

Eldoret

Re: Termination of Service

It is reported that on 27th April 2012, you refused to serve a customer even after you were asked by the supervisor. You must be aware that this is an offence and can justify instant dismissal. Accordingly, it has been decided to terminate your services with this company for gross misconduct. This is with immediate effect.

Please return all company properties in your possession including employee ID.

Signed

Maureen Millicent Njeri

For

HR Manager

48. In his testimony, the 1st Claimant stated that the incident happened when he was serving a customer. That the manager came with another customer asking that the said customer be served first. That when the 1st Claimant told the manager that he would serve the customer after serving the customer in the queue, he was told to go home. The Respondent did not rebut this evidence. The reason given for the termination of the 1st Claimant's employment was not valid or backed with evidence. The termination was therefore unfair as provided for under section 45 of the [Employment Act](#).
49. It is also not in dispute that the 1st Claimant was not taken through a fair procedure as provided in section 41(1) of the [Employment Act](#). He was not accorded a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and granting him or her the opportunity to make representations in response to the said allegations.
50. I therefore find that the 1st Claimant proved that the termination of his employment was without valid or any reason and that there was no compliance with fair procedure. The termination was therefore unlawful and unfair and I declare accordingly.



Whether the 2nd and the 3rd Claimants were unfairly and unlawfully dismissed from employment or they absconded duty

51. The Respondent in its defence averred that the 2nd and 3rd Claimants absconded duty after they learnt that they were being investigated over a theft incident in which they were alleged to have been involved.
52. It is trite that where an employer avers that an employee deserted duty, the employer has to produce evidence showing that reasonable steps were taken to contact the employee accused of deserting duty. No evidence was adduced by the Respondent to show that it had tried to contact the Claimants after it was alleged that they absconded duty.
53. This court in the case of *Joel Nyabuti Aricha v Karibu Hotel* [2019] eKLR held as follows:

“Under Section 10(6) as read with 16(7) of the *Employment Act*, it is the burden of the respondent to disprove the averments of the claimant where it has not produced prescribed records.

Under both Section 10 and Section 74(1) an employer is obliged to keep records of warning letters or other evidence of misconduct of an employee.

Having failed to do so, the court has no option but to accept the claimant’s version of events leading to the termination of his employment.”

54. In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties

55. The Respondent having failed to demonstrate that it complied with the law as spelt out in Sections 41 and 43(1) of the *Employment Act* in terminating the employment of the 2nd and 3rd Claimants the termination of their employment was substantively and procedurally unfair. I so find and hold.

Whether the Claimants are entitled to grant of the Orders sought?

56. The Respondent submitted that most of the claims by the Claimants are time barred having been brought outside the statutory limitation. The Claims herein were however filed within 3 years from the date of termination and are not time barred.
57. I proceed to address the reliefs sought by the Claimants in the Memorandum of Claim as follows: -

1st Claimant

- a. Salary in lieu of notice

Having made a finding that the 1st Claimant was unfairly and unlawfully terminated from employment, I find that the claim for one month salary in lieu of notice is founded; and I award the same at Kshs. 18,525

- b. Service benefits



I have considered the 1st Claimant's pay slips filed by the 1st Claimant and noted that the 1st Claimant was a beneficiary of NSSF and is therefore disqualified from claiming service pay. I dismiss the claim for service pay.

c. Salary for April 2012

From the termination letter reproduced above, the 1st Claimant was terminated from employment on 28th April 2012 with immediate effect. No evidence was tendered in court by the Respondent to show that the 1st Claimant was paid his salary for April 2012 and neither did the termination letter indicate that he would be paid his salary. The 1st Claimant proved, on a balance of probabilities, entitlement to his August 2012 salary, which I award.

d. Overtime dues

The payslips for David Chege Njihia show that he was paid overtime for both the normal working days and for rest days. I find that he is not entitled to any overtime.

e. Underpayments of wages

The minimum wage for a cashier in 2010 was Kshs. 14,319. 15% house allowance on the same would be Kshs. 2147.85 making a total of Kshs. 16,466.85. The Claimant was earning a salary of Kshs. 8470 plus house allowance of Kshs. 1270.50 making a total of Kshs. 9740.50. He was thus underpaid by (16466.85-9740.50) Kshs. 6726.35. I award him Kshs. 188,337.80.

2nd Claimant

i. One month pay in lieu of notice

Having found that the 2nd Claimant's termination from employment was unfair both procedurally and substantively, the Claimant is entitled to this relief by dint of Section 36 of the *Employment Act*, 2007 which I award at Kshs 44,770

ii. Leave dues

The 2nd Claimant is entitled to leave dues for the years 2010,2011 and 2012 which is 21days/26 x 3x44,770 which sums up to Kshs 108,481.15 which I award

iii. Service benefits

This is not payable as the 2nd Claimant was a member of NSSF and deductions were made to the statutory body as evidenced by his payslips filed in support of his case.

3rd Claimant

i. One month pay in lieu of notice

Having found that the 2nd Claimant's termination from employment was unfair both procedurally and substantively, the Claimant is entitled to this relief which I award at Kshs 42,349.50

ii. Leave dues

The 3rd Claimant is entitled to leave dues for 2009, 2010 and 2011 21days/26 x 3x42,349.50 which sums up to Kshs 102,616.09 which I award.

iii. Service benefits



As per section 35(5) read with section 35(6) of the *Employment Act*, the 3rd Claimant is not entitled to service pay since he was a member of the National Social Security Fund(NSSF) as evidenced by his pay slips filed in support of his case.

iv. Underpayments of wages

The Claimant did not demonstrate that he was underpaid salary.

58. Consequently, judgment is hereby entered in favour of the Claimants against the Respondent as follows: -

1st Claimant

One month salary in lieu of notice Kshs. 18,525

Salary for April 2012 Kshs 18,525

UnderpaymentsKshs. 188,337.80

2nd Claimant

One month salary in lieu of notice Kshs. 44,770

Leave dues Kshs. 108,481.15

3rd Claimant

One month pay in lieu of notice Kshs. 42,349.50

Leave dues Kshs 102,616.09

59. The Claimants are also awarded costs and interest at Court rates from date of judgment.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 27TH DAY OF FEBRUARY 2025

MAUREEN ONYANGO**

JUDGE**

