



Kudheiha Workers v Apostles of Jesus Youth Technical Institute (Cause E626 of 2020) [2025] KEELRC 1048 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1048 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E626 OF 2020
JW KELI, J
MARCH 28, 2025**

BETWEEN

KUDHEIHA WORKERS CLAIMANT

AND

APOSTLES OF JESUS YOUTH TECHNICAL INSTITUTE RESPONDENT

JUDGMENT

Issue in Dispute: Wrongful Dismissal of Service of Mr. Maulid Madjer Ogoya

1. The Claimant identified itself as KUDHEIHA workers filing the case on behalf of union members registered in the KUDHEIHA workers Nairobi Branch and who continued to pay union dues as on monthly basis. They filed a memorandum of claim dated 7th October 2020 seeking the following reliefs on behalf of Maulid Madjer Ogoya :-
 - a) Four month's salary in lieu of notice. Kshs. 31,813 x 4 = 127,252
 - b) House allowance 3,640x 36 months(3 years) = 131,040
 - c) Underpayment of wages (2016-2017) = 378,540
 - d) Six (6) months compensation for unfair termination = 190,878
 - e) Service gratuity for 24 years = 661,710
 - f) Long service award 2015-2017 = 15,180
 - g) Salary for May and December 2013 = 48,056
 - h) Costs of the Suit (as the court determines)Total = Kshs.1, 552,656



2. The claimant, in support of its case filed a verifying affidavit of Maulid Madjer Ogoya, who stated he was the grievant, sworn on the 7th of October 2020, witness statement of the grievant, of even date and list of documents of even date and the bundle of documents. The claimant filed a further list of documents dated 20th January 2025, being payslips/salary vouchers.
3. The claim was opposed by the respondent who entered appearance and filed notice of preliminary objection dated 14th November 2022 raising grounds of lack of recognition agreement and that the grievant was not a member of the union at the relevant times. The respondent filed response memorandum dated 1st March 2021, list of witnesses and witness statement of Fr. Stephen Omondi all dated 1st March 2021 and of even date list of documents and the bundle.

Hearing

4. The claimant's case was heard on the 21st January 2025 where grievant adopted his witness statement and produced his documents. He was cross-examined by counsel for the respondent, Mr. Onsando.
5. The respondent's case was heard on even date with Fr. Stepehn Omondi as RW. He adopted his witness statement as evidence in chief. He produced respondent's documents under list dated 1st March 2021 as R-exh 1-6. He was cross-examined by the union representative Ms. Mwendwa, Industrial Relations Officer.

Claimant's case in summary

6. That the Claimant was employed as from on 1994 with a salary of 3,000 shillings and adjusted to Kshs.15, 000 consolidated for the years in service of Respondent. That the Claimant was a union member registered in the KUDHEIHA workers Nairobi Branch and continued to pay union dues as on monthly basis. The Claimant was employed at the institution as a motor vehicle mechanic instructor vide appointment letters dated 15/04/1994, 17/07/1997 and 09/04/1998. That the Claimant was not getting House allowance neither accommodation as provided for by the [Employment Act](#) 2007 Section 31 and parties C.B.A, churches and institutions associated with them 2013-2017 part one Clause 1 (d).
7. That during his tenure of service the Claimant had a clean record. He has never got any warning letters only that the Director purported that he had stolen small engine block and radiator without the knowledge of the management and reported the same to the Hardy Police Station which the police officers did not arraign the Claimant in Court of Law after it was found that it was malice and victimization. That there was no prove of theft as was alleged by the director neither did the police conduct an investigation to the incidence. That the case under OB No. 32/11/7/18 has never been attended to date and efforts of the Claimant to get justice was futile and the management turned deaf ears to him whereby he reported the matter to the union branch for settlement. That the Claimants services were unfairly and wrongfully terminated without giving a hearing vide a letter dated 30th July 2018 hence termed as character assassination of the highest order.
8. That the Branch Secretary tried severally to meet the Director for the same settlement in vain. That the Branch Secretary reported this matter to the head office of the union for further action attaching memorandum of claims for perusal. That Secretary General reported the matter to the Cabinet Secretary Ministry of Labour and Social Protection as provided for in Section 62 of [Labour Relations Act](#) 2007.
9. That on 25th September 2018 the dispute was reported under Section 65 (1) of the [Labour Relations Act](#) 2007 a conciliator by the name Mr. Nelson Kimeu Industrial Area Labour Office was appointed to



act as a conciliator with a letter dated 6th November 2018. That through a letter dated 20th February 2019 the conciliator invited both parties for a conciliation meeting but the Respondent never attended. That through a letter dated 20th March 2019 the conciliator again invited both parties for another conciliation meeting where the Respondent became adamant and another meeting was scheduled to take place on 28th March 2019 vide a letter dated 20th March 2019. That on 20th February 2019 in pursuant to section 69(a) of Labour Relations Act 2007 the conciliator issued a certificate of unresolved dispute for the union on behalf of the claimant to proceed to the next level of arbitration.

