



**Kurgat v Taheer alias Esmaily t/a Associated Glass and Hardware Limited
(Cause 295 of 2017) [2025] KEELRC 465 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 465 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 295 OF 2017
MA ONYANGO, J
FEBRUARY 7, 2025**

BETWEEN

SIMON KIRWA KURGAT CLAIMANT

AND

**MOHAMMED TAHEER ALIAS ESMAILY T/A ASSOCIATED GLASS AND
HARDWARE LIMITED RESPONDENT**

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 11th October 2017 seeking compensation from the Respondent on allegation that the Respondent unlawfully terminated his employment and refused to pay his dues.
2. The Claimant averred that he was employed by the Respondent in August 2016 to 1st June 2017 when the Respondent terminated his services without compliance with section 41 of the *Employment Act*.
3. It is the Claimant's case that during his employment with the Respondent, he was grossly underpaid without regard to the Regulation of Wages (General Amendment) Order in force and that he also worked overtime and on rest days without pay.
4. The Claimant averred that owing to the unfair and unlawful termination of his employment, he is entitled to compensation which he itemized as follows:
 - i. One month pay in lieu of notice.....Kshs. 16,102.75
 - ii. Unpaid leave dues.....Kshs. 16,102.75
 - iii. Unpaid public holidays.....Kshs 8,587.73
 - iv. Overtime dues.....Kshs 74,316
 - v. Underpayment of wages.....Kshs 26,929



- vi. 12 months compensation for
unfair termination.....Kshs. 188,314.8
Total.....Kshs 314,250.28
5. The Claimant thus sought for the following reliefs:
- a. A declaration that the Claimant the termination as carried out by the Respondent was unlawful
 - b. That Claimant was underpaid by the Respondent
 - c. Payment of amount claimed under paragraph 4.
 - d. Costs of the suit and interests until payment is full
 - e. Any other relief this Honourable Court deem fit to grant.
6. The Respondent filed a Statement of Defence dated 10th January 2018 denying the allegations made by the Claimant in the Memorandum of Claim.
7. In its defence, the Respondent admitted that the Claimant was its employee but denied that he was terminated from employment. According to the Respondent, the Claimant voluntarily resigned from employment stating that he had found another opportunity and was no longer interested in working for the Respondent.
8. The Respondent averred that on or about 27th April 2017, the Claimant lost the Respondent's iron sheets which were under his custody and when it questioned its workers, the Claimant became evasive and upon receiving his salary on 31st May 2017, he left for home and never reported back to work on 2nd June 2017 after the public holiday of 1st June 2017.
9. It is the Respondent's case that the Claimant was paid his dues and he acknowledged that all his dues had been settled.
10. In response to the Claimant's allegation that he was underpaid and that he worked overtime, the Respondent stated that his business is opened strictly from 8 a.m to 5 p.m from Monday to Friday and from 8.30 a.m to 4.30 p.m on Saturday with one-hour lunch break each day for each employee. That further, the business is never opened on public holidays and as such the issue of overtime, working during rest days and public holidays does not arise.
11. The Respondent prayed that the suit be dismissed with costs.

The Evidence

12. The Claimant testified on 15th November 2023 as CW1 and adopted his written statement dated 11th October 2017 as his evidence in chief. He also relied on the documents he filed in support of his case as his evidence.
13. On being cross-examined by Counsel Aduke, the Claimant stated that he entered into an employment contract with the Respondent on 26th August 2016 as a shop assistant. He explained that he was at work on 17th April 2017 and that on the particular day, many clients had visited the hardware to buy iron sheets. That there were no extra iron sheets that he gave out. He further stated that no goods could be removed before payment was made and checked by Mr Mohammed, the Respondent herein.



