



**Gichuru v Joycot General Contractors Limited (Cause E015 of 2024)
[2025] KEELRC 885 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 885 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E015 OF 2024
ON MAKAU, J
MARCH 20, 2025**

BETWEEN

MARK DENIS KIBUE GICHURU CLAIMANT

AND

JOYCOT GENERAL CONTRACTORS LIMITED RESPONDENT

JUDGMENT

1. By a Statement of Claim dated 18th April 2024, the claimant alleged that the respondent, summarily dismissed him from his employment without informing him the reason for the same. He was also not paid his salary arrears plus terminal benefits. Therefore, he prayed for judgment as follows:
 - a. General damages for unfair and wrongful termination equivalent to twelve months salary.
 - b. One month's salary in lieu of notice Kshs. 110,000/=
 - c. Severance pay.
 - d. Unpaid salaries between December 2022 and July 2023 .. Kshs. 212,200/=
 - e. Unpaid leave days Kshs. 25,662/=
 - f. Overtime at the rate of Kshs. 458 per hour ... Kshs. 207,016/=
 - g. Unpaid house allowance Kshs. 100,000/=
 - h. Unpaid NHIF Kshs. 4,500/=
 - i. Unpaid total station machine invoice Kshs. 95,000/=
 - j. Costs of the suit.



2. The Respondent filed defence and counterclaim denying the alleged dismissal and all the reliefs sought except salary arrears of Kshs.214,373 which it agreed to pay. However, it averred that the claimant deserted employment without prior notice and prayed for Kshs.110,000 being one-month salary in lieu of notice. It also prayed for costs of the suit plus interest at court rate.

Background

3. The Claimant's case is that he was employed by the Respondent as a Site Surveyor from October 2022 under a verbal contract. Under the said contract the respondent was to pay the claimant a monthly salary of Kshs.110,000 in addition to paying the Claimant's statutory deductions. In January 2023, the Respondent began delaying claimant's salary by paying the same in instalments through various senior management officials of the Respondent.
4. The claimant raised the issue of delayed salary with the Respondent's deputy project manager, the project manager and the director but the grievance was not resolved. Instead, in July 2023, he was verbally dismissed without any prior notice or being given any reason. Therefore, he averred that the dismissal was unfair and unlawful and prayed for compensation.
5. As at that time of his dismissal, the salary arrears were Kshs.550,000 out of which Kshs.200,000 was paid on 21st July 2023 leaving a balance of Kshs. 350,000. On 17th August 2023 he received another Kshs.100,000 and on 26th March 2024 Kshs.37,800 leaving a balance of Kshs.212,200.
6. During his employment, the claimant procured a total station machine for use by the Respondent for a daily rent of Kshs.3,000 which was being invoiced under his name and as at July 2023, the arrears due for the machine stood at Kshs.95,000, which the Respondent has failed to settle.
7. He further averred that during his employment, he used to work extra hours without any pay, and as at the time of his exit, he had accumulated 452 hours as overtime worked. He further accused the Respondent of failure to remit statutory deductions, specifically NHIF and NSSF from October to July 2023.
8. Finally, he prayed for severance pay, unpaid shares, unpaid leave days, one month's pay in lieu of notice and the unremitted NHIF and NSSF contributions for October to July 2023.
9. The respondent admitted that it employed the claimant under a verbal contract but denied that it had the duty to make and remit statutory deductions on behalf of the Claimant. It avers that the Claimant was paid a gross salary inclusive of the deductions and it was upon him to deduct and remit the same. It admitted the delay in payment of salary, but it attributed the same to delayed payment by the contracting client.
10. It averred that the Claimant worked until July 2023 at which time his total arrears were Kshs. 730,140 and the total amount paid out to him as at August 2023 was Kshs. 477,967 leaving a balance of Kshs. 252,173. In April 2024 a further Kshs.37,800 was made leaving a balance of Kshs. 214,373 which amount the Respondent was ready and willing to pay.
11. It denied the claim for overtime pay contending that its employees never work on overtime. It accuses the Claimant of abruptly abandoning his employment without notice and prayed for one-month salary in lieu of notice, being Kshs. 110,000 to be deducted from the admitted salary arrears.
12. It further denied the claim for leave contending that the claimant exited before a year had not lapsed from date of his engagement. For the same reason it averred that the Claimant is not entitled to severance pay.



