



**Ochieng v Kenya Ports Authority (Cause E075 of 2024)  
[2025] KEELRC 1227 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1227 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E075 OF 2024**

**M MBARŪ, J  
APRIL 30, 2025**

**BETWEEN**

**CHRISPINE OTIENO OCHIENG ..... CLAIMANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The respondent employed the claimant as an artisan on 27 June 2014 and issued him a letter of appointment on permanent and pensionable terms. The claimant was earning Ksh: 262, 562, 39 per month.
2. The claim is that the claimant's employment was terminated unfairly on 23 March 2022. His case was that after taking his annual leave, he extended it by a few days because he was suffering from alcohol disorder and recurrent depression. The condition was diagnosed by the respondent's doctor in 2015, for which he was undergoing treatment.
3. The claim is that the respondent failed to adhere to the principles of natural justice in terminating employment. The human resources manual was not followed. Despite filing an appeal, there is no response. On 7 June 2024, the respondent changed his house's locks, evicting him without notice.
4. The respondent's actions have caused the claimant loss and damage, leading to unfair termination of employment. The claimant is seeking the following;
  - a. Notice pay Ksh. 262,562.39;
  - b. Salary for March 2022 Ksh. 262,562.39;
  - c. Damages for wrongful termination of employment at 12 months' pay in Ksh. 3,186,748.68;
  - d. Payment until retirement Ksh. 7,876,871.70;



- e. Reinstatement without loss of benefits;
  - f. Certificate of service;
  - g. Costs of the suit.
5. The claimant testified that his employment was terminated without notice or a disciplinary hearing. He seeks to be reinstated without loss of benefits and due salaries.
  6. The claimant testified that he was under the supervision of various officers and was constantly issued warning letters from 2014 to 2021. Most of the issues leading to the warning were alcoholism and absenteeism, and therefore, they were unable to attend work.
  7. The claimant admitted that in 2013, the respondent put him under rehabilitation. Still, he failed to adhere to the program and attend due to frustrations with his wife, who abandoned him, and his fear that she would leave the children alone. The respondent paid for the rehabilitation and would attend the Bandari Clinic to see the doctor.
  8. The claimant testified that in 2021, he was issued a notice to show cause why he should not be disciplined for absenteeism, and he replied. He was issued a warning, but he was later dismissed.
  9. In response, the respondent admitted that the claimant was an employee and a junior technician (boat shop) in the marine engineering division. The claimant was earning Ksh. 130,164 per month and not as alleged. The payment of Ksh. 262,572.37 included salary arrears and adjustments for previous months.
  10. The claimant was a habitual absentee; upon employment, he absented himself from duty several times without authorisation. Despite several warnings and efforts to improve his attendance and performance, the claimant failed to attend, leading to the termination of employment. On his admission that he failed to attend work without permission, no notice was necessary. The respondent had taken various steps to assist the claimant recover from alcoholism, drug and substance abuse, including enrolling him for ADSA care, which he initially declined and later, after accepting, he defaulted at the expense of the respondent.
  11. The respondent granted the claimant several opportunities from 2013 to 2022. Warning letters were issued due to unauthorised absences from work. The claimant's appeal against forfeiture of employment was rejected by the Board, as communicated in a letter dated 31 January 2024.
  12. Part of the employment benefits the claimant enjoyed was housing, which terminated with the end of employment. A letter dated 31 January 2024, copied to the union, Dock Workers Union, communicated this to this effect.
  13. From 2013, the claimant was allowed various opportunities to address his misconduct. Despite several warnings, he failed to adhere to them, to the detriment of the respondent, who incurred costs to retain the claimant at the workplace without success. Instead, the claimant remained absent and failed to adhere to treatment as advised by the company doctors.
  14. The claims sought are not due. A certificate of service is available upon clearance.
  15. In evidence, the respondent called Juma Salim, the human resources officer, who testified that since the employment of the claimant, he had an alcohol problem, forcing the respondent to take him to rehabilitation, but he defaulted. There was inpatient rehabilitation, which was meant to be voluntary, yet again, the claimant defaulted. The respondent could not force the claimant to attend rehabilitation against his will.



