



Mutahi v Kenya Biologics Limited (Employment and Labour Relations Appeal E002 of 2024) [2025] KEELRC 930 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 930 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E002 OF 2024
ON MAKAU, J
MARCH 26, 2025**

BETWEEN

MICHAEL KAMAU MUTAHI APPELLANT

AND

KENYA BIOLOGICS LIMITED RESPONDENT

(Being an appeal from the Judgment of Honourable Mr.S.Mwangi (SRM) delivered on 30th December , 2023 in Murang'a MCELRC Cause NO. E009 of 2021)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 5th March 2024, the appellant seeks the setting aside of the judgment of the trial court delivered on 20th December 2023, and award of the reliefs sought in his Memorandum of Claim dated 22nd October 2021 plus costs of the appeal.
2. The appeal is premised on 18 grounds which can basically be collapsed into the following three grounds: -
 - a. Whether the respondent terminated the appellants employment unfairly and unlawfully.
 - b. Whether the appellant is entitled to the reliefs sought in his Memorandum of Claim.
 - c. Whether he is entitled to the costs of the appeal.

Background

3. The appellant was employed by the respondent as a driver for cars and light vans vide a contract dated 26th May 2014. His starting salary was Kshs.10,579 plus house allowance of Kshs.1,587 but it



was gradually increased to Kshs.16,767 as at 5th July 2021 when his services were terminated by the respondent. Further details of his contract were in the Company's Staff Manual.

4. All seemed okay until June 2021 when the respondent proposed amendments to the appellant's contract of employment. The respondent invited the appellant to consultative meetings but he declined to sign the proposed amendment because according to him, he was given scanty information and there was no indication of the fate of his benefits/dues that had accrued under the initial contract. He was also not allowed to get a copy of the proposed amendment and the respondent was not willing to explain to him the new terms.
5. According to the appellant, the proposed amendment was phasing out the post of driver and introducing a new post of Driver and Logistics Assistant, and also introduce high qualifications including high school "degree", good knowledge of car mechanics, basic computer and proficiency in English and communication skills. All the proposed qualifications were not within his possession and there were no alternative qualifications or opportunity of training him to achieve the new minimum qualification.
6. When he declined to sign the contract, he was given leave and on 5th July 2021, his services were terminated by the employer for refusing to sign the proposed amendment to his contract of employment. In the appellant's view, he ought to have exited on account of redundancy under section 40 of the [Employment Act](#) due to proposed operational requirement.
7. In addition, the appellant laid claim for salary underpayment, overtime, leave and severance pay which were set out in the memorandum of claim.
8. On its part, the respondent averred that it exercised its managerial prerogative by revising and/or adjusting policies and procedures applicable to its drivers. This was done in order to achieve operational efficiency, better reporting channels, and custody of the vehicles. The matter was discussed with the appellant and it was fully explained to him and there was no issue of phasing out his position or any effect on his pending dues from the previous contract.
9. It further averred that the proposed amendment did not introduce new qualification to be applied to the appellant nor did it entail rendering the appellant redundant. Consequently, the respondent terminated the appellant's employment because his refusal to sign the proposed amendment meant that he was not willing to continue working under the authority and lawful directions of his employers. Further, the refusal to sign the amendment amounted to refusal to obey lawful instructions which was within his duty as an employee to sign.
10. The respondent denied the alleged redundancy situation and averred that all other claims pleaded by the appellant were misconceived and unmerited or they were statute barred by dint of section 90 of the [Employment Act](#).
11. During the hearing, the appellant testified as CW1 but he basically adopted his written statement and nine (9) documents as his evidence in chief. On cross examination, he stated that he was dismissed for failure to sign an agreement yet he lacked educational qualification. He maintained that he declined to sign the amendment because he lacked the qualifications including "degree" and mechanical knowledge. However, he confirmed that the agreement did not state anywhere that he was no longer required as a driver.
12. The respondent was represented by its HR Manager Ms Beth Wangari Mugwe who testified as RW1. She adopted her written statement as evidence in chief and produced 8 documents as exhibits. She stated that the appellant had misrepresented the facts of the case and clarified that the issues that led to this case was the desire to improve efficiency and enhance procedures and ways of work for