Evidence

13. The Claimant testified as CW1, and adopted his written statement dated 22nd April 2024 as his evidence in chief, which basically echoed the facts summarised above. He also produced a bundle of 6 documents as his exhibits. In cross examination, he stated that he never served a termination notice and no longer works for the Respondent. He added that he never left on his own volition but was also not given a termination letter.
14. Eric Kanumbi Muthike, CW2, also adopted his written statement as his evidence in chief. He confirmed that he was working with the claimant and that he was being paid a gross pay and then take care of his statutory deductions. He believed that was the case for all other employees. He confirmed that he used to work with the claimant beyond 5.00 pm on several occasions. He quit the respondent due to salary arrears of six months.
15. In cross examination he stated that he was working for the Respondent earning a salary of Kshs. 40,000 inclusive of housing. The Claimant found him working for the respondent as he had joined in March 2022 and left in June 2023. He used to pay NHIF for himself. He maintained that they were working overtime at times but he did not have documentary proof. He stated that the Claimant informed him that he had been dismissed but he did not see any termination letter.
16. James Njuguna Kinyanjui, CW3, is a civil engineer. He adopted his written statement as his evidence in chief. He stated that there was pressure of work but no payment. He stated that he found his colleagues working overtime and being paid Kshs.500 daily equalling to Kshs.2,500 weekly. He quit the employment due to pressure of work without pay.
17. In cross examination, he stated that he was employed by the Respondent in July 2022 and left in August 2023. He stated that the Claimant joined in October 2022 the Respondent and left in July 2023, which was less than one-year service. He stated that there was an issue with delayed payment and the Claimant was told to go home and wait until he was called back.
18. He contended that he was present when the Claimant went home and that he told him that he had been informed to go home until he was called back. He stated that his salary was Kshs. 25,000 from July 2022 to February 2023. He stated that no one was paying for his NHIF adding that he was not paid housing allowance. He added that he had no evidence that the Claimant was paid his claims.
19. Duncan Mwangi, RW1 adopted his witness statement as evidence in chief and produced a bundle of 3 documents as his evidence. He then testified that no one terminated the Claimant's contract but he left without notice. He acknowledged that there were days where the Claimant worked overtime but there was no agreement for payment of the same. He stated that the Claimant's gross salary was Kshs.110,000 which was inclusive of everything.
20. In cross examination he stated that he joined the Respondent in November 2022 whereas the Claimant joined in October 2022. He was not present when the Claimant was negotiating his contract and he was also not present the meeting that was held before the Claimant left the company.
21. He admitted that there was delay in the payment of salary but attributed that the same to the delay by the contracting client in remitting the Respondent's pay. He also admitted that the Claimant's salary was not dependent on the payment by the contracting client. He stated that the Respondent owed the Claimant Kshs. 200,000 and that there was no dispute about his debt as there were talks about payment.



22. He stated that the Claimant never gave the 30 days' notice as the Respondent fired him. He reiterated that there was no agreement for payment of overtime. He contended that, although he was not present at contract negotiation, he was handling payroll in the company. He stated that each employee catered for their housing upon payment of the gross pay.

