



Alubisia v Board of Management Fr Diaz Girls Secondary School (Employment and Labour Relations Cause 191 of 2018) [2025] KEELRC 423 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 191 OF 2018
MA ONYANGO, J
FEBRUARY 13, 2025**

BETWEEN

TOM SHITSAMO ALUBISIA CLAIMANT

AND

**BOARD OF MANAGEMENT FR DIAZ GIRLS SECONDARY
SCHOOL RESPONDENT**

JUDGMENT

1. Vide his Statement of Claim dated 14th March 2018 and filed in Court on 15th May 2018, the Claimant alleges that the Respondent unfairly terminated his employment.
2. The Claimant states that he was employed by the Respondent as a general worker and watchman with effect from 7th January 2014 until 31st October 2016 when his employment was unlawfully terminated by the Respondent who also refused to pay his dues.
3. According to the Claimant, the Respondent terminated his services upon his enquiry about the late night calls from school management after working hours. He avers that on the same day, he tried seeking audience with the school's management specifically one Agnes to inquire on the reason behind his termination from employment but was told to go back on 2nd November 2016. That on the said 2nd November 2016, he was told to go back home and that he would be called but he was never called.
4. The Claimant particularized the unlawfulness of the termination of his employment as follows: -
 - a. The Claimant was not given a good reason to warrant his unfair termination from employment
 - b. No evidence of investigation of any wrongdoing on the part of the Claimant if any at all was availed to the Claimant so as to formally respond on the allegations of the wrongdoing
 - c. No show cause letter was issued to the Claimant to respond to the allegation of his wrongdoing if any at all



- d. The Claimant was never accorded a fair hearing nor an opportunity to call his witness in his defence
 - e. There was no disciplinary action undertaken by the Respondent
5. The Claimant averred that the termination of his employment on the stated grounds was malicious and ill willed. That the Claimant was never invited to any disciplinary hearing; he was not allowed to call any witnesses in his defence to the allegations and no notice of termination was issued.
 6. The Claimant contended that owing to the unfair and unlawful termination, he is entitled to terminal benefits which he itemized to be:
 - i. One month pay in lieu of notice.....Kshs. 24,652.78
 - ii. 12 months compensation for unfair termination Kshs. 295,833.36
 - iii. Service pay/Gratuity Kshs. 10,718.60
 - iv. Underpayment Kshs. 157,683.60
 - v. Unpaid public holidays Kshs. 444,114.40
 - vi. House allowance Kshs. 103,817.16
 - vii. Unpaid rest days Kshs. 102,898.56
 - viii. Leave pro-rate Kshs. 12,505.03
 7. The Claimant therefore prayed for judgment against the Respondent as follows: -
 - a. A declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair
 - b. The sum of Kshs. 1,100,679.27 as set out in paragraph 6 above
 - c. Costs of this suit and interests on at court rates from time of filing suit until payment in full
 - d. A certificate of service as per section 51 of the Employment Act
 - e. Any other further and better relief the court may deem just and fit to grant
 8. The Respondent did not file a defence but participated in the hearing through cross examination of the Claimant.
 9. The suit was set down for hearing on 17th October 2023 when the Claimant testified as CW1 and adopted his witness statement recorded on 14th March 2018 as his evidence in chief. He testified that he was employed on 7th January 2014 at a salary of Kshs 8000. His employment was terminated on 31st October 2016 after he inquired from the Respondent why he was being called many times at night while at work. According to the Claimant, he was thereafter sent away and told that he would be called back but was never called to go back to work. The Claimant testified that he was never issued with a show cause letter nor taken through a disciplinary hearing by the Board of the School.
 10. It was the Claimant's testimony that he was never paid his terminal dues. That he worked for 7 days every week and was not paid for rest days. He testified that he never went on leave in 2016 but went for previous years. It was further his evidence that he was not paid house allowance and that the Respondent underpaid him during the course of his employment.



11. On cross-examination, the Claimant stated that he was employed by the Respondent on permanent terms. He stated that he did not abscond duty, that he left employment because the Respondent would call him many times while at work at night. The Claimant also stated that the reason he left the Respondent was because he was unwell and the Respondent gave him money to go for treatment which money was deducted from his salary. That after he left for medical treatment he was called and asked whether or not he was going back to work. He responded that since he had not been at work for long, the Respondent should give him a Certificate of Service.
12. At the close of the Claimant's case, the court closed the Respondent's case as the Respondent had not filed any defence to the suit. The court then directed parties to file submissions. I have perused the record and only found submissions for the Claimant which are dated 30th October 2023.

The Claimant's Submissions

13. In his submissions, the Claimant framed the issues for determination to be:
 - i. Whether the Claimant was an employee of the Respondent
 - ii. Whether the Claimant was unlawfully, unprocedural and unfairly terminated from employment.
 - iii. Whether the reason given by the Respondent for termination of the Claimant's employment amounts to a fair reason.
 - iv. Whether the Claimant is entitled to the reliefs sought?
 - v. Whether the Claimant is entitled to an award of a Certificate of Service.
14. On the first issue, the Claimant submitted that in his pleadings and testimony in court, he gave evidence that he was orally employed by the Respondent as a General Worker and also doubled up as a watchman from 7th January 2014. According to the Claimant, from the National Social Security Fund Provisional Member Statement of Account he produced in court, he was registered as an employee of the Respondent from January 2014.
15. On the issue whether the Claimant was unlawfully, unprocedurally and unfairly terminated by the Respondent, the Claimant submitted that he was never given a show cause letter prior to termination of his services. According to the Claimant, the Respondent was expected to have invited him to appear before its Disciplinary Committee to answer to charges of any offence he was alleged to have committed. It was the Claimant's submission that no proof was availed to show that he was taken through any disciplinary hearing. On this basis, the Claimant submitted that the Respondent terminated his employment without following the due process provided for in section 41 of the [Employment Act](#). That the termination was without any reason.
16. As to whether the Claimant is entitled to the reliefs sought, it was the Claimant's submission that having demonstrated that he was unlawfully, unprocedurally and unfairly terminated from employment, he is entitled to the reliefs he sought in his Claim.
17. On the fifth issue whether the Claimant is entitled to a Certificate of Service, it was submitted that the Claimant had worked for the Respondent for close to 3 years and was entitled to be issued with the same. The Claimant prayed for an order directing the Respondent to issue him with a Certificate of Service.