- the respondent. The intention was to address working hours, custody of the vehicle and Reporting procedures for him to his supervisor.
13. RW1 clarified that there was no intention to declare redundancy or to frustrate the appellant but rather address the aforementioned three matters. Meetings were held between the appellant and the other driver, CEO, Operations Manager, and the staff representative and no one forced the appellant to sign the document. However, he was given leave to go and consult. RW1 maintained that qualifications and duties for the appellant were not affected by the proposed amendment, only the reporting (supervisor).
 14. On cross examination, RW1 confirmed that the appellant was working in Makuyu and its environs since 20th May 2014 but officially his place of work was Kambiti. His reporting time was 8.00am and leave at 4.00pm. There were two drivers including the appellant. Each driver was given a template (Log sheet) to indicate reporting time, leaving time and their duties but the appellant was not doing it. He had disobeyed the rules but no disciplinary action was taken against him.
 15. RW1 contended that if the appellant worked overtime he was supposed to indicate in the log sheet but he did not do that. RW1 clarified that the 72 days paid as overtime was a gratuitous pay intended to achieve an amicable separation after the appellant insisted that he had worked overtime. She further clarified that whenever an employee worked for 7 days in a week he was compensated by 2 off days as per the Staff Manual and whenever he worked on public holiday, he was paid double the normal rate. However, she clarified that overtime work was not a routine occurrence.
 16. RW1 further stated that the appellant was entitled to 21 leave days and his outstanding leave was taken on 10th June 2021 before the termination on 5th July 2021.
 17. She reiterated that the claimant was dismissed for refusing to sign the amendment of the contract (Exh.8) but clarified that there was no new job description but just policies for him to follow. The appellant disagreed with the three policy issues and therefore he disobeyed instructions from the employer.
 18. RW1 admitted that the appellant was not subjected to disciplinary hearing but a discussion about procedural way of working. He was therefore dismissed for refusing to follow the rules and procedures of the company and he was given a certificate of service. Failure to log in was inhibiting the operations of the company and leading to late delivery of merchandize to clients. The appellant was also not picking calls, hence there was need of the proposed Policies and Procedure changes.

Submissions on the appeal

19. It was submitted for the appellant that he was unfairly and unlawfully dismissed and therefore he was entitled to compensatory damages. It was further submitted that he was entitled to all the other reliefs sought in his pleadings including salary under payment, house allowance, overtime and off days worked, severance pay and certificate of service.
20. It was argued that the court erred by ignoring clear admission by RW1 that the appellant was not taken through any disciplinary hearing before termination of his employment by the letter dated 5th July 2021. The court was therefore urged to re-evaluate the evidence and hold that the termination of the appellant's services was done on account of redundancy and fair procedure was not followed.
21. As regards the reliefs sought, it was submitted that the appellant is entitled to compensation for unfair termination by dint of section 49 of the [Employment Act](#). For emphasis, reliance was placed on Daniel Mburu Muriu v Hygrotech East Africa Ltd (2021) eKLR where the court awarded ten (10) months gross salary for unfair termination.



22. As regards the rest of the reliefs sought, it was submitted that the trial court erred by holding that the appellant was estopped from filing the suit after executing an acknowledgment of Kshs.48,144 as full and final terminal dues from the respondent. The court was therefore urged to re-evaluate the pleadings, submissions and the evidence on record and award the damages as prayed in the memorandum of claim.
23. On the other hand, it was submitted for the respondent that the appeal is without merits and should be dismissed with costs. The court was invited to re-evaluate the evidence tendered during the trial and draw its own conclusion as was observed by the Court of Appeal in *Postal Corporation of Kenya v Andrew K.Tanui* (2019) KECA 489 (KLR).
24. It was submitted that parties' pleadings are central in resolution of dispute and in the instant case the claim was predicated upon termination of employment an account of alleged redundancy. It was submitted that after considering the evidence, the trial court concluded that the appellant did not discharge the evidentiary burden of proving that his position was declared redundant.
25. It was specifically pointed out that the trial court considered the evidence by RW1 and CW1 which confirmed that the termination was not on account of redundancy but because of the appellant's refusal to sign proposed amendment to his contract to reflect the new operational Policies and Procedures for drivers. Consequently, the court was urged to uphold the conclusion by the trial court that the appellant had failed to prove the alleged termination on account of redundancy.
26. Finally, the court was urged to find that on the basis of acknowledgment of receipt of payment as full and final settlement of his terminal dues, the appellant is not entitled to any other dues. Reliance was placed on my decision in *Bernard Kwerula Ongaya v Crown Health Care Limited* (2019) eKLR where I upheld a Discharge and Settlement Agreement and dismissed the suit.

