



REPUBLIC OF KENYA



Nyakundi v Magnum Engineering & General Contractors (Cause E585 of 2023) [2025] KEELRC 911 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 911 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E585 OF 2023
CN BAARI, J
MARCH 21, 2025**

BETWEEN

BERNARD ABEL NYAKUNDI CLAIMANT

AND

MAGNUM ENGINEERING & GENERAL CONTRACTORS RESPONDENT

JUDGMENT

1. The Claimant lodged this claim against the Respondent vide a Memorandum of Claim dated 21st July, 2023 on allegations of unlawful termination. He seeks the following reliefs:-
 - i. A declaration that his termination was illegal and unlawful
 - ii. One month's pay in lieu of notice
 - iii. Unpaid leave
 - iv. Unpaid salary for April, 2023
 - v. 12 months' salary as compensation for unfair termination.
 - vi. General damages
 - vii. Costs of the suit
2. In a reply made to the Memorandum of Claim dated 4th September, 2023, the Respondent maintained that the Claimant's dismissal was valid and justified.
3. The matter proceeded for hearing of the Claimant's case on 2nd October, 2024, when the Claimant testified, adopted his witness statement and produced the documents he filed in support of his case.



4. The Respondent's case was heard on 30th October, 2024 with one Andrew Oremo testifying in support of the Respondent's case. He adopted his statement and produced the Respondent's documents as exhibits in the matter.
5. Submissions were received from both parties, and which have been duly considered.

The Claimant's Case

6. The Claimant's case is that in or about May 2019, the Respondent engaged his services as a Human Resource Manager at a monthly salary of Kshs. 100,161/= which was later reviewed to Kshs 110,176.00/=.
7. He avers that he went through the normal probation and job evaluation session successfully, and was absorbed into employment as a Human Resource manager.
8. It is his case that it was agreed between the parties that his salary would be computed and deposited into his bank account at the end of each month, which was the Respondents practice.
9. The Claimant states that he exerted his efforts and skills to the best of his abilities and whole heartedly during the 4 years that he worked for the Respondents. He states further, that he did his work honestly and diligently during his time in employment.
10. It is his case that in or about March 2023, he, as Human Resource Manager, invited the labour officer for a labour audit. He states further, that in the same month, the Respondent introduced three new individuals to assist in carrying out labour audit, despite the fact that the Claimant had earlier requested for the labour audit, and had organized for the labour officers to come and conduct the audit.
11. He states that the invitation of the labour office for audit did not go down well with the Respondent and that is what led to his dismissal.
12. It is the Claimant's case that his termination was malicious, on the premise that the Notice To show cause and the invitation to attend a disciplinary hearing were written and dated the same date of 27.03.2023 which is a clear indication that the Respondent had made up their mind to dismiss the Claimant.
13. He states that he was harassed and intimidated by the three consultants (labour auditors) to produce and avail records and documents which were with Rajinder Singh, the Director. That the said Rajinder Singh frustrated the labour audit by refusing to handover to the auditors, employment records which are kept in his office and finally that the Respondent was engaged in unfair labour practice and when he raised the matter with the management, he became the enemy.
14. The Claimant states that on or about 3rd April, 2023, he received a show cause letter dated 27th March, 2023 which invited him to attend a disciplinary on 11th April, 2023. That the disciplinary proceedings were a sham meant to sanitize an illegality.
15. The Claimant states that he was not given a written complaint against him and neither was he allowed time to respond, and that in or about 27.04.2023, he was terminated from employment for no justifiable reason or payment of terminal dues.
16. The Claimant avers that he was dismissed contrary to the principles of natural justice and Section 41 of the *employment Act*.
17. He prays that his claim be allowed.



The Respondent's Case

18. The Respondent states that it employed the Claimant as a Human Resource Manager in May 2019. It is its case that the Claimant on 13th March 2023, defied clear command from the company director and left work premises heading to the labour office, and failed to report back to work, and that he later on sent an image of the audit letter via WhatsApp.
19. It states that the Claimant absconded work without any explanation for two days being the 24th and 25th March 2023. The Respondent avers that the Claimant later reached out via message at 10.00 p.m on 26th March 2023, indicating that he would not attend work for a week, and did not bother to explain his absenteeism until he returned to work in April 2023.
20. It is the Respondent's case that the Claimant indicated that he attended a court hearing on 24th March 2023, but later on disclosed that he did not attend court, and that the hearing was stated for 29th March 2023.
21. The Respondent's further case is that it issued a Show cause letter dated 27th March 2023 to the Claimant, but that he did not explain himself, he instead, came up with allegations about the superiors. That on finding the Claimant's response unsatisfactory, the Respondent states that it issued a letter inviting him for a hearing meeting.
22. It is the Respondent's case that investigations were done and the Respondent summarily dismissed the Claimant vide a letter dated 27th April 2023.

Analysis and Determination

23. Upon careful appraisal of the pleadings, oral testimonies, and submissions by both parties, the issues that crystallize for determination are whether the Claimant's termination was fair, and whether he is entitled to the reliefs sought.

