



**Ziro v Fumathoka Kindergarten & Schools (Cause E033 of 2024)  
[2025] KEELRC 394 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 394 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E033 OF 2024  
M MBARÚ, J  
FEBRUARY 13, 2025**

**BETWEEN**

**ALI KENGA ZIRO ..... CLAIMANT**

**AND**

**FUMATHOKA KINDERGATEN & SCHOOLS ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant on 10 January 2022 as a driver/coordinator at Majaoni, Mombasa County. The claimant was issued with a two-year contract dated 6 January 2022. Upon the expiry of the contract, the claimant was issued with a deed of variation dated 21 December 2023 for a further two years.
2. The claim is that on 30 January 2024, he was invited to a disciplinary hearing on 6 February 2024 at the director's office. The letter outlined five charges, which, according to him, were vague and he was unable to understand or respond to. No notice to show cause was issued. The letter also asked for a response before 2 February 2024.
3. On 1 February 2024, the claimant wrote to Evans Ndinya seeking particulars of the allegations against him but was directed to attend the disciplinary hearing as invited.
4. On 6 February 2024, the claimant attended as required, but the respondent informed him that the respondent had other matters, and the hearing was adjourned. New dates will be communicated.
5. On 13 February 2024, the claimant was notified of summary dismissal and informed that the disciplinary meeting had been held on 8 February 2024. He was found guilty of two offences that justified summary dismissal. He was alleged to have knowingly failed to obey lawful orders and directions on 30 September 2023 by having a kitchen meeting with all staff members.



6. The claim is that the claimant was employed as a driver/coordinator, and the kitchen budget was not within his scope of duties. The summary dismissal was also because the claimant had driven the respondent's motorbike for a year without a valid insurance sticker.
7. The claimant's case was that he was employed as a driver, not the motorbike driver as alleged, and acquiring an insurance sticker was not part of his duties.
8. The claim is that there was unlawful and unfair termination of employment without payment of terminal dues. His wages for February 2024 were not paid. He was not housed by the respondent or paid a house allowance. He worked from 7.30 am to 4.30 pm for 6 days without overtime compensation. The statutory payments were not remitted in some months. The employment as a driver and the wage paid was an underpayment.
9. The summary dismissal was without justification, and the claimant was not allowed to attend a disciplinary hearing to defend himself. He claimed the following:
  - a. Unpaid salary for 13 days Ksh.14,300;
  - b. Notice pay Ksh.26,000;
  - c. Unpaid house allowances for 2 years Ksh.93,600;s
  - d. service pay for 2 years Ksh.30,000;
  - e. Leave pay for 2 years ksh.42,000;
  - f. Overtime pay;
  - g. Underpayments;
  - h. 12 months compensation Ksh.312,000;
  - i. Costs of the suit.
10. The claimant testified that he was issued with a notice to show cause by the respondent on 31 January 2024, but the allegations made were vague, and he could not understand them to be able to respond. He asked the respondent for clarification but was told to wait and attend the disciplinary hearing. On 6 February 2024, when the disciplinary hearing was scheduled to proceed, he attended but it was adjourned. He was later called to attend on 8 February 2024 but he did not realize this was the disciplinary hearing. He signed the minutes for the meeting on 8 February 2024.
11. The claimant was accused of stealing some food items in the kitchen. He was also accused of driving the motorbike without permission.
12. In response, the respondent admitted that the claimant was an employee as a driver/coordinator. His two-year contract was extended for 24 months from 6 January 2024 through a deed of variation.
13. The claimant was served notice to show cause on 30 January 2024. If he found the notice ambiguous, he did not respond seeking clarification. He was invited to the disciplinary hearing on 8 February 2024, where he attended and signed the minutes to confirm participation.
14. During the disciplinary hearing, the claimant was found guilty of driving the respondent's motorcycle without an insurance sticker. Such a breach of the employee contract justified summary dismissal.
15. The response was that on 30 September 2023, a meeting was held with kitchen staff following complaints on the quality of food being served, and it was resolved that there would be budgetary



