



Rop & another v Emngwen Farmers Cooperative Society Limited (Cause 17 of 2017) [2025] KEELRC 1266 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 17 OF 2017
MA ONYANGO, J
APRIL 30, 2025
FORMERLY KERICHO ELRC 250 OF 2015**

BETWEEN

**BARNABAS ROP 1ST CLAIMANT
LAWRENCE KIPLIMO 2ND CLAIMANT**

AND

EMNGWEN FARMERS COOPERATIVE SOCIETY LIMITED RESPONDENT

JUDGMENT

1. The Claim herein was originally filed in Kericho as two separate suits being Kericho ELRC Cause No. 250 of 2015 and Kericho Cause No. 252 of 2015 which were consolidated vide an order of the court issued on 10th February 2016. The suits were later transferred to this court under the current reference number.

The 1st Claimant's case

2. Vide a Memorandum of Claim dated 7th October 2015, the 1st Claimant sued the Respondent seeking the following reliefs: -
 - i. A declaration that the termination of the Claimant from employment by the Respondent was malicious, unlawful, unfair and unprocedural and as such the claimant is entitled to compensation
 - ii. Kshs 830,528
 - iii. Cost of this suit and Interest at court rates from the time of filing the suit until payment in full
 - iv. Any other further and better relief the Honourable court may deem fit to grant



3. The 1st Claimant averred that at all material times, he was employed by the Respondent as a Manager with effect from 3rd January 1995 at a salary of Kshs. 2300. That he worked until 14th August 2014 when he alleges to have been unfairly, unprocedurally and unlawfully terminated from employment by the Respondent. He contended that at the time his employment was unlawfully terminated he was earning Kshs. 11,065.
4. It was the 1st Claimant's case that the termination was on allegations that he misappropriated farmers money which allegation according to the 1st Claimant was false as no money under his docket was misappropriated for the 19 years he served as the Respondent's manager.
5. The 1st Claimant further contended that before he was unfairly terminated from employment, he was not given an opportunity to defend himself. He averred that the Respondent terminated his services without following the right procedure laid down in the Employment Act, 2007.
6. He particularized the unfairness of his termination as follows: -
 - i. No evidence was availed to the Claimant of the alleged misappropriation of funds
 - ii. No notice to show cause was availed to the Claimant to dispute the said allegations
 - iii. The Claimant was never accorded a hearing or an opportunity to call his witness in his defence and given an opportunity to dispute his unfair termination from service
 - iv. The audit report was never availed to the Claimant before terminating him from employment
 - v. The alleged report of the inspection by the ministry of cooperative in July 2013 was not availed to the claimants
 - vi. The claimant was not paid his salary for the period of 29 months and later unfairly terminated instead of remunerating him
 - vii. The Claimant never operated any bank accounts on behalf of the Respondent. All accounts were operated by the Respondent's chairman, secretary and the treasurer
 - viii. The Claimant was condemned unheard
7. The 1st Claimant contended that owing to the unfair and unlawful termination of his employment, he is entitled to terminal benefits which he itemized as follows:-
 - i. One month pay in lieu of Notice Kshs. 11,065
 - ii. Compensation for unfair termination Kshs 132,780
 - iii. Unpaid salary from April 2012 to date Kshs 245,550
 - iv. Underpayment of wages..... Kshs. 277,278
 - v. Severance pay Kshs 378,423
 - vi. Leave prorata Kshs 11,065Total Kshs 810,611
8. The 1st Claimant further avers that the unfair termination of his employment was against the provisions of ILO Convention No. 158 in respect of termination at the initiative of Respondent.