Issues for determination and analysis

27. This being a first appeal, my mandate is to re-evaluate the evidence tendered by the parties during the trial and make my own independent conclusions. I should, however not differ with any finding of fact by the trial court unless it is not founded on evidence or on a misapprehension of the evidence or the trial court acted on wrong principles and reached in an erroneous decision. I also appreciate that I was not present during the trial when the witnesses gave their testimonies. (See *Selle v Associated Motor Boat Company Ltd & others* (1968) EA 123).
28. Having considered the whole record of appeal and the submissions made before this court, the following issues fall for determination: -
 - a. Whether the respondent terminated the appellant's contract of employment unlawfully and unfairly.
 - b. Whether appellant is entitled to the reliefs sought in his Memorandum of Claim dated 22nd October 2021.
 - c. Whether the appellant is entitled to the costs of the appeal and court below.

Unfair and unlawful termination

29. Section 45 (1) & (2) of the *Employment Act* provides as follows: -
 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 employee’s 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.”
30. The appellant sued the respondent for unfair and unlawful termination of his employment on account of redundancy caused by proposed amendment to his contract. He alleged that the proposed amendment would disqualify him for the job because of the expanded mandate and academic and professional qualifications. The amendment also did not provide for the dues from the previous contract dated 26th May 2014.
31. However, the respondent contended that the amendment to the contract did not change the claimant’s Job description or qualification. It was only meant to align his contract with new policy and procedure on working hours, reporting channels and custody of the vehicles applicable to all the drivers. As such, the alleged new qualification and redundancy were denied.
32. The offending Amendment of Contract of Employment was contained in an undated letter which I have copied below: -

“Dear Mr. Michael Mutahi

Amendment Of Contract Of Employment

This contract incorporates the terms and conditions of your employment with Kenya Biologics Ltd (A company incorporated under the laws of Kenya) Registration Number: C.138311, located in Makuyu-Kambiti/BLK.2/Kitune/609, P.O Box 249-01020. Hereby trading as Kenya Biologics Limited, represented by Mr. Jean-Marc Moulin (hereafter referred to as the ‘Company Representative’) and shall constitute a contract enforceable in law.

This shall be an agreement between you and the Employer and shall include but not limited to terms and conditions of employment of the Employer, and any procedures, codes and practices now in use and force and as may be introduced and amended from time to time.

The above subject applies. As per our discussion, we wish to revise the roles and duties of our company drivers to incorporate the below:

1. Reporting time

It is expected that you will report to the office premises (Kambiti or Kakuzi) every working day at 08.00am. Any other arrangement owing to a particular schedule will be communicated to you accordingly by the Industrial Manager or Logistics Department.

2. Company vehicle

Any company vehicle in your custody for the day will be picked from the designated premises and left at the designated premises as instructed by the company.

If for any reason whatsoever due to a schedule situation you are required to have the car in your custody overnight then prior authorization in writing must be provided by the Industrial Manager or Logistics Department.



As per any typical work situation, you may be expected to carry out other duties within the parameters of your scope as and when required.

3. Supervisor

This position reports to the Industrial Manager with functional reporting to the Logistics Department. All instructions and work schedules will strictly come from these facilities.

By your signature hereto, you confirm that you understand the terms and conditions of service as contained herein, done in Kenya and thus confirm to agree or disagree, on this 10th day of June 2021.

