



**Omani v Vipingo Ridge Services Limited (Cause E022 of 2023)
[2025] KEELRC 426 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 426 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E022 OF 2023
AK NZEI, J
FEBRUARY 14, 2025**

BETWEEN

ALEX MOCHIEMO OMANI CLAIMANT

AND

VIPINGO RIDGE SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent herein vide a Statement of Claim dated 14th March, 2023 and filed in this Court on 21st March, 2023, and sought the following reliefs:-
 - a. A declaration that termination of the Claimant's services was unfair, unlawful and unjust.
 - b. One month salary in lieu of notice Kshs.325,000/=.
 - c. Twelve months' salary compensation ... Kshs.3,900,000/=.
 - d. Overtime hours Kshs.2,197,687.75/=.
 - e. Legitimate salary expected salary for 3 years remainder of contract Kshs.11,700,000/=.
 - f. Gratuity Kshs.162,500/=.
 - g. Leave pay for 15 months Kshs.340,000/=.
 - h. Costs of the suit and interest at court rates.
 - i. Issuance of certificate of service.
 - j. Any other relief that the court may deem just and fit to grant.



2. The Claimant pleaded that he had, vide an agreement dated 8th September, 2021, been employed by the Respondent as a Human Resource Manager earning a consolidated monthly salary of Kshs.325,000/=. The Claimant further pleaded:-
 - a. that he performed his duties diligently and with due dispatch, and was subsequently confirmed on 1st January, 2022.
 - b. that on 29th December, 2022, the Respondent's General Manager, one Mr. Barry, indicated to the Claimant that the Respondent had decided to reinstate one Esther Muli who had earlier worked with the Respondent as a Human Resource Manager, based on promises made to her. That the Claimant would be issued with the requisite notice, and that the Respondent would work out a mutually agreeable termination package.
 - c. that despite several demands to the Respondent to issue the termination notice and letter, the Respondent failed to do so, and on 31st January, 2023 orally told the Claimant to cease employment, having handed over to his predecessor and eventual successor, Esther Muli.
 - d. that termination of the Claimant's employment was procedurally and substantively unfair as it contravened provisions of the Employment Act and relevant labour laws.
 - e. that the Claimant was unfairly, unjustly and wrongfully constructively dismissed from employment contrary to Sections 35, 41, 43, 45 and 49 of the Employment Act 2007; and Articles 41 and 47 of the Constitution of Kenya on fair labour practices and fair administrative actions.
 - f. that the Respondent terminated the Claimant's employment unfairly and failed to pay his contractual and terminal benefits.
 - g. that the Claimant has a right to protection against discrimination and unfair treatment in the Respondent's services; that the Claimant was willing to continue working with the Respondent who discriminated against him in favour of Esther Muli.
 - h. that during his employment, the Claimant worked 930 hours overtime which was not paid, and claims for overtime 1.5 of the hourly pay i.e $(325,000 \text{ (salary)} \div 26 \text{ (days)} \div 8 \text{ (working hours)} \times 1.5 \text{ (hourly payment)} \times 930 \text{ (overtime hours)} = \text{Kshs.}2,197,687.75/=$.
3. Documents filed alongside the Claimant's statement of claim included the Claimant's affidavit in verification of the claim, the Claimant's witness statement dated 14th March, 2023 and an evenly dated list of documents, listing 7 documents. The listed documents are a demand letter dated 20th February, 2023, email correspondences, a contract of employment dated 8th September, 2021, employment confirmation letter dated 4th January, 2022, summary of overtime sheet, biometric clock-in indicating overtime hours and a copy of the Claimant's identity card.
4. The Respondent entered appearance on 5th May, 2023 and subsequently filed Response to the Claimant's claim on 16th May, 2023, denying having unfairly terminated the Claimant's employment and stating that the Claimant and the Respondent had agreed to mutually end the employment relationship between them, and denying the Claimant's claim.
5. The Respondent pleaded:-
 - a. that the Claimant was employed by the Respondent on 7th September, 2021 as a Human Resource Manager, earning a consolidated monthly salary of Kshs.300,000/=, inclusive of house allowance as per Clause 6(i) of the employment contract.