Submission

23. The Claimant submitted on whether the Claimant deserted his employment or he was unlawfully terminated by the Respondent, whether the reliefs sought by Claimant are merited and, who should bear the costs of the suit.
24. On the first issue, reliance was placed on the case of Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR in submitting that his termination was contrary to section 45 of the *Employment Act* as he was not given reasons for termination. He added that he produced screenshots between him and the Respondent showing constant communication between them asking for his salary arrears and settlement of the invoice.
25. On the second issue, it was admitted that the Respondent admitted owing Kshs. 214,000 and the court was urged to enter judgment accordingly. It was submitted that the Respondent has not contested the claim for Kshs.95,000 in respect of the total station invoice, and as such the court urged enter judgement for the same.
26. On statutory deductions, it was submitted that the Respondent's witness was not privy to the contract negotiations thus the claim is unchallenged. On overtime, it was submitted that the Claimant's witnesses and RW1 confirmed that the claimant worked overtime.
27. It was further submitted that the Claimant has proved his case of unfair termination and as such he was entitled to damages together with salary in lieu of notice, and costs. For emphasis reliance was placed on section 27 of the *Civil Procedure Act* and the case of Orix (K) Limited vs Paul Kabeu & 2 others [2014] eKLR in urging the Court to grant the same.
28. On the other hand, the Respondent submitted on three issues being: whether the Claimant was unfairly terminated or dismissed, whether the Claimant is entitled to the reliefs sought and what orders commend the outcome of this matter.
29. On the first issue, it was submitted that the Claimant's witnesses all testified that they quit, thus showing that the Respondent had no history of terminating its employees unfairly. Reliance was placed on the case of Wangereka v Rupra (Cause 2473 of 2017) KEELRC 625 (KLR) in arguing that the Claimant bore the onus of proof of unfair termination but he did not adduce any evidence on circumstances that led to his termination.
30. It was submitted that the Claimant being the party that terminated the contract had the duty of issuing the Respondent with notice. Reliance was placed on the case of Trustees of Premier Academy Charitable Trust t/a Premier Academy v Thomas Ndani Njuguna [2020] eKLR. Further reliance was placed on section 44 of the *Employment Act* in submitting that the Respondent had a right to terminate the Claimant for absenting himself without permission.
31. On the second issue, reliance was placed on section 49 in arguing that the Claimant should not be paid more than 12 months' salary in case unfair termination is proved. However, it was submitted that the Claimant was not entitled to the relief as it was proved that the Respondent did not unfairly terminate him. It was submitted that the duty to pay the payment in lieu of notice was upon the Claimant as he terminated his employment.



32. It was submitted that the Respondent admits owing the Claimant salary arrears of Kshs. 214,373 but the rest of the claims are unmerited. It was submitted that severance pay is only applicable to employees who are declared redundant in accordance with section 40 of the Act, while leave crystallizes after 12 months of working with the employer. Besides the claim for overtime is not founded on any agreement between the Respondent and the employees. It was further argued that the source of the Mpesa message on overtime was unknown.
33. On unpaid statutory deductions and housing allowance, the Respondent maintained that the amount paid to the Claimant was gross and that the Respondent was required to make deductions from the same.
34. As regards the unpaid total station invoice, the Respondent admitted the debt but blamed the same on the financial challenges caused by delay in payments by clients.
35. Finally, it was submitted that the Claimant is entitled to payment of his salary arrears of Kshs.104,373 plus the unpaid total station invoice, but still the Court was urged to dismiss the claim with costs to the respondent.

Issues for determination and analysis

36. It is not in dispute that the Claimant was dismissed from employment by the respondent in July 2023 and left behind salary arrears of Kshs.214,373 and an unpaid total station invoice of Kshs.95,000. The issues for determination are:
 - a. Whether the dismissal of the claimant from employment was unfair and unlawful.
 - b. whether the claimant is entitled to the reliefs sought.
 - c. Whether the Respondent is entitled to the counterclaim.

Unfair termination

37. The Claimant averred that he was verbally dismissed from employment and RW1 testified that Respondent fired the Claimant. He confirmed that, there was meeting before the Claimant was sent away, but he (RW1) did not attend.
38. 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.”
39. Section 41 of the Act further provides that:

“ 41. Notification and hearing before termination on grounds of misconduct



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.”
40. Section 43 of the Act then provides 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.”
41. The legal principles emerging from the above Sections are that, before terminating the services of an employee, an employer must to explain to the employee in a language he understands the reasons upon which termination is contemplated and then accord the employee a fair opportunity to defend himself/ herself.
42. The said basic tenets have been upheld in a legion of Court decisions in this country including *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR where 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.”
43. Again, in *George Musamali versus 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."

