



**Kenya Union of Commercial Food & Allied Workers v Jumbo Supermart Ltd
(Cause E044 of 2024) [2025] KEELRC 263 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 263 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E044 OF 2024
JK GAKERI, J
FEBRUARY 5, 2025**

**BETWEEN
KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT
AND
JUMBO SUPERMART LTD RESPONDENT**

JUDGMENT

1. The Claimant commenced this suit on behalf of the grievant by a statement of claim filed on 28th May, 2024.
2. It is the Claimant's case that the grievant was employed by the respondent as a cashier on 2nd October, 2016 at Kshs.17,000 per month and was issued with a new one (1) year contract on 11th January, 2023 by White Collar Consulting and asked for time to peruse the same before signing.
3. That on account of the delay, she was allocated new duties at the Mabati Store and received a letter on "New work location and another one on compulsory leave" and on resumption of duty on 3rd February, 2023 the grievant was informed that she had been transferred to the Migori Branch and was expected there on 4th February, 2023 and reported on 6th February, 2023 when she requested for one (1) month salary advance and 7 days off to relocate to Migori from Kisii but was later given two payment vouchers for January and February 2023 to sign and informed verbally that her employment had been terminated, but demanded a termination letter.
4. The grievant avers that she was issued with a notice to show cause on 8th February, 2023 for refusal to sign a contract and reported the dispute to the claimant union.

The claimant prays for:

- i. Reinstatement, and if unavailable:
- ii. Salary in lieu of notice Kshs.17,000.00.



- iii. Salary for January and February 2023 Kshs.34,000.00.
- iv. 14 days salary for March 2023 Kshs.8,500.00.
- v. 3 years leave Ksh.41,192.30.
- vi. Underpayment for 76 months Kshs.1,161,280.00.
- vii. Severance pay for 6 years Kshs.51,000.00.
- viii. 12 months compensation 204,000.00.
- ix. Public holidays worked 6 years Kshs.78,461.20
- x. Certificate of service.
- xi. Costs of this suit.
- xii. Any other relief the court deems fit.

Respondents case

- 5. By a response filed on 4th July, 2024, the respondent avers that it issued an employment contract to all employees on 1st January, 2023 as a formal continuation of the existing verbal contract and gave each employee 3 days to seek advice and sign and all signed except the grievant, hence to transfer to Mabati section but declined and was sent on compulsory leave for 15 days under letter dated 12th January, 2023 and was transferred to Migori, reported and was verbally interviewed on her conduct and a notice to show cause issued on 8th February, 2023 but the claimant did not respond and the respondent received a letter from the union dated 10th February, 2023 on unfair termination of the claimants employment which had not taken place.
- 6. It is the respondent's case that the grievant was invited for a disciplinary hearing on 8th March, 2023 but did not attend and employment was terminated vide letter dated 14th March, 2023 and accorded 7 days to appeal but did not.
- 7. The respondent avers that the claimant was employed by Ritu Ltd in October, 2016 as a Shop Assistant until July, 2022 when she was transferred to Jumbo Supermart Ltd a sister company as an Assistant Cashier and signed salary vouchers for January, 2021 to March 2022 and was paid the January 2023 salary and signed the salary voucher on 10th February, 2023 but the salary for February and 14 days in March was not paid.
- 8. The respondent avers that the grievant cannot claim leave for more than 18 months.
- 9. The respondent prays for dismissal of the claimant's case with costs.

Claimant's evidence

- 10. On cross-examination, the grievant confirmed that she was a member of the union but had no documentary evidence to show and none was on the court's file.
- 11. It was her testimony that she had no evidence of her employment in October 2016 as it was verbal and was a cashier. The grievant denied having been employed as a Shop Assistant but admitted having been employed by Panish Patel at Kshs.17,000.00 per month and signed a new contract on 11th January, 2023 with White Collar Consulting and her workstation was Mabati Stores and was to terminate the old contract.