- meetings to address the concerns. The claimant took minutes of the proceedings. On 25 January 2024, another meeting was held, and it was discovered that the action points were not acted upon.
16. A notice to show cause dated 30 January 2024 was issued, and the claimant was asked to provide reasons on 6 February 2024 why disciplinary action should not be taken against him. He was advised of his right to bring another employee of his choice.
  17. The respondent held a disciplinary meeting on 6 February 2024. It was revealed that budgetary meetings were not held because the claimant kept referring the kitchen staff to the accountant. The claimant failed to address the issue of foods that had gone bad on 22 January 2023. He had also ceased to use gate passes without the director's approval.
  18. Due to time constraints, the disciplinary hearing was adjourned to 8 February 2024, which the claimant attended and signed minutes. On 13 February 2024, a notice of summary dismissal was issued.
  19. At the time of termination of employment, the claimant had a Ksh loan.50, 000 which he had not repaid. Through a written agreement dated 26 April 2023, the claimant was enrolled in a D1 endorsement course and exam in German, financed by the respondent for a sum of Ksh.34, 000 which was to be refunded if he worked for the respondent school.
  20. The respondent accorded the claimant due process, and the claims made should be dismissed with costs.
  21. In evidence, the respondent called Furaha Charo Kombe the director of operations who testified that the claimant was an employee who was issued with a work diary for his duties. This was the practice for all respondents' employees.
  22. Kombe testified that on 6 February 2024, the disciplinary hearing against the claimant was to be held but was adjourned to 8 February 2024. The claimant alleged that he asked for clarifications on the notice to show the cause dated 30 January 2024, which is incorrect. He indicated that he was ready for the disciplinary hearing. He signed the minutes in acceptance of the process. He failed to respond to the show cause notice by 2 February 2024 as directed. The claimant had failed in his duties, and meetings had been held with him, but he failed to address them. He is a driver and coordinator. The coordination duties were between the farm and the kitchen.
  23. Kombe testified that the disciplinary hearing on 8 February 2024 was communicated to the claimant verbally.
  24. He drove the motorbike without a valid license in 2023. In his contract, a valid licence was required as a driver.
  25. At the close of the hearing, both parties agreed to file written submissions. The submissions are analyzed, and the issues which emerge for determination are whether there was an unfair termination of employment, whether the remedies sought should be issued, and who should pay costs.
  26. Through notice dated 13 February 2024, the respondent terminated the claimant's employment through summary dismissal. The reasons given were that he breached section 44 of the [Employment Act](#) for;
    1. Knowingly and willingly failing to and refusing to obey lawful command dated 30 September 2023 where you were directed to have every kitchen budget meeting with all the staff members which it was within the scope of your duty to obey issued by the director of the school through staff briefing.



2. Failing to acquire and ride the school's motorbike for one whole year without a valid insurance sticker, conduct by you tending to bring you the employee, the school, or the employee's position in the school into disrepute.
27. Indeed, the employer is allowed under Section 44 of the *Employment Act* to terminate employment through summary dismissal subject to the employee's rights under Section 41(2) being protected. That is, allowing the employee to attend and make his representation before the sanction of summary dismissal is issued.
28. In this case, the claimant was issued with a notice to show the cause dated 30 January 2024. He was required to respond by 2 February 2024 and attend a disciplinary hearing on 6 February 2024.
29. The claimant testified that the allegations made against him were ambiguous. He sought clarification from Evans Ndinya but was advised to attend during the disciplinary hearing.
30. On 6 February 2024, the claimant was advised to bring his employee of choice. He attended but the meeting was adjourned. Mr. Kombe the respondent testified that the disciplinary hearing was held on 8 February 2024 and the claimant was verbally informed and noted this in his diary.
31. The claimant contested the hearing date on 8 February 2024 and noted that he could not bring another employee of his choice since he was not made aware that this was the disciplinary hearing date. He however attended and signed the minutes.
32. Termination of employment is not a casual event. The procedures under Sections 41 and 44 of the *Employment Act* are enacted to guide employees and employers on the attendant procedures.
33. The motions of Section 41 of the *Employment Act* are mandatory. Section 41(2) requires that;
  - (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.
34. The subject employee must be served with a notice stating the grounds upon which the employer intends to terminate employment to allow the employee to address by making representations in the presence of another employee of his choice.
35. The respondent admitted that the date for the disciplinary hearing changed from the earlier scheduled on 6 February 2024 to 8 February 2024. There was no notice to the claimant. The verbal communication on the change of dates was contested.
36. In the case of *Kosgei v Metkei Multi-Purpose Company Limited* [2021] KECA 140 (KLR), the court held that Section 41(1) of the *Employment Act* provides for the procedure to be followed before termination. This section provides for notification and hearing before termination for misconduct, poor performance, and incapacity. There are two stages set out in the section, and both are in mandatory terms. The second stage is provided under sub-section (2) in mandatory terms, which requires the employer to hear the employee in the presence of another employee of his choice.
37. In this case, the respondent cannot be said to have met the mandatory dual requirements in Section 41 of the Act. See *Teacher Service Commission v Adhiambo* [2024] KECA 620 (KLR) and *Rotich v Metkei Multi-Purpose Company Limited* [2021] KECA 161 (KLR).