- b. that on 25th November, 2022, the Respondent's General Manager held a meeting with the Claimant, whereat the Claimant's poor performance as the Respondent's Human Resource Manager was discussed at length and a mutual separation was verbally agreed on, and terms thereof confirmed in the Respondent's General Manager's email dated 28th November, 2022; which made reference to discussions between the Claimant and the General Manager on 25th November, 2022.
- c. that upon the Claimant and the Respondent agreeing to mutually end their employment relationship on 25th November, 2022, the Respondent opted to have its former Human Resource Manager take up the position.
- d. that the Claimant acknowledged receipt of the said email vide his email dated 28th November, 2022 whereby he stated "this is well noted".
- e. that the Respondent's former Human Resource Manager took up the position some times in December 2022; and that on or about 17th January, 2023, the Claimant sent an email to the Respondent's General Manager following up on a separation letter detailing terms of separation and payment of his dues.
- f. that the Respondent informed the Claimant that as Esther Muli (the former Human Resource Manager) had to postpone her official start date, they were behind the envisaged curve of the separation procedure; and that the General Manager had already verbally outlined terms of the separation.
- g. that on 25th January, 2023, the Respondent's General Manager held a meeting with the Claimant and issued him with a Mutual Separation Agreement, duly executed by the Respondent on 18th January, 2023. That the Respondent did not verbally terminate the Claimant's employment.
- h. that the Claimant refused and/or ignored to sign the Mutual Separation Agreement issued to him by the Respondent, despite follow up by the Respondent as evidenced in an email dated 2nd February, 2023.
- i. that the Claimant absconded work despite being aware that he was to work until 31st January, 2023.
- j. that on 16th February, 2023, the Respondent's General Manager sent an email to the Claimant inviting him for a meeting for purposes of finalising on the mutual separation agreement, but the Claimant declined vide an email dated 16th February, 2023; and did not return the duly executed mutual separation agreement issued to him on 25th January, 2023, and issued the Respondent with a demand letter on 20th February, 2023.
- k. that the Respondent paid the Claimant dues amounting to Kshs.187,399/= and leave encashment of 31.5 days, which amounted to Kshs.272,000/=.
- l. that the Claimant is estopped from claiming that he was unfairly terminated by the Respondent.
- m. that the Respondent did not contravene Sections 35, 41, 43, 45 and 49 of the *Employment Act* and Articles 41 and 47 of *the Constitution*.
- n. that the Claimant is not entitled to the reliefs sought.



6. Documents filed alongside the Respondent's Response to Claim included witness statements of David Barry and Esther Muli, and a list of documents dated 12th May, 2023 listing 9 documents. The listed documents included copies of the employment contract dated 8th September, 2021, email correspondences dated 28th November, 2022, 17th January, 2023, 18th January, 2023, 16th February, 2023, 20th February, 2023, the Claimant's payslip for January 2023, Diamond Trust Bank Cheque No. 001757 and KCB deposit slip dated/stamped 21st March, 2023.
7. Trial commenced before me on 18th October, 2023. The Claimant adopted his filed witness statement dated 14th March, 2023 as his testimony, and produced in evidence the documents referred to in paragraph 3 of this Judgment. The Claimant further testified that he was employed by the Respondent from 8th September, 2021 upto 31st January, 2023; and had a written contract of employment. That he was called to a meeting by the Respondent's General Manager and was, during the meeting, verbally informed that the Respondent intended to bring back the Respondent's previous Human Resource Manager. That the Claimant's employment was unfairly terminated because whereas Clause 10 of the Claimant's employment contract provided that termination could only be done in writing and upon notice, the Claimant did not receive a termination notice; and that there was no mutual separation agreement between the Claimant and the Respondent. That the termination was unfair.
8. The Claimant further testified:-
 - a. that his monthly salary was Kshs.325,000/=.
 - b. that although the Claimant was ordinarily supposed to work for 8 hours per day, he worked for 930 extra hours, and had a biometric clock-in/report/summary of overtime sheet from the Respondent's system which captured the time of exit and the time of entry (Claimant's exhibit No. 6). That the Claimant could access the Respondent's system, and therefore got it from there. That the Claimant was not paid for the 930 extra/overtime hours worked.
 - c. that the Claimant was employed permanently, and therefore expected to work for many years. That payment of gratuity was not provided for in the Claimant's contract, but it was the Respondent's culture to pay.
9. Cross-examined, the Claimant testified:-
 - a. that under Clause 6 of his employment contract, the Claimant's consolidated salary was Kshs.300,000/=.
 - b. that the Claimant had not stepped down as indicated by the Respondent, but had been unfairly terminated. That no mutual separation agreement was signed between the Claimant and the Respondent.
 - c. that on 17th January, 2023, long after the previous Human Resource Manager (Esther Muli) had reported, the Claimant wrote an email to the Respondent's General Manager (David Barry) and enquired on payment of his dues and a separation (termination) letter, to which David Barry responded on the said date and stated that he had already "verbally outlined the terms of separation."
 - d. that the Claimant refused to sign a document, referred to by David Barry in his emails as "a mutual separation agreement", because he (the Claimant) was already out of the Respondent Company; and the document had not taken into account any input by the Claimant and had made unsubstantiated allegations against the Claimant. That a mutual separation agreement is supposed to be a product of negotiations.