12. The grievant later contradicted herself by testifying that she did not sign the new contract nor report to Mabati Stores and admitted having been sent on compulsory leave vide letter dated 12th January, 2023 and was later transferred to the Migori Branch and reported on 6th February, instead of 4th February, 2023 as directed, allegedly for lack of financial means and the employer offered no assistance.
13. The grievant further testified that at Migori she was not allocated work.
14. The grievant admitted that she received but did not respond to the notice to show cause or attend a hearing and had no evidence of a verbal termination of employment.

Respondents evidence

15. RWI, Mr. Vincent Akoko Oluoch confirmed, on cross-examination that the grievant was initially appointed as a Shop Assistant and later transfer to Jumbo Supermart Ltd on promotion and the one (1) year contract was a continuation of the previous verbal agreement.
16. RWI testified that White Collar Consultant managed the Human Resource matters of the respondent and all employees were trained and Mr. Patel signed the letter of transfer to Migori and the grievant was accorded 3 days to settle down in Migori and termination of employment was formal on 14th March, 2023.
17. On re-examination the witness testified that the grievant received but did not respond to the notice to show cause and did not attend the hearing despite being invited.

Claimant's submissions

18. On termination, the claimant submits that it was unfair because the provisions of Section 41 of the [Employment Act](#) were not complied with.
19. Reliance was made on the sentiments of Ndolo J in *Walter Ogal Anuro V Teachers Service Commission [2013] eKLR* on the prerequisites of a fair termination of the employment under the provisions of the [Employment Act](#).
20. Strangely, the claimant appears to be suggesting that the grievant was declared redundant yet no evidence to that effect was adduced by the grievant.
21. On the reliefs sought, the claimant submits that the grievant had pending 7 years leave and cites the decision in *Stephen Kansa Jefwa V Elsek & Elsek (K) Ltd [2014] eKLR* to urge that the respondent had not produced evidence to show that the grievant had no pending leave days.

Respondent's submissions

Analysis and determination

22. It is common ground that the grievant was an employee of the respondent's sister company Ritu Enterprises Ltd effective October 2016 under a verbal agreement.
23. Although the claimant alleged that she was employed as a cashier, she admitted that she had no evidence to establish that fact and according to RWI, she was a Shop Assistant and only transitioned to Assistant cashier in July 2022 when she was transferred to Jumbo Supermart Ltd.
24. Assuming both the grievant and RWI are untruthful about the grievant's employer and position, the vouchers signed by the grievant from January 2021 to April 2022 show that the claimant was Shop Assistant. Without a pay roll number, written contract of service which the employer was bound to



provide or a job description, the payment vouchers, which the grievant did not contradict conclusively establish the grievant's position as Shop Assistant until July 2022 when she was promoted.

25. It is equally not in dispute that the grievant's salary was Kshs.17,000.00 for the entire duration of employment and was a member of the NSSF and NHIF.
26. Puzzlingly, although the grievant testified that she joined the claimant union in 2018, it is apparent that the employer was not deducting union dues.
27. It is also not in contest that after the respondent appears to have outsourced its Human Resource function to White Collar Consulting Ltd in early 2023, all employees were offered one (1) year written contract of service which according to RWI was a continuation of the verbal arrangement, heralded the grievant's separation from the respondent for reasons the respondents witness did not disclose.
28. The grievant, however, alleged that her employment was terminated because she did not sign the new contract, evidence the respondent did not controvert by providing a different explanation.
29. Evidence on record reveals that the grievant proceeded on compulsory leave pursuant to the respondent's letter dated 12th January, 2023 was transferred to Migori effective 4th March, 2023, but did not render any service, was issued with a notice to show cause, did not respond, was invited for a disciplinary hearing schedule for 13th March, 2023, did not attend and was dismissed from employment on 14th March, 2023.
30. On cross-examination the claimant admitted that she had no evidence of a verbal dismissal by Human Resource and has expressly acknowledged that his employment was terminated on 14th March, 2023 under prayer No. (iii) of the statement of claim dated 23rd May, 2023.