38. Returning to the notice to show cause, the claimant protested that the allegations against him were ambiguous, and he could not understand how to respond. He sought better particulars but was directed to attend the disciplinary hearing as required.
39. Before termination of employment, there must be both procedural fairness and substantive justification. Substantial justification involves establishing a valid reason for the termination, while procedural fairness addresses the procedure adopted by the employer that affects the termination.
40. Sections 43 and 45 of the *Employment Act* require the employee to have valid and genuine reasons before terminating employment.
41. The reasons for terminating the claimant's employment were that he refused to obey a lawful command on 30 September 2023. He was alleged to have been directed to have every kitchen budget meeting with all the staff members, which was within the scope of your duty to obey, as issued by the school director through staff briefing.

#### **What exactly did the claimant fail to do?**

42. The court finds these allegations ambiguous based on the letter and disciplinary minutes.
43. The claimant's employment contract was for the driver and coordinator position. His coordination duties were for the kitchen and farm.
44. The claimant is not noted as a participant in the minutes filed for the meeting held on 30 September 2023. No specific role or duties are allocated to him as set out in the notice to show cause and notice terminating his employment.
45. The entire record of this meeting is MIN 6/09/23 – Reactions, where Gona asked if Shukran could use the water pipe if she resumes work.
46. The second allegation was that the claimant was riding the school's motorbike for 2023 without a valid insurance sticker.
47. The employer must provide the employee with his tools of work. The acquisition of the school's motorbike insurance sticker is a tool the respondent should have secured for the claimant, not vice versa. This is the scenario described by the court in *Obware Georgiadis Ochieng, George Ngugi Ndungu, Simon Muchemi Mbuthia, Samuel Ndegwa Muthoni, Stephen Gaita Mutabari [Suing on their Behalf and Behalf of 56 other Employees as per Attached List] v Kenya Wildlife Service [2016] KEELRC 8 (KLR)* and *Kenneth Kimani Mburu & Saidi Emmerich v Kibe Muigai Holdings Limited [2014] KEELRC 723 (KLR)* that the employer must provide the employee with the essential tools of work unlike in a consultancy contract where the contracted provide attends with his tools or as agreed by the contracting parties.
48. In this case, the claimant failed to acquire the insurance sticker for the school motorbike, which is a direct admission by the respondent that it failed to provide him with his essential tools at work. Such cannot constitute a valid and genuine reason leading to termination of employment.
49. The request for better particulars on the allegations in the notice to show cause is justified. These were not provided, and eventually, the claimant attended a disciplinary hearing devoid of the mandatory protection under Section 41 of the *Employment Act*.

#### **Employment terminated unlawfully and unfairly.**

50. The claimant is entitled to notice pay and compensation.



51. The claimant was earning Ksh.26, 000, due in the notice of pay.
52. The claimant was under a contract of 24 months and was not given a fair chance to serve to the end. There is no record filed to show previous misconduct. An award of three (3) months gross pay is hereby found appropriate, all at Ksh.78, 000.
53. On the other claim made for salary due for 13 days worked in February 2024, for work done, the due wage should be paid at Ksh.11, 267.
54. On the claim for house allowance, the claimant was employed as a driver in Mombasa County. Under the Minimum Wage Orders applicable in February 2024, a driver had a minimum wage of Ksh.19, 668.30 plus a 15% house allowance of Ksh.2, 950.25 and gross pay of Ksh.22, 618.55
55. The claimant was paid above the minimum wage due. He was well compensated for his labour. There was no underpayment or due house allowance above the wage paid.
56. On the claim for overtime pay at one (1) hour for 6 days each week, the claimant pleaded that he worked from 7.30 am to 4.30 pm for 6 days each week. In a week, an employee is allowed one day off. The time outlined in the pleadings is commensurate with the allowed working hours of 8 hours each day.
57. On the claim for leave pay, the respondent has not filed any work records on how the claimant was allocated his accrued leave days. It is noted that the respondent is a registered limited liability company running a school. Unlike public schools or entities that operate as schools, the claimant was employed as a driver/coordinator with duties in the farm and kitchen. His duties span in and out of the ordinary school events.
58. Accrued annual leave is a right under Section 28 of the Employment Act. Without any record filed, the claim for leave pay at Ksh.46, 000 is justified.
59. On costs, the claim is successful; costs are hereby awarded.
60. The respondent made a case that the claimant had a Ksh loan.50, 000 and Ksh.18, 000 for German classes. Under Section 19 of the Employment Act, these advances are lawfully due and deductible from the benefits to the employee at the end of his employment.
61. Accordingly, judgment is hereby entered for the claimant against the respondents in the following terms;
  - a. Employment terminated unfairly;
  - b. Notice pay Ksh.26,000;
  - c. Compensation ksh.78,000;
  - d. Leave pay Ksh.46,000
  - e. Salary for 13 days Ksh.11,267;
  - f. Costs of the suit;
  - g. Dues above (b) to (e) to be paid less loan at Ksh.50, 000 and German class payments of Ksh.18, 000.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF FEBRUARY 2025.**

**M. MBARŪ**



**JUDGE**

In the presence of:

Court Assistant: Japhet