- e. that the Claimant had not produced in evidence a certificate of electronic evidence regarding the biometric clock-in records on overtime hours worked by him. That the document produced was from the month of September 2021, and that according to the document, the total overtime worked by the Claimant was 930 hours.
 - f. that the overtime sheet (summary) did not take into account the hours of lateness indicated in some cases.
 - g. that the raw data summary of overtime hours worked could not have been manipulated at the company level. That only the (system) service provider could manipulate.
10. The Respondent called 2 witnesses. The first witness, David Barry (RW-1), adopted his witness statement dated 13th October, 2023 as his testimony, and produced in evidence the documents referred to at paragraph 6 of this Judgment. RW-1 further testified that the Claimant's contractual monthly salary was Kshs.300,000/= and Kshs.25,000/= transport allowance; and that he was supposed to work from 8.00 am to 5.00 pm, though at management level there is normally flexibility of time. That there was nothing like overtime for Managers, save for Managers in key areas like security, food and beverage. That there was a policy document on payment of overtime for Managers. That based on this, the Claimant was not entitled to overtime. That the Claimant's contract was open ended (for an indefinite time).
11. RW-1 further testified:-
- a. that the Claimant's contract could be terminated by either party giving one month written notice or one month salary (Clause 10 of the contract).
 - b. that at a given point in time, the Claimant started struggling with workload as the Human Resource Manager's position is a big post, leading to complains of performance delays.
 - c. that RW-1 had informal meetings with the Claimant to discuss the problems that he (the Claimant) had. That they exchanged emails and had face to face meetings; and that the Claimant agreed to a mutual separation. That details of the mutual separation had to be agreed on.
 - d. that a mutual separation agreement, which was different from the Claimant's contract, was sent to the Claimant on or about 18th or 19th January, 2023, but the Claimant did not sign it.
 - e. that the Claimant was paid his termination dues which included his salary, house allowance, leave pay and a bonus (Kshs.162,500/=).
12. Cross-examined, RW-1 testified:-
- a. that based on the Claimant's performance, the Respondent made a decision to separate with the Claimant, which decision was discussable but not changeable; and that the Claimant could not say no to it.
 - b. that the Respondent did not call the Claimant for any meeting or write to him any letter before making the decision to separate with him.
 - c. that the Claimant did not sign a mutual separation agreement.
 - d. that the Respondent's decision to return Esther Muli was made in or about December 2022.
 - e. that the Respondent verbally communicated its decision (to separate with the Claimant and to return Esther Muli) to the Claimant.



- f. that according to Clause 10 of the Claimant's contract of employment, any termination notice had to be in writing. That the Claimant was never issued with a termination notice.
 - g. that the Claimant's contract of employment did not make reference to any HR policy or manual. That what the Respondent had produced in court was a 2 page document with no commencement date.
 - h. that the Respondent had not produced in court any document challenging the Claimant's claim for overtime pay. That the Respondent had a clocking-in system that was downloadable.
 - i. that termination of the Claimant's employment was based on his performance.
 - j. that Esther Muli went and took over from the Claimant without the Respondent giving the Claimant a termination letter.
13. Re-examined, RW-1 testified that the Claimant was not subjected to any disciplinary proceedings. That pursuant to Clause 11 of his contract of employment, the Claimant was familiar with the Respondent's policies and staff terms. It was RW-1's further evidence that the Claimant's contract had no provision for overtime payment. That the Claimant never presented his overtime claim to RW-1 (the General Manager).
14. The Respondent's second witness, Esther Muli, testified that she was employed by the Respondent as its HR Manager in mid-January 2023. She adopted her witness statement dated 13th October, 2023 as her testimony. She testified:-
- a. that the Claimant was not terminated as there was a mutual separation agreement, but the Claimant was not paid his dues according to the separation agreement as he never collected the same.
 - b. that the Claimant was not entitled to overtime pay as the Respondent's manual provided that holders of managerial positions were not entitled to the same.
 - c. that the Claimant's contract was open ended (not fixed), and as such the issue of remainder of the contract did not arise.
15. Cross-examined, RW-2 testified that she was employed by the Respondent for the second time in Mid-January 2023, but received her employment letter in early January 2023. That she was called by David Barry (RW-1) in December 2022 and informed that there was a vacancy for HR Manager, and if she was interested. That she started working on 15th or 17th January, 2023. That she did not see any mutual separation agreement between the Claimant and the Respondent before she started working. That a "mutual separation agreement" was presented to the Claimant by RW-1 after RW-2 started working. That a mutual separation agreement is supposed to be signed before a departing employee is replaced.
16. RW-2 further testified that under Clause 10 of the Claimant's contract, the Claimant was supposed to get a written termination, which was not given. That the "mutual separation agreement" produced in court by the Respondent was not signed by the Claimant, hence there was no such agreement.
17. RW-2 further testified that the Claimant was paid his salary for January 2023.
18. Having considered the pleadings filed by both parties and evidence presented thereon, issues that fall for determination, in my view, are as follows:-
- a. Whether the Claimant and the Respondent separated mutually, and if not,