18. Lastly, the Claimant urged the Court to make a finding that he was unlawfully, unprocedurally and unfairly terminated by the Respondent as the termination was not in accordance to the provisions of the *Employment Act*.
19. The Claimant urged the court to award his prayers as sought in the suit.

Analysis and Determination

20. From the testimony and submissions of the Claimant, the issues that fall for the court's determination are:
 - i. Whether the Claimant's employment was unfairly terminated
 - ii. Whether the Claimant is entitled to reliefs sought.

Whether the Claimant's employment was unfairly terminated

21. Section 47(5) of the *employment Act* places an obligation on the employee to prove the fact of unfair dismissal or termination. It 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.”

22. In his statement of Claim, the Claimant accused the Respondent of unfairly terminating his employment after he complained of the many night calls he received from the Respondent while on duty. However, in his evidence during cross examination, the Claimant stated as follows:

“I was unwell and was given money to go for treatment and come back. The money was deducted from my salary. I was called to go to school and asked whether I will go back or not. I told them that since I had not been at work for long, they should only give me a certificate of service.”

23. In the cross-examination the Claimant contradicted the averment in his pleadings that his employment was unfairly terminated by the Respondent and left the court with doubts as to what exactly happened leading to the separation. In his claim the Claimant alleged that he was unfairly terminated but on cross examination during oral hearing he testified that when asked whether he intended to go back to work, he asked the Respondent to issue him with a Certificate of Service as he had been away from work for long. Based on this contradiction, it is my considered opinion that the Claimant did not discharge the evidential burden on the balance of probability.
24. I therefore make a finding that the Claimant did not prove that he was unfairly and unlawfully terminated from employment.

Whether the Claimant is entitled to reliefs sought

25. The Claimant prayed for one-month pay in lieu of notice, 12 months compensation for unfair termination, Service pay/Gratuity, Underpayment, Unpaid public holidays, House allowance, Unpaid rest days and Leave pro-rate.



26. The prayers for declaration that the termination was unfair and unlawful, notice pay and compensation for unfair termination are declined as the Claimant did not prove that his employment was unfairly terminated by the Respondent.

27. The Claimant pleaded and testified that he was employed as a general worker and watchman 7th January 2014. Regulation 5 of the Regulation of Wages (General) Order, provides that house allowance is payable at 15% of the salary where the employee is not provided with housing accommodation. The regulations also provide for rest days, work on public holidays, and, leave travelling allowance and overtime.

i. Service Gratuity

The law does not provide for gratuity and the Claimant's terms of employment did not provide for the same based on the evidence before the court. The Claimant is therefore not entitled to this relief.

ii. Underpayment

In his testimony the Claimant stated that during the entire period he was employed by the Respondent, he was paid an all inclusive salary of Kshs. 8,000. In January 2014 when the Claimant was employed, the statutory basic minimum wage for a watchman was Kshs. 9024.15 and from May, 2015 it was Kshs.10107.10. The Claimant is granted underpayment of salary for the year 2014 to April 2015 at [Kshs. 9024.15- Kshs 8000] x 16 months = Kshs. 16,385.6 and for the period 1st May 2015 to October 2016 [Kshs. 10107.10 – 8,000] x 18 = Kshs. 37,927.8 The total underpayment of salary is granted at Kshs. 54,313,4.

iii. Unpaid public holidays

This prayer is declined as the Claimant did not prove that he worked during public holidays.

iv. House allowance

The Regulation of the Wages Order provides for house allowance at 15% of the basic salary in addition to basic salary where free housing is not provided. The Claimant worked from 7th January 2014 to 31st October 2016. From January 2014 to April 2015 his house allowance was 15% of Kshs. 9024.15 x 16 months and from May 2015 to October 2016 his house allowance was 15% of Kshs 10,107.10x18 months totaling to Kshs. 48,947.13 which amount is hereby granted.

v. Unpaid rest days

The Claimant did not offer any evidence in support of this prayer. This prayer is declined.

vi. Leave pro-rate

The Claimant seeks payment of annual leave for the year 2016. I award him 21 days leave at Kshs. 8,164 under this head.

28. Consequently, Judgment is entered for the Claimant in the following terms:

- a. Underpayment..... Kshs. 54,313.40
- b. House allowance..... Kshs. 48,947.13
- c. Leave pro-rate..... Kshs. 8,164.00
- d. The Respondent is directed to issue the Claimant with the Certificate of Service.



- e. Each party shall bear their own costs as the court has made a finding that the Claimant was not unfairly terminated from employment.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 13TH DAY OF FEBRUARY, 2025.

M. ONYANGO

JUDGE

