



**Ndeti v Goken Hardware Limited & another (Cause E066 of 2024)
[2025] KEELRC 417 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 417 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E066 OF 2024
SC RUTTO, J
FEBRUARY 14, 2025**

BETWEEN

EZEL MWIKALI NDETI CLAIMANT

AND

GOKEN HARDWARE LIMITED 1ST RESPONDENT

RODS & STEEL LIMITED 2ND RESPONDENT

JUDGMENT

1. The Claimant avers that she was employed by the 2nd Respondent, a sister company forming the Group of Companies to the 1st Respondent, as a Stock Manager with effect from 1st October 2007. According to the Claimant, the 1st Respondent was satisfied with her work pursuant to her commitment, discipline and diligence hence her salary was increased from Kshs 57,000/= to Kshs 76,734/= and then to Kshs 98,833/=.
2. In the Claimant's view, the salary increases implied that she had been a high performer at her workplace.
3. It is the Claimant's case that she served the Respondents with loyalty, diligence and full dedication until 16th December 2023 when the 1st Respondent wrongfully, unprocedurally and unlawfully terminated her services.
4. Her claim against the Respondents is for the sum of Kshs 4,996,009/= being one month's salary in lieu of notice, compensation for unfair termination, service pay/gratuity, house allowance and prorated leave pay. She has further sought a declaratory order that her termination from employment was unfair and unlawful as well as the costs of the suit plus interest.
5. The claim did not go unopposed. The Respondents through the Memorandum of Response dated 5th March 2024 denied the Claimant's assertions that she was unlawfully terminated from employment.



The Respondents have further averred that the Claimant's salary increase was merely based on company policy and not any indication of her performance.

6. According to the Respondents, the Claimant was terminated based on grounds listed in the letter of termination and was done on humanitarian grounds in order to ensure that she received her terminal dues. Consequently, the Respondents have asked the Court to dismiss the Claim with costs.
7. In her Reply to the Memorandum of Response, the Claimant has denied the Respondents' assertions and maintained that her dismissal was unfair and unprocedural.
8. The matter proceeded for hearing on 14th November 2024, during which both sides called oral evidence.

Claimant's case

9. The Claimant testified in support of her case and to start with, she adopted her witness statement as well as the list and bundle of documents filed on her behalf to constitute her evidence in chief.
10. It was the Claimant's evidence that at the time of termination, she was a full-time employee and therefore stands to benefit from the Employment Act with respect to being notified and given a chance to defend herself pursuant to Section 41 of the Employment Act.
11. The Claimant further averred that the 1st Respondent failed to notify her and give her a chance to be heard before any decision to terminate her employment was arrived at.
12. It is the Claimant's assertion that the 1st Respondent did not have any viable nor justifiable reason for terminating her services hence the termination was unfair and unlawful.

Respondents' Case

13. On the part of the Respondents, they called oral evidence through Ms. Grace Wanjiru Kanyuira, who testified as RW1. She identified herself as the Respondents' Human Resource Officer and similarly, she adopted her witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
14. It was RW1's evidence that the Claimant had been reporting for work late and there was a clear shift in her work and this consequently affected productivity leading the organization to take the option of termination.
15. RW1 further stated that the 1st Respondent Company offered to pay the Claimant her terminal dues as per the law together with a certificate of service.
16. That the Claimant has always been at liberty to collect her terminal dues from the 1st Respondent as well as her certificate of service.
17. According to RW1, the Claimant faced accusations of misconduct and her employment at the 1st Respondent Company was no longer tenable hence the decision to have her employment terminated.

Submissions

18. The Claimant submitted that she never received any warnings against any misconduct during the duration of her employment which spanned almost 17 years.



19. Referencing the case of Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & another (2025) eKLR, the Claimant submitted that her dismissal was devoid of a fair lawful procedure as required under the *Employment Act*.
20. In the same vein, the Claimant submitted that her termination was wrongful and unlawful as it did not conform to the laid out procedures of termination under the employment law.
21. The Respondents did not file written submissions as the same were missing on the Court's physical record and were not traceable on the online portal at the time of writing this decision.

Analysis and Determination

22. Arising from the pleadings by both parties, the evidence on record as well as the Claimant's submissions, it is apparent that the Court is being called to determine the following issues:
 - i. Whether the Claimant's termination from employment was fair and lawful; and
 - ii. Whether the Claimant is entitled to the reliefs sought.

Unfair and unlawful termination?