14. The Claimant further stated that he was paid his salary on 31st May 2017 and issued with a recommendation letter. He however denied the averment by the Respondent that he was paid his terminal dues of Kshs 117,000.
15. On re-examination, the Claimant maintained that he did not resign voluntarily but was verbally terminated by the Respondent on 31st May 2017.
16. The Respondent, Mr. Mohammed Taheer testified as RW1 in furtherance of his case. He adopted his witness statement recorded on 10th May 2018 as his evidence in chief. He also relied on the documents filed by the Respondent in its defence. RW1 stated that he employed the Claimant as a General Shop Attendant. That the Claimant was charged with loading goods for customers upon confirmation from the receipt that the items had been paid for.
17. According to the Respondent, the Claimant disappeared after it was established that he loaded extra iron sheets to a customer without a receipt.
18. RW1 maintained that the Claimant was paid his terminal dues of Kshs 117,00 which he acknowledged receipt of. He denied that the Claimant was underpaid during the course of his employment and also disputed the averment made by the Claimant that he worked during public holidays and on Sundays.
19. On cross examination by Counsel Rugut, the Respondent conceded that the Claimant never proceeded on leave. RW1 stated that after he confronted the Claimant over the theft allegations, the Claimant apologized and asked him to write a recommendation letter for him stating that he had gotten another job opportunity.
20. On re-examination, RW1 reiterated that the Claimant was paid his terminal dues of Kshs 117,000 before he left employment and that he signed for the said payments.
21. With that evidence, the Respondent closed its case and the court directed parties to file written submissions. The Claimant's submissions were filed on 28th November 2023 while the Respondent's submissions were filed on 6th December 2023.

The Claimant's submissions

22. In his submissions, the Claimant identified the issues for determination to be:
 - a. Whether the process the Respondent followed to terminate the employment of the Claimant was unlawful and unfair.
 - b. Whether notice to terminate employment for the Claimant was issued and disciplinary process followed as per the law.
 - c. Whether the Claimant was paid all his lawful allowance.
 - d. Whether the Claimant was paid legal minimum salary as per legal notice.
23. On the first issue, the Claimant submitted that the Respondent did not follow the due process as per section 41 of Employees Act.
24. As regards the second issue, it was the Claimant's submission that no notice was issued to him before he was terminated from employment. According to the Claimant, he was not issued with a suspension or show cause letter indicating misconduct on the part of the Claimant.



25. On the issue whether the Claimant was paid all his lawful allowance, the Claimant submitted that he was paid salary of Kshs.10,000/= and there was no payment of House allowance, Overtime, Public Holiday and leave allowance.
26. Lastly, on the issue whether the Claimant was paid legal minimum salary as per the legal notice in force, the Claimant submitted that he was underpaid contrary to Legal Notice No. 117 of 1st May 2015 to April 2017.
27. The Claimant thus submitted that he had proved his case on a balance of probabilities and urged the court to find the Respondent liable for the unlawful and unfair termination of his employment. He urged the court to award the reliefs sought in his suit.

The Respondent's submissions

28. The Respondent on its part framed the issues for determination to be:
 - a. Whether the Claimant's services were terminated by the Respondent as alleged.
 - b. Whether the Claimant is entitled to the reliefs sought herein
29. On the first issue, the Respondent submitted that the Claimant's services were not terminated as alleged and contended that the Claimant left employment after he was confronted over his dishonesty of loading extra iron sheets on a customer's vehicle without any explanation.
30. According to the Respondent, section 41 of the *Employment Act* is not applicable in the instant case as the provisions thereof contemplate a situation where an employer has terminated the employment of an employee which is not the situation at hand given that the Claimant left employment.
31. It was thus submitted that the Claimant did not establish his claim for unlawful termination and as such, the instant claim must as a consequence fail. In support of this position, the Respondent cited the case of Denis Okora Magio v Greenwood Groove Academy (2015) eKLR and John Kebaso Mose v Uchumi Supermarket (2017) eKLR.
32. Regarding the second issue, it is the Respondent's submission that there being no unlawful, unfair or wrongful termination of the Claimant's services as alleged, the Claimant is not entitled to compensation.
33. While placing reliance on the case of Seong Geun Seo v Africon Limited (2021) eKLR, the Respondent submitted that from the contract of employment dated 23rd August 2016, the Claimant acknowledged and confirmed receipt of his casual employment dues totaling to Kshs 117,000
34. The Respondent urged the court to dismiss the Claimant's suit with costs arguing that the Claimant was not terminated from employment but that he voluntarily left employment.

Determination

35. From the pleadings, the evidence before court, the submissions of the parties and the authorities cited therein, the issues for determination are:
 - a. Whether the Claimant's employment was terminated by the Respondent unfairly or he voluntarily left employment;
 - b. What reliefs should issue.