Beth Mugwe -hr Manager

For: Jean-Marc Moulin

CEO-Kenya Biologics

Name:

Signature preceded by the date and handwritten words “Read and approved” or “Read & Disapproved”

33. A careful reading of the above letter in my view does not create a redundancy situation at all. Section 2 of the [Employment Act](#) defines redundancy as follows: -

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment”.

34. The letter basically clarified on the time for reporting to work, the custody of the vehicle and the reporting channel (supervisor). The said amendment was Operational Policy and Procedures matters within the Managerial prerogative of the respondent. The changes were necessary considering the explanation given by RW1 that the late reporting was negatively affecting delivery of merchandize to clients and further that the appellant failed to pick calls when required.

35. The proposed amendment did not change the contract save for the reporting channel from the Director Marketing and Sales to the Industrial Manager. There was no change in job description or any benefits assigned to the position of the driver.

36. Having considered the above matters, I am satisfied that no redundancy occurred but the appellant was dismissed for refusing to sign the amendment to his contract terms. The termination letter dated 5th July 2021 stated as follows: -

“Dear Mr. Michael Mutahi

Contract of Employment Termination

...the above subject applies in relation to the successive discussions dated the 10th, 25th & 28th of June 2021 in relation to the driver's contract amendment applying to the policies and procedures required by the company in this position.

Regrettably, we fail to reach an agreement which consequently leads to the severance of the employment relationship and thereupon instigates your contract termination on the basis of failure to follow the set processes and procedures of the company. Your contractual period with Kenya Biologics



Limited thus terminates today, the 5th of July 2021. Please consider the aforementioned date as your last day of work.

You are required to return any of the company's material, documents or equipment to which you had access during your contractual period. As with all employees, you are bound by the company's confidentiality and data protection policies.

Your final dues will be paid at the total amount of five (5) working days in the month of July 2021, one month (1) pay in lieu of notice period and overtime accrued.

We thank you for your work so far and we wish you all the best for the future.

By your signature hereto, you confirm that you understand the terms and conditions of service as contained herein, done in Kambiti, Kenya on this 5th day of July 2021.

Beth Mugwe -human Resource Manager

For: Jean-Marc Moulin Name: Michael Kamau Mutahi

CEO-Kenya Biologics LtdSigned on 5/7/021”

37. What comes out clear from the letter and proposed amendment and the termination above is that the employer wanted to control the appellant's time of reporting, how he used the vehicle and also make him accountable to the employer for the use of time and the company vehicle but he refused to commit himself by signing the proposed amendment to his contract.
38. The question that arises is whether the refusal to sign the proposed amendment to the contract amounted to a valid reason for terminating the appellants contract of service. As already observed above, the employer wanted to exercise control over the appellant and hold him accountable on the use of his working hours and company vehicle.
39. In this case, I must observe that the respondent exercised his power to terminate prematurely before complying with section 41 of the Employment Act. Section 10 (5) of the Employment Act provides that:

“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”
40. Some of the stipulations listed under subsection (1) are the place of work and the hours of work which falls within the four walls of this appeal. There is no dispute that the respondent held consultation with the appellant about the proposed amendment in his contract and the changes were then served on him to sign but he declined.
41. I need not overemphasize that one of the key elements of employment under a contract of service is the mandate of the employer to control the employee in the manner and time of working and also in the use of the tools of trade. The absence of such aspect in business engagement, nullifies the employer-employee relationship. It follows that where an employee frees himself from such control, he becomes fit for separation.
42. An employee who decides when to report to work, who to report to, and how to use employer's tools of trade is not worthy the description of an employee. Having said that, I must find and hold that the respondent had a valid ground for terminating the employment of the appellant on 5th July 2021.
43. However, I have noted that the trial court did not consider the appellant's complaint that the termination of his employment was not in accordance with a fair procedure. He testified that he was



never accorded a fair hearing before the termination a fact which was admitted by RW1 in her testimony under oath. Section 41 of the *Employment Act* provides that: -

1. Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
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.”