Whether the Claimant's termination was fair

24. Section 41 of the *Employment Act*, 2007 demands that before terminating an employment contract on account of misconduct, poor performance or physical incapacity, the employer must grant the employee an opportunity to make representations either in the presence of a colleague or representative of a trade union if he is a member of one.
25. Section 41 (2) of the *Employment Act* provides as follows: -
 - “(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.”
26. It is the Claimant's evidence that he was issued with a show cause letter informing him of the charges against him, and invited for a disciplinary hearing. He further told court that he attended the hearing in the company of two representatives, and that he was later issued with the verdict on his case, which verdict was a dismissal from the service of the Respondent.
27. In the case of *Philip Kimosop v Kingdom Bank Limited* (2022) eKLR, the Court opined that the Respondent's action of serving a show cause letter to the Claimant, inviting the Claimant to an oral



hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing, constituted fair procedure.

28. Although the Claimant faults the disciplinary process for having been issued both the show cause letter and the invitation letter at the same time, I do not see how that went against the requirements of Section 41. The Claimant admitted responding to the show cause letter and appearing before the disciplinary committee accompanied by two representative, which actions in my view satisfy the requirements of Section 41 of the *employment Act*. In the case of Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR, the Court observed as follows: -

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

29. I have no doubt in my mind that the Claimant was accorded fair process and his allegations of unfair termination on this basis are unfounded.
30. I thus find the Claimant’s termination procedurally fair.
31. On whether the Respondent had fair, reasonable and justified reason to terminate the Claimant, the Claimant’s position is that he was unfairly terminated for visiting the labour office to take letters of termination of four employees who had been dismissed when their contracts were already expired, and to also report hiring of expatriates by the Respondent who did not have the requisite qualification.
32. Indeed, the show cause letter placed before this court indicates that the Claimant did not inform his superiors why he needed to visit the labour offices. The letter goes on to say that even after the Claimant had invited labour officers to conduct audit on its employer, he did not attend work on the day to facilitate the audit.
33. The Claimant was also accused of absenting himself from duty on 23rd March, 2023, and his response was that he was attending court to testify in a case against the Respondent.
34. Under Sections 43, 45 and 47 (5) of the *Employment Act*, the law has placed upon the employer the duty to prove the reasons for termination, prove that the reasons are valid and fair and to justify the reasons for termination/dismissal. The question for this court is whether the grounds for the Claimant’s termination enumerated above, were fair reasons to terminate.
35. In Nyeri Civil Appeal No.97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another, the Court of Appeal held:-

“the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the



termination of employment rests with the employer. See Section 47(5) of the *Employment Act...*”

36. The same court in *Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR while citing with approval the following excerpt from the Halsbury’s Laws of England, 4th Edition, Vol.16(1B) para 642 stated:-

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable response to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.

37. In my view, for a Human Resources Manager to invite auditors on its employer on employee related issues that fell squarely under his docket, is both unreasonable and unjustified. Further, the Claimant did not show that he had raised issues with his superiors, but who did not heed his professional advice.

38. The role of a HR Manager in my opinion, is to safeguard a company’s interest and not to work against it. The Claimant no doubt bit the hands that fed him and the Respondent had every reason not trust his leadership in the position.

39. The Claimant confirmed to this court that he had nothing to show that the Respondent’s processes were illegal as to warrant an audit, and had not reported any malpractices to the Respondent’s management.

40. I also note from the evidence before court, that the Claimant could not have been in court on the date he was accused of absenting himself from duty as the matter he was supposed to appear and testify on, was coming up for hearing on a different date.

41. It is also evident that the Claimant was absent from duty for over a week without applying for official leave, going by the WhatsApp messages exchanged between him and the Respondent’s management and produced in evidence.

42. In the circumstances, this court reaches the conclusion that the reasons for the Claimant’s termination were fair and justified, and which renders the dismissal substantively fair.

43. In the end, I find and hold that the Claimant’s termination was both procedurally and substantively fair and lawful.

Whether the Claimant is entitled to the remedies sought.

44. The Claimant sought a declaration that his termination was illegal and unlawful, one month’s pay in lieu of notice, unpaid leave, unpaid salary for April, 2023, 12 months’ salary as compensation for unfair termination, general damages and costs of the suit.

45. The Claim for 12 months’ salary as compensation for unfair termination together with the claim for general damages, fail on the finding that the Claimant’s termination was fair.



One month's pay in lieu of notice

46. The Claimant was evidently not issued with termination notice and this claim thus succeeds.

Unpaid leave

47. Claims under this head are terminal dues which the Claimant is entitled to irrespective of how he separated with the Respondent. The Respondent did not show that the Claimant was paid his terminal dues, specifically, the unutilized leave days upon termination.

48. I find the claims for leave merited, and allowed as prayed.

Unpaid salary for April, 2023

49. The record shows that the Respondent wrote the Claimant a cheque of Kshs.108,334/- which he collected on 29th June, 2023. This claim thus fails on this account.

50. In the end, the Claimant's claim partly succeeds and orders granted as follows:-

- a. A declaration that the Claimant's termination was fair and lawful.
- b. One month pay in lieu of notice at Kshs. 110,176/=
- c. Pay for leave days not utilized at Kshs. 106,503.47/=
- d. The Respondent will bear the costs of the suit plus interest from the date of this judgment until payment in full.

51. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Ochieng h/b for Mr. Khalwale for the Claimant

Ms. Koki present for the Respondent

Ms. Esther S-CA.