- b. Whether the Respondent unfairly terminated the Claimant's employment, and if so, whether the termination was unfair.
- c. Whether the Claimant is entitled to the reliefs sought.
19. On the first issue, it was a common ground that the Claimant's employment with the Respondent was terminated. The Respondent's General Manager, David Barry (RW-1) testified that due to the Claimant's poor performance, the Respondent decided to terminate the Claimant's employment and to bring back its previous Human Resource Manager, Esther Muli; and that this decision could not be the subject of any change, though it was discussable.
20. Esther Muli (RW-2) testified that she was in December 2019 called by the Respondent's General Manager (David Barry – RW-1) and told that the Respondent had a vacancy in the position of Human Resource Manager, and whether she was interested. RW-2 further testified that she received an employment letter in early January 2023 and started working on or about 15th or 17th January, 2023.
21. Whereas the Respondent alleged that the Claimant's employment had been terminated by mutual separation agreement, the Claimant denied having signed any such agreement, or having given any input towards the realization of such an agreement. The Respondent's witnesses, RW-1 and RW-2, testified that the Claimant never signed any mutual separation agreement. Based on the evidence on record, I make a finding that the Claimant did not sign any mutual separation agreement, and that termination of his employment by the Respondent was not based on any mutual separation agreement.
22. On the second issue, it is clear from the evidence adduced in court by both parties that the Respondent terminated the Claimant's employment, and thereupon replaced him with Esther Muli (RW-2) in January 2023. On whether termination of the Claimant's employment was unfair, it is worthy noting that termination of an employee's employment may be procedurally or substantively unfair. For fairness to be attained, there must be both substantive and procedural fairness. It was stated as follows in the case of *Walter Ogal Anuro – vs – Teachers Service Commission* [2013] eKLR:-
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
23. On substantive fairness, the Respondent did not demonstrate the existence of any valid reason that informed termination of the Claimant's employment by the Respondent. The allegations of poor performance made against the Claimant in the Respondent's pleadings and by RW-1 in his evidence in court were not proved. RW-1 did not set out the scope of the Claimant's duties, what it was that he did poorly, how, when, and the tool used in measuring his performance. An employer who alleges poor performance on the part of an employee is obligated to demonstrate the alleged poor performance.
24. Section 43(1) of the *Employment Act* provides as follows:-
- “(1) In any claim arising out of a 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.”
25. Section 45(2)(a) of the *Employment Act* provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid.



26. Section 43(2) of the *Employment Act* provides as follows:-

“(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.”

27. On procedural fairness, Section 41 of the *Employment Act* sets out a mandatory procedure which must be adhered to by an employer before terminating an employee’s employment on account of misconduct, poor performance or physical incapacity. The Section provides as follows:-

“(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 provisions 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.”

28. The foregoing Section of the statute encompasses basic components of the rules of natural justice. Failure by an employer to adhere to the stated mandatory procedure in terminating an employee’s employment renders the termination procedurally unfair. In the present case, the Claimant was not given an opportunity to be heard and to defend himself against the allegations made against him, and the charge informing termination of his employment is not shown to have been communicated to the Claimant; and he is not shown to have been given an opportunity to respond to the charge before termination; or to call a witness pursuant to Section 41 of the *Employment Act*.