The 2nd Claimant's case

9. In his Memorandum of Claim dated 19th September 2015, the 2nd Claimant contended that he was employed by the Respondent as a clerk with effect from 3rd January 1995 at a monthly salary of Kshs. 900 and that he served the Respondent until 14th August 2014 when he was unfairly, unprocedurally and unlawfully terminated from employment by the Respondent without being paid his terminal dues. He stated that at the time he left employment, he was earning a monthly salary of Kshs. 9,000.
10. The Claimant stated that the reason given by the Respondent for the termination of his employment was that he colluded with the 1st Claimant herein to defraud the society, an allegation which according to him is not true.
11. It is the Claimant's case that the Respondent terminated his services without following the right procedure laid down in section 41(1), section 43(1) and 44(4) of the *Employment Act*.
12. According to the 2nd Claimant, his termination was unfair and unlawful on the following grounds: -
 - i. The Respondent did not give the Claimant termination notice as provided by section 35(1) and 36 of the *Employment Act*
 - ii. The Respondent denied the Claimant's employment without following the procedure laid down in the *Employment Act* specifically the procedure laid out in section 43, 41 and 45 of the *Employment Act*
 - iii. The Respondent terminated the Claimant's employment without proving that the reason for termination was valid as provided under section 43 and 45 of the *Employment Act*
 - iv. The Respondent failed to pay the Claimant his severance pay
 - v. The Respondent failed to pay the Claimant his wages (salary) from April 2012 to 14th August 2014
 - vi. The Respondent did not give the claimant his lawful leave days and rest days contrary to section 28(1) of the *Employment Act*.
 - vii. The Respondent failed to pay the Claimant his 12 months' wages for loss of employment as provided under section 15 of the Labour Institutions and section 49(c) of the *Employment Act*
 - viii. The Respondent failed to give the Claimant a certificate of service as required under section 51 of the *Employment Act*.
13. The 2nd Claimant contended that owing to the unfair and unlawful termination of his employment, he is entitled to terminal benefits which he itemized as follows: -
 - vii. One month pay in lieu of Notice Kshs. 15,837.8
 - viii. Compensation for unfair termination Kshs 190,053
 - ix. Severance pay Kshs. 541,652
 - x. Leave pro rata for the year 2015 Kshs 15,837.8
 - xi. Leave allowance Kshs 300,918
 - xii. Unpaid salary from April 2012 to date. Kshs 245,550
 - xiii. Underpayment of wages Kshs. 129,902



- xiv. Rest days Kshs 483,079.3
Total Kshs 1,922,831.9

14. The 2nd Claimant prayed for the following reliefs:

- i. A declaration that the termination of the Claimant from employment by the Respondent was malicious, unlawful, unfair and unprocedural and as such, the claimant is entitled to compensation
- ii. Kshs 1,922,831.9
- iii. Cost of this suit and interest at court rates from the time of filing suit until payment in full
- iv. Any other further and better relief the court may deem just and fit to grant.

The Respondent's Response

15. The Respondent filed a response to the Memorandum of Claim dated 16th November 2015 in respect to Cause No 250 of 2015 and a Statement of Defence dated 16th November 2015 in respect to Cause No 252 of 2015.
16. In response to the claim by the 1st Claimant, the Respondent denied that it unlawfully terminated the 1st Claimant's employment and maintained that the 1st Claimant was dismissed for committing acts of gross misconduct in contravention of the *Employment Act* after he misappropriated Kshs. 717,648 from the Respondent. It was the Respondent's further contention that the 1st Claimant paid himself all the salaries, wages, house allowances, leave allowances and other emoluments as he was the financial accountant of the Respondent.
17. The Respondent further contended that the 1st Claimant appeared before the management committee and the District Co-Operative Officer to defend himself but he failed to. The Respondent averred that the report by the auditor and by the District Cooperative Officer showed that the Claimant misappropriated the Respondent's funds.
18. Regarding the 2nd Claimant, the Respondent denied that he was its employee and maintained that he was irregularly employed by the 1st Claimant and was paid salary illegally using the society's funds. The Respondent contended that it never endorsed the 2nd Claimant as its employee and that the documents filed in court by the 2nd Claimant were given to him by the 1st Claimant as an individual and not as an employee of the Respondent.
19. In response to the prayers sought by the 2nd Claimant in his Statement of Claim, the Respondent contended that he is not entitled to the reliefs as he was not its employee.
20. The Respondent stated that it chased the 2nd Claimant from its premises after it discovered that he was involved in embezzlement of the Respondent's funds in collusion with the 1st Claimant.
21. The Respondent prayed that the 2nd Claimant's suit be dismissed with costs.

The Evidence adduced

22. The 1st Claimant testified as CW1. He adopted his witness statement as his evidence in chief and relied on the documents he filed in the list of documents dated 19th September 2015 as well as the supplementary list of documents dated 15th February 2017 as part of his evidence.