From the foregoing, the issues for determination are:

- i. Whether the respondent had a valid and fair reason to terminate the grievant's employment.
 - ii. Whether the grievant is entitled to the reliefs sought.
31. As to whether termination of the grievant's employment was unfair, parties have adopted contracting positions. While the respondent's case is that it had no option than to do so as the grievant refused to respond to the notice to show cause or attend a hearing, facts the grievant confirmed on cross-examination, the claimant union submitted that the termination was substantively unjustified and procedurally unfair.
 32. The law on termination of employment is well settled by the *Employment Act* and case law.
 33. The provisions of the *Employment Act* are unambiguous that for a termination of employment to pass the fairness test, it must be demonstrated that the employer had a valid and fair reason to terminate the employee's employment and did so in accordance with a fair procedure.
 34. The sentiments of Ndolo J in *Walter Ogal anuro V Teachers Service Commission (Supra)* paraphrased by the claimant leave no doubt that the employer must prove that it had a substantive justification for the termination and the process was fair.
 35. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press (EA) ltd [2017] eKLR*.
 36. In the instant case, RWI testified that the after grievant reported to the respondent's Headquarters in Migori, she was allocated duties and interviewed about her conduct and that was the last time she reported to the work place.



37. In a similar vein, the claimant admitted having received the Notice to show cause and did not attend the hearing.
38. Strangely, the grievant's written statement states that the grievant's employment was terminated verbally on 6th March, 2023. The statement is unclear as to who terminated the grievant's employment as the statement uses the words "they informed me verbally that my services had been terminated"
39. The statement is silent on the reason for the termination of employment.
40. In her oral evidence, the grievant suggested that her employment was terminated for refusal to sign the new contract on 11th January, 2023 which her statement made no reference to.
41. Perplexingly, in its submissions, the claimant union appears to be suggesting that the grievant was declared redundant, which never arose expressly or by implication.
42. On its part the respondent attached a copy of the termination letter dated 14th March, 2023 which cited three (3) reasons for the termination of employment namely (i) absconding duty following the transfer letter dated 3rd February, 2023 (ii) refusal to obey a lawful order by the supervisor and (iii) knowingly using 'insightful' language and behaving in a manner deemed insulting to the person placed in authority by the employer.

Section 45 of the *Employment Act* provides that:

- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove——
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason——
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
43. On absconding, documents on record show that the respondent transferred the claimant from Kisii to Migori vide letter dated 3rd February, 2023 and the transfer was effective 4th February, 2023 and the claimant reported on 6th February, 2023, 2 days late. The claimant testified that she had no money to move to Migori immediately and the employer did not help.
 44. Whereas the employer has the right to effect the transfer of employee owing to exigencies of duty and dynamism of the work place, the same ought to be effected under reasonable conditions such as adequate notice and facilitation.
 45. In this case, these requirements were not complied with as the transfer was instantaneous, and there was no facilitation of movement from Kisii to Migori.
 46. The grievant merely absented herself from work without authority for 2 days and, in the courts view, the employer was to blame for the too short notice and refused to facilitate the claimant.
 47. Additionally, RWI testified on cross-examination that when the grievant reported on 6th March, 2023, she was given 3 days to look for a house. She therefore had authority to be away until 8th March, 2023 and was additionally given a car to transport her goods to Migori. It is therefore unclear to the court as to when the grievant absconded.