29. Further, the Claimant is not shown to have been given a termination notice pursuant to Section 35(1)(c) of the *Employment Act* and Clause 10 of the Claimant’s contract of employment dated 8th September, 2021 which states:-

“10. If circumstances warrant, either party giving one month’s notice or one month salary in lieu may terminate this contract. The termination notice must be given in writing.”

30. The Court of Appeal stated as follows in the case of Kenfreight (E.A) Limited – vs – Benson K. Nguti [2016] eKLR:-

“Apart from issuing a 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 is taken . . .”



31. The Court of Appeal further stated as follows in the aforecited Kenfreight (E.A) Case (Supra):-

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

32. I find and hold that termination of the Claimant’s employment by the Respondent was procedurally and substantively unfair, and I so declare.

33. On the third issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of six months’ salary being compensation for unfair termination of employment. Under Clause 6(i) and (iii) of the Claimant’s contract of employment, the Claimant’s monthly consolidated salary was Kshs.300,000/= plus a fuel allowance of Kshs.25,000/=; a gross total of Kshs.325,000/=. The equivalent of six months’ salary is Kshs.325,000/= x 6 = Kshs.1,950,000/=: which I award to the Claimant as compensation for unfair termination of employment. I have taken into account the manner in which the Claimant’s employment was terminated and the fact that the Claimant was not shown to have in any contributed to the termination of his employment.

34. The claim for one month salary in lieu of notice is allowed, and the Claimant is awarded Kshs.325,000/= being one month gross salary in lieu of notice. The claim is allowed pursuant to Section 35(1)(c) of the *Employment Act* and Clause 10 of the Claimant’s employment contract.

35. The claim for overtime is declined. The Claimant did not demonstrate that he was contractually entitled to be paid for extra hours worked. Clause 5 of the Claimant’s contract of employment provided as follows:-

“5. The employee will be required to devote his full working capacity exclusively to the company. However, given the nature of the responsibilities, she/he will be expected to perform duties outside these hours and will be expected to support the company in the discharge of its responsibilities.”

36. The Claimant did not demonstrate contractual entitlement to overtime payment. His contract of employment did not make a provision for such payment, and he did not point to any policy document of the Respondent which provided for payment of overtime to him as the Human Resource Manager. The Respondent (RW-1) testified that although the Claimant was supposed to work from 8.00 a.m to 5.00 pm, there was flexibility of time at management level. That there was nothing like payment of overtime at management level, save for Managers at key areas like security and food and beverage. The Claimant did not rebut this evidence which, in my view, accords with Clause 5 of the Claimant’s employment contract. If the contracting parties intended that the Claimant would earn overtime pay, Clause 5 of the contract of employment would have expressly stated so. Further, the Claimant did not demonstrate that he had previously been paid for overtime hours worked at any time during his employment period.

37. The claim for legitimate expectation of 3 years salary for the remainder of the contract is declined. The Claimant’s contract of employment is not shown to have been a fixed term contract. It was clearly for an indefinite period of time. RW-1 testified that the contract was open-ended. Further, this kind of claim does not fall under the reliefs provided for under Section 49(1) of the *Employment Act*.



38. The claim for gratuity payment is declined; as the Claimant's contract of employment did not provide for such payment. Further, the Claimant's payslip for February 2023 (produced in evidence by the Respondent) indicates that the Claimant was a member of, and a contributor to the NSSF. Section 35(6)(d) of the *Employment Act* excludes the Claimant from gratuity payment.
39. The claim for 15 months' leave pay is declined. The Claimant's payslip for February 2023 (being the Claimant's last payslip) indicates that the Claimant was paid Kshs.272,000/= being leave encashment. The Respondent demonstrated that the net pay indicated on the said payslip was, indeed, paid to the Claimant. The Claimant did not deny having received the payment.
40. In sum, and having considered written submissions filed on behalf of both parties herein, Judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. Compensation for unfair termination of employment Kshs.1,950,000/=.
 - b. One month salary in lieu of notice Kshs.325,000/=.
- Total = Kshs.2,275,000/=.
41. The awarded sum shall be subject to statutory deductions which were applicable to the Claimant at the time of termination; pursuant to Section 49(2) of the *Employment Act*.
42. The Respondent shall, within thirty days of the date of this Judgment, issue a certificate of service to the Claimant in accordance with Section 51(1) of the *Employment Act*.
43. The Claimant is awarded costs of the suit and interest on the awarded sum. Interest shall be calculated at Court rates from the date of this Judgment.

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

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Mr. Marima for the Respondent