10. That the Respondent contravened section 41 (1) of Employment Act 2007 which states that an employer shall before terminating the employment of an employee on grounds of misconduct or poor performance or physical incapacity explain to the employee in a language the employee can understand, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of choice present during this explanation.
11. The Claimant asserted that the grievant's employment contract was unfairly and unprocedurally terminated where the Claimant demands for the following from the Respondent in accordance to churches Collective Bargaining Agreement since the institution was under catholic domain and is a party to the said CBA:
 - a) Notice - Kshs. $(31,813 \times 4) = 127,252$
 - b) House allowance 2013-2016 (3 years) - Kshs. $(3,640 \times 36) = 131,040$
 - c) Six (6) months compensation for unfair termination -Kshs. $(6 \times 31,813) = 190,878$
 - d) Underpayment of wages (2016-2017) - Kshs. $(31,813-15,000) \times 24 = 378,540$
 - e) Service gratuity for 24 years @ 26 days per each completed year of service $(31,813 \times 26/30 \times 24) = 661,710$
 - f) Salary for the month of May and December 2013 = 48,056
 - g) Long service award 2015-2017 = 15,180Total KSHS. = 1,552,656

Respondent's case in summary

12. In response to paragraph 4 of the Claim, the Respondent asserted that the Claimant's employment was terminated on 18th December 1998 by a letter dated on the same date and it is not clear when and how the Claimant resumed employment. In response to paragraph 4 of the Claim, the Respondent states that the Claimant's salary included house allowance. In response to paragraph 6 of the Claim, the Respondent states that the claim is false on the following grounds: on 09/12/1998 the Claimant wrote an apology letter to the Respondent which was followed by termination of his employment by letter dated 18/12/1998. On 25/2/1999 the Claimant was served with a warning letter for having absconded duties. On 16/03/1999 the Claimant submitted to the administration an apology letter on diverse misconducts. On 23/2/2018 the Claimant was given a warning letter over absconding duties, being rude to his employer, abusive to the employer and disrespectful to the employer. On 14/05/2018) the Claimant was given another warning letter over being disrespectful to his co-workers and students, and also of being unable to deliver in his service.
13. In response to paragraphs 6, 7 and 8 of the Claim, the Respondent states that on 11/7/2018 the Respondent's director caught the Claimant red-handed in the act of stealing a car engine block and radiator that were used for training purposes. The director called the police, but the Claimant ran



away to avoid arrest. The director reported the case at Hardy Police Station and was issued with an OB number. The case is still pending at the police station because the Claimant has never been found by the police.

14. In response to paragraph 9 of the Claim, the Respondent stated that the Claimant ran away when he was caught stealing and also evaded police arrest and investigations. In response to paragraph 10 of the Claim, the Respondent states that contrary to the claim, the Respondent's director met with the Claimant's Secretary General over the matter. In response to paragraph 11 to 16 of the Claim, the Respondent states that the Claimant should have availed himself to the police for his arrest and investigations.
15. The parties filed written submissions on close of the Respondent's case as directed the court.

Determination

Issues for determination

16. Claimant's issues for determination
 - a. Merit of the preliminary objection
 - b. Procedural fairness
 - c. Validity of the reasons for dismissal of the claimant
 - d. Whether the collective agreement applies
 - e. Whether the grievant is entitled to reliefs sought.
17. Respondent's issues for determination
 - a. Whether the termination was lawful and unfair
 - b. Reliefs sought.
18. The court taking into account that the respondent raised a preliminary objection dated 14th November 2022 but ignored it in submissions, the court held that the respondent had abandoned the objection on locus standi of the claimant and proceeded to formulate the issues as follows:- Whether the termination was lawful and unfair Whether the claimant was entitled to reliefs sought

Whether the termination was lawful and unfair

The claimant's submissions

19. The reason brought forth by the respondent was that :-"you were caught involved in the act of theft of small engine block and a radiator used for teaching the students..."The questions that arises is:-
 1. Was the grievant caught inside the school environs or outside the institution with the items?
 2. Were the items in anyway connected to his duties and responsibilities?
20. According to the respondent, the grievant was "caught in the act" within the school environment but not outside the school with stolen item. Secondly, during the hearing, the grievant indicated that among other duties he was employed as a Motor vehicle Instructor handling the said items to teach the



students thus it's very clear that the grievant did not steal as alleged but all faked up to do away with the grievant without any prove. Section 43 of the Employment Act 2007 states that: -

43. Proof of reason for termination

(1) In any claim arising out of 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.