23. Pursuant to Section 43(1) of the *Employment Act* an employer is required to prove the reasons for termination of employment and failure to do so, such termination is deemed to be unfair. Coupled with that, Section 45 (2) (a) and (b) of the *Employment Act* provides that termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair, and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
24. Beyond proving the reason for termination, the employer is duty-bound to prove that the termination from employment was in accordance with fair procedure. In a nutshell, an employer is enjoined to prove that termination of employment was fair substantively and procedurally.
25. I will start by considering whether the Respondents have proved that there was a fair and valid reason to terminate the Claimant's employment.
26. The record bears that the Claimant was terminated from employment with effect from 16th December 2023 on what the 1st Respondent termed as her "attitude towards work and reporting late".
27. What is notable from the reason advanced for the termination of employment, is that the 1st Respondent did not elaborate on what it termed as the Claimant's attitude towards work.
28. Further to that, the 1st Respondent did not specify the instances when the Claimant reported to work late. What's more, there was no evidence from the 1st Respondent's end to prove its assertions that the Claimant reported to work late in any single instance. For instance, where were the attendance or log-in records to prove that the Claimant was in the habit of reporting to work late?
29. The long and the short of it is that the Respondents did not present any evidence to substantiate the allegations against the Claimant. What the 1st Respondent did was to merely prefer the allegations against the Claimant and leave it that. As such, the allegations against the Claimant were not corroborated through evidence presented in whatever form or manner.
30. In terms of Sections 43 and 45(2) (a) and (b) of the *Employment Act*, the burden was on the Respondents to prove the reasons for the Claimant's termination from employment and that such reasons were fair, valid and related to her conduct.



31. Indeed, I cannot help but question how else the 1st Respondent expected to discharge this responsibility without evidence. Needless to say, the 1st Respondent failed to discharge its evidential burden and to that extent, its allegations against the Claimant were not proven.
32. In light of the foregoing, it is this Court's finding that the Respondents have failed to satisfy the requirements of Section 43 read together with Section 45(2) (a) (b) of the *Employment Act* hence the Court arrives at the inescapable conclusion that the termination of the Claimant's employment was unfair for want of substance.
33. With respect to procedural fairness, Section 45 (2) (c) of the *Employment Act* places the burden on the employer to prove that termination of employment was in line with a process that is fair. In this regard, Section 41 (1) makes specific requirements regarding the process to be complied with by an employer. This process entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
34. In this case, the Respondents did not lead any evidence in whatever form or manner to prove that the Claimant was subjected to the process contemplated under Section 41 of the *Employment Act* prior to being terminated from employment.
35. In this regard, there is no evidence that the Claimant was put on notice that the 1st Respondent was contemplating termination of her employment on account of her attitude towards work and reporting to work late. In addition, there is no evidence that the Claimant was given an opportunity to give an explanation to the said allegations in the presence of a fellow employee of her own choice.
36. It is imperative to underscore that the provisions of Section 41 of the *Employment Act* are mandatory hence it follows that anything short of that process, is unprocedural and unfair. This position was buttressed in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR in which the learned Judges of the Court of Appeal expressed themselves as follows:
- “It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....Four elements must thus be discernible for the procedure to pass muster:-
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
37. Applying the aforementioned precedent to the case herein, it is evident that the Claimant herein was not accorded a fair hearing as envisaged under the *Employment Act*, prior to the termination of her employment.
38. As such, her termination from employment was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the *Employment Act*.
39. The total sum of my consideration is that the Claimant's termination was unjustified in all respects.



40. That said I now turn to consider the appropriate reliefs to be awarded in this case.

Reliefs?

41. Having found that the Claimant's termination from employment was unfair and unlawful, the Court awards her one (1) month's salary in lieu of notice and compensatory damages equivalent to eight (8) months of her gross salary. This award has taken into consideration the length of the employment relationship and the fact that the Respondents failed to prove that the Claimant's termination from employment was fair in substance and that it applied a fair process in effecting the said termination.
42. As the Respondents did not adduce the Claimant's leave record in line with the obligations of an employer under Section 74(1) (f) of the Employment Act to maintain employment records, the Claimant is awarded leave pay.
43. The claim for service pay is declined as it is evident that the Claimant was a registered member of the National Social Security Fund hence falling within the exclusions under Section 35(6) of the Employment Act.
44. The claim for house allowance is similarly disallowed as the pay slips exhibited by the Respondents reveal that the Claimant was earning house allowance in addition to basic salary. On her part, the Claimant did not lead evidence to prove the contrary.

Orders

45. It is against this background that I enter Judgment in favour of the Claimant as follows:
 - a. A declaration that the termination of the Claimant's employment was unfair and unlawful.
 - b. The Claimant is awarded the sum of Kshs 102,021.00 being one (1) month's salary in lieu of notice.
 - c. The Claimant is awarded the sum of Kshs 816,168.00 being compensatory damages equivalent to eight (8) months of her gross salary.
 - d. The Claimant is awarded the sum of Kshs 178,536.75 being unpaid leave.
 - e. The total award is Kshs 1,096,725.75.
 - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
 - g. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY, 2025.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Okoth instructed by Mr. Owang

For the Respondents Mr. Omondi Were

Court Assistant Kemboi

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 15th March 2020 and subsequent directions of 21st 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 had 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 *Civil 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.