16. Salim testified that in 2022, the claimant remained absent from work without authorisation. The head of the department issued letters and went out to look for him without success. Further efforts to trace him were employed. Eventually, when the claim was traced, he was brought back to work, yet he was rude and uncooperative and said he was ready for whatever outcome the respondent would take against him.
17. In 2021, the respondent issued the claim with a notice to show cause, and he replied. A warning letter required the claimant to attend rehabilitation, yet he refused. He was taken for internal counselling, yet he defaulted. The respondent could not force the claimant to participate, and the head of medical services wrote to the respondent and indicated that the claimant had defaulted. The claimant then disappeared without a trace. Efforts to get him to attend a disciplinary hearing were frustrated by his constant absence from duty.
18. The board addressed the claimant's appeal and held it had no merit. The claimant was paid all his dues, including any arrears.
19. Upon cross-examination, Juma testified that no shop-floor disciplinary hearing was conducted due to habitual absenteeism. The claimant forfeited his employment through his conduct. Absence from work is a disciplinary issue, and one should be subjected to a hearing, but this condition could not be met due to constant absence and alcoholism. Despite efforts to assist the claimant, he defaulted on treatment and rehabilitation.
20. At the close of the hearing, both parties filed written submissions, which are analysed in the analysis and findings.
21. It is conceded that the claimant was an employee of the respondent, and his employment was terminated through a notice dated 23 March 2022, referenced Foreiture of Appointment. This was due to his absence from work for more than 10 days without authorisation.
22. Indeed, in his claim under paragraph (6), the claimant has admitted that upon taking his annual leave, he extended the period by a few days because he was suffering from alcohol disorder and recurrent depression.
23. The claimant admitted that he was diagnosed with alcoholism in 2015 by the respondent. He was undergoing treatment for the condition.
24. However, the respondent submitted evidence that the claimant, despite being facilitated to address the diagnosis, defaulted on treatment. This was coupled with several absences from work, and several warning letters were issued.
25. There is evidence and a record of the claimant being absent from work on various dates. He has admitted that he remained absent after taking annual leave. He does not state the number of days he was absent, which the respondent clarified as more than 10 days.
26. Absence from work without permission from the employer is defined as gross misconduct under Section 44(4) (a) of the *Employment Act*. Absence from work without authorisation is a fundamental breach of the employment relationship, subject to summary dismissal under Section 44(3) of the *Employment Act*. See Peter Kemeli Too v Nandi County Public Service Board [2016] KEELRC 1538 (KLR).
27. The employer's rights are defined for such a breach, and the employee is protected under Section 41(2) of the *Employment Act*. The employer must summon the employee and allow him to make representations. Where the employee fails to address his misconduct, the employer can issue a notice



- of summary dismissal and serve the Labour Officer under Section 18(5) (b) of the *Employment Act*. This is to secure the employer who fails to attend and address despite all efforts to bring the employee to account for his misconduct or gross misconduct.
28. The respondent's witness, Salim, testified that the claimant was issued various warnings, yet he remained absent from work. Its officers went out to look for him, and when he was found, he was issued a warning letter.
  29. Absence from work without authorisation is an act of gross misconduct. Where the claimant was traced and attended, the respondent had the opportunity under Section 44 of the *Employment Act* to apply the motions of Section 41(2) of the Act. This allowed for short notice and attendance at the hearing in the presence of the union representative, the Dock Workers Union.
  30. The provisions of Section 41(2) are mandatory. See *Moses Daniel Kyalo v Treadsetters Tyres Limited* [2019] KEELRC 1864 (KLR) and *Lele v Mwaura t/a Gongoni Market* (Appeal E013 of 2024) [2025] KEELRC 1076 (KLR) (3 April 2025) (Judgment) that the employee must be summoned to attend. Where the employee fails to address a matter, a notice must be issued and served upon the labour officer.
  31. Where due process of the law is not adhered to, employment termination is unlawful and unfair. In this case, the claimant is entitled to notice pay at the last gross salary of Ksh. 130,164.
  32. On the salary claim for March 2022, for the 23 days in employment in the month, the claimant is entitled to Ksh 99,792.40 gross salary, if this amount has not been paid.
  33. For damages for wrongful termination, on the findings above that the due process of the law was not followed, the court is required under section 45(5) of the *Employment Act* to look at the work record. Indeed, the claimant does not deny that he extended leave of absence without authorisation after his annual leave. The respondent has made provision for more than 10 days. Under Section 19 (1) (c) of the *Employment Act*, a deduction is allowed for each day absent from work. For the 10 days absent, a deduction of Ksh. 43,388 is permissible.
  34. Further, for the litany of warnings, these have been taken into account, including the warning dated;
    - 11 February 2024;
    - 1 October 2013
    - 5 October 2018;
    - Memo dated 15 October 2018 listing 7 incidents of absence;
      - 11 December 2018;
      - 10 July 2019;
      - 27 July 2019;
      - 20 September 2019;
      - 13 July 2020;
      - 7 August 2020;
      - 14 April 2021.
  35. Allocating compensation in the face of these documented instances would reward gross misconduct. Zero (0) compensation is awarded. See *Lillian W. Mbogo-Omollo v Cabinet Secretary, Ministry of Public Service and Gender & another* [2020] KEELRC 344 (KLR).



36. On the claim for pay until retirement upon termination of employment, the claimant should mitigate his circumstances and secure himself. He was absent from work on several occasions despite all efforts to rehabilitate and offer counselling, but he still failed to adhere. To seek pay until retirement and reinstatement would not apply in the given circumstances.
37. On the claim for a certificate of service, this is due upon clearance.
38. On costs, save for notice pay at Ksh. 130,162 and pay for 23 days at Ksh. 99,792.40 if this has not been paid, less Ksh. 43,388 for 10 days absent, each party should meet its costs.

Orders accordingly.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 30<sup>TH</sup> DAY OF APRIL 2025**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

