



**Wanjiru v Neuce Kenya Paint Industry Limited (Employment and Labour Relations Cause E007 of 2024) [2025] KEELRC 584 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 584 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E007 OF 2024  
AN MWAURE, J  
FEBRUARY 26, 2025**

**BETWEEN**

**JOSEPH MAINA WANJIRU ..... CLAIMANT**

**AND**

**NEUCE KENYA PAINT INDUSTRY LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a memorandum of claim dated 12<sup>th</sup> February, 2024.

**Claimant's case**

2. The Claimant avers that he was employed as a sales representative vide a letter of appointment on 11<sup>th</sup> July 2021.
3. The Claimant avers that he was earning Kshs.135,000/=, which comprised net salary and commission.
4. The Claimant avers that he was unfairly terminated vide a letter dated 8<sup>th</sup> December 2023 by being declared redundant.
5. The Claimant avers that he entered into a mutual agreement dated 14<sup>th</sup> November 2023 where his terminal dues were paid, amounting to Kshs.191,620.15/= after the Respondent double-taxed him Kshs.93,880/=.
6. The Claimant avers that he did not execute the said mutual agreement, but the Respondent withheld his terminal dues.
7. The Claimant avers that he executed the mutual agreement dated 14<sup>th</sup> November 2023 on 24<sup>th</sup> November 2023.



8. The Claimant avers that before leaving the Respondent's company, he was required to train his replacement which was part of the mutual agreement.
9. The Claimant avers that he was unfairly and unlawfully terminated on account of redundancy as substantive justification and procedural fairness were not followed, contravening the provisions of the *Employment Act*.
10. The Claimant prays that:
  - a. There be a declaration that the Claimant's fundamental rights and freedoms under Article 41(1)(2)(a) of the *Constitution* 2010 have been and were grossly violated by the Respondent as contained in the body of the claim herein.
  - b. General damages, exemplary damages and aggravated damages under Article 23(3) of the *Constitution* 2010 for unconstitutional conduct of the Respondent be awarded to the Claimant.
  - c. A declaration be made to the effect that the Claimant's employment was unfairly terminated by the Respondent on or about 8<sup>th</sup> December 2023 contrary to the provisions of section 40 of the *Employment Act*.
  - d. The Claimant herein be awarded the maximum 12 months compensation for the unfair and unlawful termination as provided for under section 49(1)(c) of the *Employment Act* as follows:
    - i. 12 months compensation Kshs.1,869,900
    - ii. One month in lieu of notice Kshs. 55,825
    - iii. House allowance Kshs. 528,450
    - iv. Unpaid wages for 8 days Kshs. 203,771
    - v. Severance pay Kshs. 44,798
    - vi. Unpaid annual leave Kshs. 72,878
    - vii. Pro-rata annual leave Kshs. 28,956.25
  - e. Refund of the money deducted from his terminal dues amounting to Kshs. 93,880/=.
  - f. Certificate of service.
  - g. Costs of the suit and interest.

### **Respondent's memorandum of response**

11. In opposition to the memorandum of claim, the Respondent filed a memorandum of response dated 8<sup>th</sup> October 2024 with leave of court.
12. The Respondent admitted that the Claimant was its employee earning Kshs.75,000/= being net salary and commission of Kshs.25,000/=.
13. The Respondent avers that the Claimant was issued with a written contract dated 11<sup>th</sup> July 2021.
14. The Respondent avers that the Claimant agreed to mutually terminate his contract of 11<sup>th</sup> July 2021 without any coercion or undue influence and was paid all his dues.



15. The Respondent avers that the Claimant was paid Kshs. 191,620/= according to the mutual agreement.
16. The Respondent avers that the Claimant was lawfully terminated on 8<sup>th</sup> November 2023 because of his behaviour and conduct, which amounted to irresponsibility, negligence, insubordination and absenteeism.
17. The Respondent avers that despite being served with warning letters regarding his behaviour, he did not improve and this led to his termination.
18. The Respondent avers that the Claimant was not entitled to his terminal dues as it is part of the National Social Security Fund (NSSF) according to Section 35(6) of the *Employment Act*.
19. The Respondent avers that his terminal dues amounted to Kshs.221, 620 less Kshs.30,000 amounting to Kshs. 191,620/=.
20. The Respondent avers that it fully paid the Claimant, and he only wants to enrich himself by seeking double claims for leave and holiday days.
21. The Respondent avers that the Claimant took up his leave days and was fully paid for leave days not taken up.
22. The Respondent avers that there is no provision in statute and/or employment contract for travelling allowance
23. The Respondent avers that the Claimant is not entitled to any compensatory damages as the termination was lawful and is once again attempting to unjustly enrich himself.
24. The Respondent prays that the Claimant's suit be dismissed with costs.

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

25. The Claimant testified by adopting his written statement dated 12<sup>th</sup> February 2024 as his evidence in chief.
26. The Claimant also produced and adopted his bundle of documents dated on even date as exhibit 1 to 9.
27. In cross-examination, he stated that he has worked for the Respondent for 2 years.
28. The Claimant stated that he signed the mutual agreement dated 14<sup>th</sup> November 2023, but he was forced to sign it on 24<sup>th</sup> November 2023.
29. He stated that in the mutual agreement, it was indicated that he was not to demand any money as compensation.