48. Puzzlingly, in an earlier transfer within Kisii, the claimant was accorded 7 days to report to the new work station.
49. The court is left wondering why the same employee was accorded hours to report to Migori branch. This cannot pass as a fair labour practice under Article 41 of the Constitution of Kenya.
50. This, in the courts view, was not a fair reason for terminating the claimant's employment.
51. Concerning refusal to obey a lawful Order, evidence on record reveals that the claimant was transferred to the Mabati section and simultaneously asked to sign a new contract for the transfer but declined and sought clarification in writings, which was not provided.
52. Although the letter dated 12th January, 2024 sending the claimant on compulsory leave makes reference to neglect of work given by one Biren, the supervisor, the letter lacks particulars as to when this actually happened as the claimant was transferred to a new work station the day before and equally RWI did not testify about any instance in which the claimant disobeyed the supervisor's instructions other than refusal to sign the contract.
53. Evidence as to what the claimant did or did not do would have embellished the allegation as it now lacks supportive evidence as what appears to have infuriated the respondents management was the grievant audacious refusal to sign the new one (1) year contract.
54. In a nutshell, this ground lacks particulars and cannot pass as a valid ground for termination of employment.
55. Finally, on the alleged use of "insightful", (possible insulting) language and behaviour, the respondent provided no particulars as to the alleged insults and to whom as well as the alleged insulting without particulars, it is difficult for the respondent to demonstrate that the ground was valid which means legally sufficient.
56. Clearly, the respondent tendered no factual evidence of the alleged disobedience of lawful orders of the superior or insulting language and/or conduct.
57. More significantly, it substantially contributed to the late reporting to Migori by giving the grievant insufficient notice and without facilitation.
58. In the court's view, it is an unfair labour practice for an employer to transfer an employee without sufficient notice and without facilitating the employee as necessary.
59. From the totality of the evidence before the court it is discernible that the grievant's employment was terminated because she declined to sign the new contractual arrangement and the respondent's management felt belittled by the grievant as she was the only one who sought explanation.
60. Evidence reveals that the claimant sought clarification before she could sign the document but none was provided and she was immediately placed on compulsory leave and subsequently transferred to Migori.
61. It was incumbent upon the respondent to clarify the issues raised. In any event the respondent had not issued written contracts of service previously.

Procedure

62. It is trite law that for a determination of employment to pass muster, it must be proved that it was procedurally fair as ordained by the provisions of Section 45(2)(c) of the Employment Act.



63. Similarly, the procedural requirements prescribed by Section 41 of the *Employment Act* must be complied with.
64. In *Pius Machafu Isindi V Lavingto Guards Ltd* [2017] eKLR the Court of Appeal held that the elaborate process prescribed by Section 41 of the Act is mandatory.
65. The procedural precepts of Section 41 have been summarised by several decisions including *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR, where the Court of Appeal isolated the elements as:
 - i. explanation of the grounds of termination in a language understood by the employee;
 - ii. reasons for which termination of employment is being considered;
 - iii. entitlement of the employee to a representative of his or her choice when the explanation is made; and
 - iv. hearing and considering any representations by the employee or the representative or both.
66. Evidence on record reveals that the grievant was issued with a notice to show cause dated 9th February, 2023, a fact she admitted on cross-examination.
67. The letter set out two (2) allegations, namely; refusal to be transferred from being a cashier to Mabati section and refusal to sign the contract of employment.
68. The letter accorded the grievant sufficient time to respond but the grievant admitted, on cross-examination that she did not and no reason was provided.
69. Evidence provided by the respondent reveals that the respondent vide letter dated 28th February, 2023 invited the grievant for a disciplinary hearing slated for 9th March, 2023, but for unexplained reasons she did not attend and employment was terminated on 14th March, 2023.
70. The respondent's witness testified that the letter of termination of employment accorded the grievant 7 days to appeal the decision but she did not.
71. As the respondent accorded the grievant the opportunity to be heard and present her case but she blatantly refused to attend the meeting notwithstanding the fact that she had been invited, and refused to appeal the respondent's decision, the court is satisfied that the respondent has demonstrated that it complied with the provisions of Section 41 of the *Employment Act*.
72. Although the copy of the invitation letter dated 28th February, 2023 is unclear, it was served on the grievant twice and she was thus aware of the meeting.
73. It is the finding of the court that termination of the claimant's employment was procedurally fair.
74. Flowing from the foregoing and guided by the provisions of Section 45(4) and 45(5) of the *Employment Act* it is the finding of the Court that termination of the claimant's employment by the respondent was unfair under Section 45 of the Act.

On the reliefs the court proceeds as follows:

- i. Reinstatement
 - a. The grievant refused to respond to the respondent's notice to show cause with no explanation.
 - b. The grievant refused to attend the disciplinary meeting to explain her case.



- c. The grievant did not express her wish to remain in the respondent's employment.
- d. The foregoing reinforces the challenge of practicability of reinstatement of the claimant.