44. It follows, the legal burden remains with the employee to prove unfair termination, but once he alleges that there was no valid reason for termination and/or that fair procedure was not followed, the evidentiary burden shifts to the employer to prove that the termination was grounded on a valid reason and fair procedure was followed. Valid reason is one that is related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure entails a hearing of the employee before termination.

45. The foregoing position was echoed in the case of Peter Otabong Ekisa v County Government of Busia [2017] eKLR where the Court held as follows:

"The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words, the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities."

46. In the instant case RW1 admitted that the claimant was fired but adduced no iota of evidence to establish the foregoing elements of substantive and procedural fairness. Consequently, I find that the respondent terminated the employment of the claimant unfairly for no valid reason and without following a fair procedure.

47. Even if I was to believe respondent's allegation that the Claimant deserted work, the Respondent has not shown when that happened, and what action it took to trace the Claimant or warn him of the consequences of his desertion. In Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR the Court held as follows:

"It is however not in enough for an employer to simply state that an employee has deserted duty. The law requires that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting the on notice that termination of employment on this ground is under consideration."

48. Having made a finding that the respondent did not prove that it had a valid reason for dismissing the claimant, and that it followed a fair procedure, I now hold that the dismissal was unfair within the meaning of section 45 of the *Employment Act*.

Reliefs

49. In view of the foregoing holding, I am satisfied that the claimant is entitled to relief under section 49 of the Act, being salary in lieu of notice and compensation for the unfair termination. There was no written contract prescribing a termination notice period, but both parties agree that termination period was one month or payment of salary in lieu of the notice. Therefore, I award the claimant KShs.110,000.



50. As regards compensation, it is without dispute that the claimant did not contribute to the termination, and that he served for less than one year. In consideration of the above factors, I award him one-month salary as compensation for the unfair dismissal being Kshs.110,000.
51. The claim for salary arrears of Kshs.214,373 and Kshs.95,000 in respect of Total Station invoice were admitted. However, I award the claimant Kshs.212,200 which he has pleaded as salary arrears plus Kshs.95,000 for Total Station Machine invoice.
52. As regards the claim for leave, it is a fact that the claimant did not serve for twelve consecutive months. However, section 28 of the *Employment Act* provides that:
- “(1) An employee shall be entitled-
- a. after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;
 - b. where employment is terminated after the completion of two or more consecutive months of service during any twelve months’ leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.”
53. Guided by the above legislation, I find that the claimant is entitled to the claim for leave on pro-rata basis for the nine months served. Hence $Kshs.110,000 \times 1.75/30 \times 9 = Kshs.57,750$.
54. As regards the claim for house allowance, CW2 and CW3 confirmed that they were paid gross pay and they cater for their housing. RW1 corroborated the said evidence by stating that the salary paid was inclusive of everything. Therefore, I decline to award the claim for Kshs.100,000 for house allowance. In any case the claim lacks particulars as it is not shown how the said figure was arrived at.
55. Likewise, the claim for overtime lacks particulars and supporting evidence and it is declined. Finally, the claim for unremitted statutory deductions is declined for lack of particulars and proof that the deductions were made from claimant’s salary.
56. In view of my finding that the claimant was unlawfully dismissed by the respondent, I find no merits in the allegation that the claimant deserted employment, and proceed to dismiss the counterclaim with costs.

Conclusions

57. I have found that, the respondent unfairly dismissed the claimant from employment. I have further found that the claimant is entitled to compensatory damages plus accrued terminal benefits. I have also found no merits in the respondent’s counterclaim and dismiss it. Consequently, I enter judgment for the claimant against the respondent for payment of the following:
- a. One-month salary in lieu of notice.....Kshs.110,000.00
 - b. Compensation for unfair termination.....Kshs.110,000.00
 - c. Salary arrears.....Kshs.212,200.00
 - d. Total Station Machine Invoice.....Kshs.95,000.00
 - e. Pro-rata leave.....Kshs. 57,750.00
- Total Kshs. 584,950.00



58. The award is subject to statutory deductions but in addition to costs and interests at court rates from the date of filing the suit since the claim is largely liquidated in nature.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH 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