(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.” The Respondent has not proved beyond reasonable doubt to this Honourable Court with either police investigation report, board minutes or any witness to ascertain the accusation. This is a case where things were just assumed and the respondent is not in any way able to prove the reason for dismissing the grievant. Section 45 (2) of the Employment Act 2007 states that: -

(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 employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure” The Claimant further relied on the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR.

Respondent's submissions

21. The respondent submitted that in the case of the grievant no notice and hearing was given under section 41 of the Employment Act. The reason being that the grievant absconded duty. That had he



been available in the institution as claimed, he would have been arrested by the police and investigated. Instead he went to the union. That the director genuinely believed the claimant stole the spare parts. That the grievant's explanation that he was acting on directions of the assistant director whom he sent the money of sale of the item was not a defence in a criminal act. That the director came with the police to arrest the grievant but he ran away and never came back to the institution.

Decision

22. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '45(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.” To pass the fairness test the termination must pass the substantive(in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro V Teachers Service Commission[2013]eKLR).
23. It was not in dispute that there was no procedural hearing. What was in dispute was the validity of the reasons for the termination according to section 43 of the employment act which states:-‘ 43. Proof of reason for termination
- (1) In any claim arising out of 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.
 - (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.”

Whether the termination was fair

24. The Respondent issued Letter dated 30/7/2018 terminating the grievant's employment which stated:-

“Dear Maulid Medjer,

Re: Dismissal Letter From Being Instructor

In this letter I would like to appreciate what you have been doing to our students, however, due to what happened in July 11th, 2018 whereby you were caught involved in the act of theft of small engine block and a radiator used for teaching the students, we would like to inform you that, you will no longer be student instructor in the Apostles of Jesus Youth Technical Institute. This was an act of dishonesty on your part and bad example for the students. Your case is already with the police with OB No. 32/11/07/18. Before leaving, may you please submit your results for the students to the office of the assistant director. We wish you all the best in whatever you do.



Yours in service,

Fr. Mark Lowot, AJ

Director

Cc. County Labour Officer – Nairobi

cc. Shopsteward”.

25. Essentially the grievant was dismissed summarily on ground of being involved in theft. The validity of the reason is on the employer(Section 43, supra). The Director Fr. Lowot stated the case was with police OB No. 32/11/07/18. There was no hearing nor did the police investigate the case. The Claimant was never arrested and continued to teach. Indeed, the dismissal letter asked him to submit the results of the students. During the hearing, at cross-examination the Claimant told the court he was informed of reason of termination to be stealing engine block and radiator. The Claimant on being asked who caught him stealing stated:- “I do not know. First read from the letter served”.The next question was:- “You were not aware of the stealing?”. To which the Claimant answered:- “No. Until 30th July when served with the letter.”The Claimant denied contents of paragraph 2 of the letter by KUDHEIDHA dated 1st August 2018 where it was stated the Claimant was paid and the money sent to Assistant Director. The Claimant admitted he was aware of the incident as he was oversighting the motor vehicle spare parts. The Claimant admitted having been aware of the reporting of crime by the Respondent to Karen Hardy Police Station. The Claimant told the court in his statement he had not commented on alleged theft stating he was not aware of the same. The Claimant admitted to have had a past warning letters dated 23rd February 2018 and 14th May 2018. The Claimant denied having been served with other filed warning letters.
26. The Respondent’s Witness was Fr. Omondi who stated the Claimant was caught red handed by ex-director stealing. That he took off on being caught. The matter was reported to police OB No. 32/11/07/18. The court noted the OB was not on the list of Respondent’s documents produced as R – Exh. 1 – The Respondent witness told the court by time of joining the Respondent the Claimant had not been dismissed. At cross-examination the Respondent witness told the court that the Director had caught the Claimant stealing and that was same as having stolen. He was aware the Claimant’s role was on handling parts of the motor vehicle.
27. The Respondent’s witness confirmed that despite the allegation the Claimant ran away to avoid arrest he continued to be in employment. He told the court that the issue of arrest was with the police.
28. The test of reasons validity is accounting to section 43 of the *Employment Act*. Did the employer have a reason to believe the Claimant stole the motor vehicle spare parts? There was no statement of the said Director who was said to have caught the Claimant red-handed stealing the spare parts. The Claimant’s role was to oversight the spare parts. He continued teaching even after alleged report of case to police. He was never arrested. He was not subjected to disciplinary hearing and there was no investigation on the incident, the Claimant was called from class and issued with termination letter. The alleged police abstract was not produced before court. The court found there was no proof on balance of probability of the existence valid reasons for the termination. The termination was unfair for non-compliance with procedural fairness under section 41 of the *Employment Act*. The court upheld the decision of the Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR where it was held:-