In *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya and Others* (supra), Murgor JA, while discussing the practicability of directing reinstatement, cited the sentiments of the Court in *Newzealand Educational Institute V Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERN2 414(CA) where the New Zealand Court of Appeal stated:

“Whether... it would not be practicable to reinstate (the employee) involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is no uncommon for this court or its predecessor, having found a dismissal to have been unjustified to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.

Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences”.

In the *Kenya Airways Ltd* case, (supra) the majority judgment found the remedy of reinstatement impracticable.

In *Kenya Ports Authority V Managing Director, Kenya Ports Authority and 5 Others* [2019] eKLR where the trial court granted reinstatement of the 1st and 2nd respondents, the Court of Appeal set aside the same on the ground of impracticability.

In the instance case, the court is not persuaded that it is an appropriate remedy.

ii. Salary in lieu of notice

Having found that the respondent had no substantial justification to terminate the grievant's employment the prayer for pay in lieu of notice is merited as neither the provisions of Section 35 nor 36 of the *Employment Act* were complied with.

The claim is awarded Kshs.17,000.00.

iii. Salary for January and February 2023

Evidence availed by the respondent shows that the claimant signed the salary voucher for January 2023 on 10th February, 2023 whose contents the grievant did not controvert.

The respondent tendered no evidence of having paid, the claimant's salary for February 2023.

The claim for salary for February 2023 is thus merited and is awarded, Kshs.17,000.00

iv. 14 days in March 2023

As the grievant was still in employment till the date of termination on 14th March, 2023, the claim is merited and is awarded Kshs.8,500.00.

v. 3 years leave



Neither the grievant's written statement nor the oral evidence adduced in court make reference to any outstanding leave or leave days.

Similarly, the grievant tendered no evidence or alleged that she did not proceed on annual leave and why.

The claim lacks particulars and is declined.

vi. Under payment for 76 months

Although the grievant testified that she was employed as a cashier in October 2016, that was not the case as she only became an Assistant Cashier when she was promoted and transferred from Ritu Enterprises Ltd to Jumbo Supermart Ltd and was previously a Shop Assistant.

The grievant did not contest the contents of this letter dated July 2022 nor the salary vouchers she signed which are explicit that she was a shop Assistant.

The respondent's evidence as to the grievant's position of employment is borne by documents the grievant read, understood and signed every month.

The grievant's grounds her claim on the assertion that she was a cashier yet evidence shows that she was an Assistant Cashier.

Relatedly, the promotion had no remunerative benefits.

In sum, the claim for underpayment is unsubstantiated and is declined.

vii. Severance pay

This claim is patently unsustainable as the grievant was not declared redundant.

Severance pay is unavailable in circumstances outside the provisions of Section 40(1) of the [*Employment Act*](#).

The claim is dismissed.

viii. 12 months compensation

Having found that termination of the grievant's employment was unfair for want of a valid and fair reason, the grievant is entitled to compensation under Section 49(1)(c) of the [*Employment Act*](#).

However, bearing in mind that the grievant contributed to the termination, did not appeal the decision to terminate her employment or express her desire to remain in employment and had served since October 2016 (about 7 years) and tendered no evidence as to how she mitigated her loss, the court is satisfied that the equivalent of 3 months gross salary is fair.

ix. Public holidays worked

This claim lacks supportive evidence and is for dismissal.

Neither the grievant's written statement nor the oral evidence adduced in court make reference to the fact that the grievant worked on any public holiday and was not paid.

The claim lacks particulars and it is accordingly dismissed.

x. Certificate of Service

The claimant is entitled to a certificate of service by dint of Section 51 of the [*Employment Act*](#).



75. In conclusion, judgment is entered in favour of the claimant against the respondent in the following terms:

- a. Salary in lieu of notice Kshs.17,000.00
- b. Salary for February 2023 Kshs.17,000.00.
- c. Salary for 14 days in March 2023 Kshs.8,500.00.
- d. Equivalent of 3 months salary Kshs.51,000.00.
Total Kshs.93,500.00
- e. Certificate of Service.
- f. Costs of this suit.
- g. Interest at court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 5TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