Whether the Claimant's employment was terminated by the Respondent unfairly or he voluntarily left employment.

36. The Claimant averred that he was unfairly dismissed from employment after he was suspected of stealing from the Respondent. On cross examination the Claimant stated that he was paid his salary on 31st May 2017 and asked not to report back to work after 1st June 2017. The Respondent however maintained that the Claimant left employment when cornered about the stolen iron sheets stating that he had gotten another job opportunity.

37. The burden of proof in employment claims is provided for under section 47 (5) of the Employment Act to wit:

“47(5) 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.”

38. In the case of Samsung Electronics East Africa Ltd v- K M [2017] eKLR the Court observed as follows:

“29. In a claim such as this, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer.

39. Discharging the burden placed upon employees by section 47(5) of the Act generally require some form of evidence. It is trite law that he who alleges the existence of a fact must prove it. The burden of proving the assertion of a fact lies with the party seeking to rely on the same, as outlined under section 107 of the Evidence Act, Cap 80 of the laws of Kenya, which states that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

40. In the instant case, the Claimant has not tendered any evidence to suggest that there was an unfair termination of employment. The Recommendation letter issued to him by the Respondent does not indicate that the reasons for the Claimant's resignation was prompted by harsh or unfair termination.

41. It is therefore my finding that the Claimant failed to discharge the burden placed upon him by section 47(5) of the Employment Act, 2007, and therefore there is no need to call upon the Respondent to discharge the burden placed on it as an employer by sections 43 and 45 of the Employment Act, 2007.

What reliefs should issue

42. The Court will next examine the remedies sought by the Claimant.

43. The Respondent averred that the Claimant was paid his terminal dues of Kshs 117,000 when he left employment. The Claimant on the other hand has contended he was only paid his salary on 31st May 2016 when he left employment and denied being paid the alleged terminal dues. No evidence was tendered in court by the Respondent to prove that the Claimant was indeed paid his terminal dues.

44. In his Memorandum of Claim, prayed for payment of Kshs 314,250.28 as terminal dues comprising of one month's pay in lieu of notice, unpaid leave dues, unpaid public holidays, overtime dues,



underpayment of wages, 12 months compensation for unfair termination. I will address these prayers in separate heads.

a. One-month pay in lieu notice

Having found that the Claimant did not prove that his employment was terminated unfairly, he is not entitled to pay in lieu of notice.

b. Unpaid leave dues

The Claimant stated he was employed on 26th August 2016 on a one year contract. As at the time he left employment, the Claimant had served for 9 months into his contract. He is therefore entitled to 9 months leave at 1.75 days per month as provided in section 28 of the Employment Act being 15.75 days. I award him the same at Kshs. 8,267.

c. Unpaid public holidays

The Claimant stated that he worked during all Public Holidays and was not paid double salary as is required by law. The Respondent averred that the Claimant never worked on public holidays. The Claimant did not adduce any evidence to controvert the Respondent's evidence that the Respondent does not work on public holidays. The prayer is not proved and is dismissed.

d. Overtime dues

The Claimant in his testimony stated that he worked from Monday to Saturday. RW1 on the other hand testified that the Respondent never worked during public holidays and on Sundays. The prayer for overtime was not proved and is dismissed.

e. Underpayments

The Claimant was in the employment of the Respondent for 9 months. Under the Regulation of Wages (General) (Amendment) Order 2015, the Claimant was entitled to a consolidated salary of Kshs. 13,646.40 per month. From the Claimant's evidence he was paid an all-inclusive salary of Kshs 10,000. The Respondent did not controvert this evidence. The Claimant was thus underpaid by Kshs. 3,646.4 per month making a total of Kshs 43,756.80 for the 9 months he worked which I award him.

f. 2 months' compensation for unfair termination

The Claimant prayed for maximum compensation for the unlawful termination. However, having found that the Claimant was not unfairly terminated from employment, this prayer cannot issue.

45. In the end, Judgment is entered for the Claimant in the following terms:

- a. Unpaid leave dues..... Kshs 8,267.00
- b. Underpayments Kshs. 43,756.80
- c. The Respondent shall bear the Claimant's costs.
- d. The decretal sum shall attract interest from date of Judgement.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 7TH DAY OF FEBRUARY 2025

MAUREEN ONYANGO

JUDGE