44. It is now well settled that, before terminating the employment of an employee, the employer has a legal duty of according the employee a fair hearing in the presence of another employee or union official of the employee’s choice. In the *Postal Corporation of Kenya v Andrew K Tanui* (2019) KECA 489 (KLR) the Court of Appeal held that: -

“ Four elements must thus be discernible for the procedure to pass muster: -

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

45. Again, in *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR Abuodha J held that: -

“ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

46. In my considered view, the moment the respondent made up its mind to discipline the appellant for declining to sign the amendments, a legal obligation to accord him a hearing under section 41 of the *Employment Act* accrued. There was a mandatory obligation to invite him to a meeting in the company of another employee or union official defend himself from the intended termination for refusing to



sign the amendment to his contract. Consequently, I find that the termination was procedurally unfair within the meaning of section 45 of the *Employment Act*, 2007.

Reliefs

47. The respondent submitted that the appellant was estopped from filing the suit and therefore no relief is justified. However, my reading of the alleged settlement agreement does not constitute a discharge from further claims. Consequently, I proceed to consider the reliefs sought.
48. In view of the finding that the termination was procedurally unfair, I am satisfied that the appellant is entitled to a declaration that his contract of employment was unfairly terminated within the meaning of section 45 of the *Employment Act*. Accordingly, I find that the appellant is entitled to compensatory damages and salary in lieu of notice under section 49 and 50 of the *Employment Act*. His contract of employment provided for one-month salary in lieu of notice which I award to him. I also award him four (4) months gross salary as compensation for the unfair termination considering his long service of eight (8) years and the fact that he caused his dismissal through gross misconduct.
49. As regards the claim for underpayment, the appellant made reference to some Government legal notices but failed to tender the same as evidence to help the trial court to adjudicate over the same. Such evidence is missing from the record and this court is not able to effectively determine that issue. Besides, even if the same was on record, there is no proof that the alleged underpayment of salary took into account that the appellant was based in Kambiti and not within the cities and former Municipalities. Consequently, I find that the claim for underpayment is not proved on a balance of probability.
50. Likewise, I find that the claim for overtime, public holidays and off days worked not substantiated because the appellant did not rebut the evidence by RW1 that he never signed log sheets which led to the proposed amendment to his contract with respect to reporting time and supervision. He never adduced any documentary evidence to prove that he worked overtime nor did he call any witness to support his case. Consequently, I dismiss the same and say that he was lucky the employer paid him 72 days overtime on gratuitous basis to amicably bring the matter to an end.
51. As regards the claim for leave, RW1 admitted that the appellant was entitled to 21 days every year. The appellant stated that he only went for leave when he declined to sign the amended contract. The respondent produced leave record for the leave taken from 11th June 2021 to 22nd June 2021.
52. The computation of leave days in the form shows that the appellant had earned 10.5 leave days and had so far utilized three days leaving a balance of 7.5 leave days. The form further indicated that after taking the leave from 11th - 22nd June 2021, the net balance was negative zero five (-0.5). The appellant signed the leave application form without any protest. Consequently, I find and hold that the claim for accrued leave is not substantiated.
53. The claim for certificate of service is granted because RW1 did not produce copy of the certificate.

Conclusion

54. I have found that the termination of the appellant's employment by the respondent was unfair and unlawful. I have also found that the appellant is entitled to award of one-month salary in lieu of notice plus compensation for the unfair termination of four months' gross salary. Finally, I have found that the rest of the claims are not warranted save for a certificate of service. Consequently, I allow the appeal, set aside the impugned judgment to the extent highlighted above and make the following orders: -
 - a. A declaration that the appellant's employment vide letter dated 5th July 2021 was unfair and unlawful.



- b. Respondent to pay the appellant Kshs.16,767 being one-month salary in lieu of notice.
- c. Respondent to pay the appellant Kshs.67,068 being four (4) months' gross salary as compensation for unfair termination.
- d. The award shall be paid subject to statutory deductions.
- e. The respondent to pay costs of the appeal and the court below plus interests at court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF MARCH, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