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment



contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

“..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees. Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.” The Claimant ought to have been issued with show cause notice on the alleged offence, investigations done like recording statement of the claimant and the director etc. The fact of reporting a case of theft to the police does not exculpate the employer from the burden to prove a valid reason for the termination. In the instant case, no arrest was made. The claimant ought to have been invited for hearing session to make his representations in the presence of an employee of choice or shop floor representative before the employer on the reason for termination(section 41 of the Employment Act) This was not done. For the foregoing reasons the court held the termination as unlawful and unfair.

Whether the claimant was entitled to reliefs sought

29. The claimant sought the following reliefs:-

- a) Four month's salary in lieu of notice. Kshs. 31,813 x 4 = 127,252
- b) House allowance 3,640x 36 months(3 years) = 131,040
- c) Underpayment of wages (2016-2017) = 378,540
- d) Six (6) months compensation for unfair termination = 190,878
- e) Service gratuity for 24 years = 661,710
- f) Long service award 2015-2017 = 15,180
- g) Salary for May and December 2013 = 48,056
- h) Costs of the Suit (as the court determines)

Total = Kshs.1, 552,656

30. The claimant confirmed to this Honourable Court that the respondent institution is a catholic institution run by churches and affiliated to Catholic Diocese of Nairobi managed by Fathers' as directors of the institution. The claimant told the court that the Archbishop of Catholic Diocese of Nairobi had signed a recognition agreement and several collective bargaining Agreement for and on behalf of all institution under churches umbrella where the respondent was one of the implementor. The CBA was not produced.

31. Notice pay- the contract had no notice period. The alleged CBA with 4 months notice period was not produced. There was no notice of termination issued. The same is allowed under section 35 of the Employment Act at Kshs. 15000.



32. Prayer for housing - housing is a basis condition of employment under section 31 of the Employment Act 2007, which provides that:-

31. Housing

(1)

An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employer or shall pay to the employee such sufficient sum, as rent, in addition to the wages salary of the employee, as will enable the employee to obtain reasonable accommodation."

As per regulation of wages (general) Order (CAP 234), 'An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the first or second schedule, be paid housing allowance equal to fifteen percent of his basic minimum wage.' As per the grievant's appointment letter, he was entitled to Kshs. 1,000 per month as housing allowance which upon checking the payslips attached with last of January 2018 there is no provisions for house allowance. The court awards the grievant 15% of basic salary for three years as prayed by the union .i.e= $15,000 \times 15/100 = 2,250 \times 12 \times 3 \text{ years} = \text{Kshs. } 81,000$

Service gratuity

33. The claimant submitted that the grievant having worked for the respondent for 24 years deserves service gratuity for the years worked since the respondent constructively dismissed before he attained the retirement age. The respondent submitted that the Claimant prayed for service gratuity for 24 years totaling Kshs. 661,710/=. However, under paragraph 5 of the contract dated 17th July 1997(Page 13 of Respondent's Bundle of documents) it is clear that PW-1 was a beneficiary of NSSF. In Kenya Union of Domestic Workers, Hotels, Educational Institutions And Hospital Workers Union(KUDHEIHA) v BOM Lirbanda Girls High School (Employment and Labour Relations Cause 16 of 2023) [2023] KEELRC 2519 (KLR) (18 October 2023), para. 63-65, the court held that gratuity is not payable where there is no CBA providing for the same and where NSSF is paid. In this particular case no evidence of a CBA was produced as to support the claim of gratuity. The court agreed with the respondent and upheld the said decision. The claimant relied on a CBA which was not before the court. The claimant was under NSSF (section 35(6) of the Employment Act). The prayer for gratuity was not justified.

34. The other prayers were not proved and the claimant did not submit on the them.

Conclusion

35. The claim is allowed. Judgment is entered for the claimant, on behalf of the grievant, against the respondent as follows:-

- a. A Declaration is issued that the termination was unlawful and unfair
- b. Notice pay of Kshs. 15000
- c. Housing pay Kshs. 81000
- d. Compensation equivalent of 6 months salary Kshs. 90000

Total award of 186000



e. Costs and interest at court rates from date of judgment until payment in full.

36. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