#### **Respondent's evidence**

30. The Respondent's manager, Ms. Gladys Atieno Omondi, adopted her witness statement dated 18<sup>th</sup> October 2024 as her evidence in chief together with the list of documents dated 5<sup>th</sup> July 2024 as exhibits 1 to 3 respectively.
31. In cross-examination, she stated that she knew the Claimant and the Respondent had kept proper books of record. She stated that the Claimant was not an independent contractor but an employee of the Respondent.



32. She stated that the Claimant's appointment letter did not contain a clause for a house allowance, and on his payslip, there was no house allowance as well.
33. She stated the Claimant worked for the Respondent for more than 2 years. She stated that the Claimant was paid 10.5 days for his leave, and the Respondent had records of the Claimant's leave days but did not bring them to court.
34. The Respondent's manager stated that the Claimant's last day was on 8<sup>th</sup> November 2023, and he was paid one month's notice. She stated that the Claimant went on leave on 4<sup>th</sup> November 2023 and was recalled on 8<sup>th</sup> November 2023. She stated that his leave was to continue to 12<sup>th</sup> November 2023.
35. She stated that the Claimant was issued with a termination notice on 8<sup>th</sup> November 2023 on account of redundancy, but the said notice does not show that he was declared redundant. She stated that the Claimant was not given value for his contract. She stated that there were several meetings which were held, but there were no minutes to show for it.
36. She stated that the mutual agreement contained the calculated terminal dues for the Claimant. She stated that the Claimant was paid a net amount, but he was deducted Kshs. 93,000/= as he was earning Kshs.100,000/=.
37. In re-examination, she stated that the Claimant signed a second mutual agreement as he had raised concerns about the first mutual agreement.
38. Both parties put in their written submissions.

#### **Claimant's submissions**

39. The Claimant submitted that he was an employee, not an independent contractor and any reference to him as an independent contractor without evidence to support it was merely an attempt to evade responsibility for unfair and unlawful termination, as well as the non-payment of terminal dues.
40. The Claimant submitted that the substantive justification and procedural fairness on account of redundancy were not followed as set out in sections 40, 41 and 45(2) of the *Employment Act*. The Claimant relied on the case of *Kenya Airways Limited V Aviation & Allied Workers Union & 3 Others* (2014) eKLR the Court of Appeal stated as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”
41. The Claimant argued that for redundancy to take effect, there should be an issuance of a one-month notice to the labour office and the trade union if the employee is a member of a trade union and if not a member, the employee to be served directly with the notice.



42. The Claimant submitted that the notice of termination dated 8<sup>th</sup> November 2023 refers to the termination of employment as set out in Section 35 of the *Employment Act*. The Claimant also submitted that the Respondent did not carry out the process to arrive at a decision on the employees to be affected by the redundancy with due consideration to the employee's seniority in time and skill, ability and reliability.
43. The Claimant submitted that he was coerced to sign the mutual agreement as the payment of his terminal dues was pegged to the execution of the said agreement. The Claimant argued that upon execution of the mutual agreement, he had fully discharged and waived his rights and further claims against the Respondent. The Claimant urged this Honourable to find that the mutual agreement did not constitute any legally binding separation agreement, having been coerced to do so.
44. The Claimant relied on the case of *Fredrick Odhiambo V Kenya Safari Lodges & Hotel Ltd* [2015] eKLR where the court held that the computation of dues was done unilaterally by the respondent and was not a mutually negotiated agreement. The Claimant signed in a blank space without declaring the sum as a full and final settlement. The alleged discharge voucher was a letter from the respondent to the claimant dated 6<sup>th</sup> October 2014, enclosing four cheques totalling Kshs. 3,081,417.50 as the final payment of the claimant's terminal dues.
45. The Claimant submitted that he is entitled to the relief sought as set out in the memorandum of claim.

### **Respondent's submissions**

46. The Respondent submitted that the Claimant was not coerced to sign the mutual agreement dated 14<sup>th</sup> November 2023, and the particulars of coercion were not pleaded in the claim. The Respondent relied on the case of *Wenslaus Oduki Odinga V Kenyatta National Hospital Board* [2013] eKLR where the court held as follows:

“Apart from the general claim of duress, the Claimant did not adduce any particulars. An employee alleging duress or inducement to sign a document in a non-custodial environment must provide details of such duress or inducement. It is not enough to say, “I was forced or I was confused.” The Claimant failed to provide any such details and his claim that he was forced to sign the admission is therefore rejected. This in effect means that the Respondent had a substantive justification for terminating the Claimant's employment.”
47. The Respondent argued that the Claimant was given time to review the mutual agreement, and when there was a proposal of the separation package, the Respondent took consideration to amend to include the said proposal asked by the Claimant. Once the mutual agreement was in order, both parties executed it.
48. The Respondent submitted that the parties to an employment contract could mutually agree to terminate the contract on a mutual undertaking as it was held in *Fredrick Kariuki Kamau V Bank of India* [2015] eKLR.
49. The Respondent submitted that the mutual agreement was binding as it fulfilled the requirements of a contract, which includes offer, acceptance, awareness, consideration, capacity and legality. The Respondent relied on the cases of *Gilbert Mugambi V Michimikuru Tea Factory Limited* (2018) eKLR, *Ephraim Gaitbo Githongari V Timaflor Limited* (2018) eKLR, *Felix Mutie Musango V Tin Can Manufacturers Limited* [2020] eKLR, *Wokabi V British American Tobacco Kenya Limited* [2022] KEELRC 12694 (KLR) and *Werunga V Foremost Limited* [2022] KEELRC where the courts have held that mutual separation agreements between parties are legally binding contracts. These



agreements can only be invalidated if elements like fraud, coercion, duress, or undue influence are proven with substantial evidence beyond a balance of probabilities. In summary, mutual separation agreements are upheld unless specific factors invalidate the contract with strong evidence.

50. The Respondent submitted that the Claimant was fully compensated as his terminal dues were paid and relied on the case of *Felix Mutie Musango V Tin Can Manufacturers Limited* (*supra*), where it was held that it is now trite law that a settlement agreement, such as the discharge certificate, is a binding contract between the parties. The court cannot interfere with it unless it is invalidated by factors that would vitiate a regular contract under common law. In summary, the court respects the binding nature of settlement agreements and will only intervene if specific reasons invalidate the contract.
51. The Respondent urges this Honourable Court to dismiss the suit with costs.

### **Analysis and determination**

52. The court has considered the pleadings on record, the evidence adduced together with the submissions, the issues for determination are as follows:
- i. Whether the Respondent declared the Claimant redundant or he was terminated normally
  - ii. Whether the mutual agreement is binding
  - iii. Whether the Claimant is entitled to the relief sought.
53. The Claimant avers that he was issued with a notice of termination dated 8<sup>th</sup> November 2023 which reads as follows:

Ref: AD2023070

Nairobi, on 08<sup>th</sup> November 2023

Joseph Maina Wanjiru

Nyeri

Re: Notice Of Termination Of Employment

Dear Joseph,

We regret to inform you that we will be ending your employment with us as of 08/12/2023. Please consider the date as your last working day of work.

This is done in compliance with the minimum one-month notice.

Yours Faithfully

Managing Director

54. The above letter does not contain any communication or reasons of redundancy as set out in Section 40(1) of the *Employment Act*, which provides as follows:

“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent



of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

55. From the same letter shows that his last day of work was on 8<sup>th</sup> December 2023. According to the employment contract, both parties were required to give one month's salary in lieu of notice and this should be done in writing. It shows that the Claimant was terminated in accordance with Section 35(1) (c) of the *Employment Act*, which provides as follows:

- “(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—
  - (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”

56. In the Respondent's memorandum of response, the Respondent stated that the reasons for terminating the Claimant was because of his conduct behaviour which amounted to irresponsibility, negligence, insubordination and absenteeism.

57. Section 47(5) of the *Employment Act* provides as follows:

“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.”

58. Section 45(1) of the *Employment Act* make now mandatory that for termination to be legal the employer must give a valid reason for termination and also must follow the right procedure set out in Section 41(1) of the *Employment Act*. Section 45(1) of the *Employment Act* states:-

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 employees 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.

59. The Respondent gave no reason to the claimant as to the reason for his termination. The termination letter was just a notification that the respondent was ending the employment with the claimant. Interestingly enough, the respondents in their response said they terminated the claimant due to his irresponsible behaviour, negligence, in-subordination and absenteeism.

However, they did not indicate those in their termination letter and further they did not follow the required procedure in Section 41 of the *Employment Act*.

60. Section 41 of the *Employment Act* states: -

- (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.

The claimant should have been called for a disciplinary hearing in the presence of an employee of his choice or a union representative, if he was a member of the union.

The respondent terminated the claimant both unfairly and unprocedurally.

61. In the case of *Walter Ogal Onuro -vs Teachers Service Commission* Cause No. 955 of 2011 the court held: -

“For termination to pass the fairness test, it ought to be shown that there was not only substantive justification of the termination but also procedural fairness.

Such evidence is lacking in this case.

62. Even if the Claimant signed a mutual agreement to terminate his employment the same was already after he had been served with a termination notice. The two letters are dated 14<sup>th</sup> November 2023 and 24<sup>th</sup> November 2023.

The two agreements were issued after claimant had already been terminated and so they cannot be regarded mutual consent.

63. The court is satisfied that the claimant was unfairly and unprocedurally terminated from his employment and judgment is entered in his favour.



64. He is awarded

- (a) Compensation equivalent to 2 months' salary having worked for a short time with the claimant .....Kshs.200,000/=
- (b) The claimant was paid salary in lieu of notice, pending leave days, severance pay and commission for sales.
- (c) Total awarded is Kshs.200,000/= plus interest at 14% per annum at court rates from date of judgment till full payment.
- (d) He is awarded costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