23. In his testimony, CW1 stated that before he was terminated from employment on 14th August 2014, he was never issued with a show cause letter nor was he issued with a letter of notice of termination. He stated that he was issued with a dismissal letter dated 7th May 2014 on allegations that after investigations were conducted by the Respondent it was established that he had embezzled the Respondent's funds. It was his testimony that he never witnessed any investigations or audit being carried out during his tenure as the Respondent's manager. The 1st Claimant stated that he was sent on compulsory leave in April 2013. That the inspection report filed by the Respondent indicated that inspection was done in July 2013. According to the 1st Claimant, by July 2013 all books of accounts had been taken away and this showed that the report was cooked to frame him when he was on compulsory leave. The 1st Claimant denied plucking original receipts from the books and averred that the books were not in his custody. The 1st Claimant prayed for the reliefs he sought in his Memorandum of Claim.
24. During cross examination, the 1st Claimant stated that he did not know who employed the 2nd Claimant as he found him working for the Respondent when he was employed. He stated that he was not paid a salary during the period he was on compulsory leave.
25. On re-examination, CW1 stated that he was never issued with a written complaint on misappropriation of milk funds.
26. The 2nd Claimant testified as CW2. He adopted his witness statement recorded on 26th October 2023 as his evidence in chief. He also relied on the documents he filed in support of his case. CW2 stated that he was not heard or given an opportunity to defend himself. He stated that he did not come across any investigation report before he was terminated. He also stated that he was accused of fraud and dishonesty. It was the testimony of CW2's that he was not given any notice before he was terminated. He prayed to be awarded the reliefs he sought in his Memorandum of Claim.
27. On cross examination, CW2 stated that he was employed on 3rd January 1995 by the Respondent as a dairy clerk. That he was answerable to the management. That he reported to the Dairy chairman who was always in the office.
28. On re-examination, CW2 stated that he was issued with an appointment letter in 1995. He also contended that he was never questioned by DCO over the lost milk funds.
29. The Respondent called two witnesses in furtherance of its case. Richard Morogo Tarus, its chairman testified as RW1. He adopted his witness statement recorded on 25th November 2015 as his evidence in chief. He also relied on the documents filed by the Respondent.
30. During cross examination, RW1 stated that the 1st Claimant was in charge of the day to day running of the society and was also the executor of the decisions of the management committee. RW1 further stated the Respondent's employees were the manager, the clerk and the bookkeeper. He testified that he knew that Lawrence was working for the society but was not employed. He also stated that the Claimants were not suspended but had been given compulsory leave as they were under investigation.
31. RW1 stated that the Claimants were not issued with show cause letters nor taken through disciplinary hearing before they were dismissed from employment vide the dismissal letters dated 7th May 2015.
32. RW1 further testified that the reason given for the termination of the 1st and the 2nd Claimants was the misappropriation of milk funds disclosed after an audit was done. RW1 stated that on investigating the matter the Respondent found that the 1st Claimant had plucked some receipts from the records which were in his custody. He stated that the Claimants were not paid salaries from August 2012 to August 2014.



33. It was RW1's testimony that the Claimants were required to be at work every day and that they were not given a certificate of service because they were not permanent employees. He also stated that when he became the Respondent's Chairman in 2010 he found the Claimants working and they continued working for the Respondent until their employment was terminated.
34. RW2 was Paul Kipkoech Boen, who introduced himself as a former employee of the Department of Cooperatives attached to Nandi County. He adopted his witness statement recorded on 15th January 2020 as his evidence in chief. RW2 testified that he was the maker of the report dated July 2013 attached to the Respondent's bundle of documents at page 1-3. He relied on that inspection report as part of his evidence.
35. On being cross examined, RW2 stated that he received a complaint from the Respondent's Management Committee regarding failure by the Society to pay farmers after milk was delivered. RW2 testified that on inspection, he found that Kshs. 717,648 could not be accounted for. He stated that after inspecting the books of accounts, he found that there were some plain receipts which had not been accounted for. RW2 stated that the original receipts had information but the duplicate did not. He explained that the persons issuing the receipts were required to use a carbon copy to make a copy which was not done in this case.
36. At the close of the Respondent's case, the court directed the parties to file written submissions. Both parties filed their respective submissions.

Claimants' Submissions

37. In their joint submissions dated 16th September 2024, the Claimants identified the issues for determination to be:
 - i. Whether the Claimants were employees of the Respondent
 - ii. Whether the Claimants were unlawfully, unprocedural and unfairly terminated from employment
 - iii. Whether the Claimants are entitled to the reliefs they sought
 - iv. Who should pay costs and interests of the suit
38. On the first issue, it was submitted that the Claimants produced payment vouchers and that the minutes of both the advisory and management committee showed that both Claimants were employees of the Respondent.
39. It was the Claimants submissions that the Respondent's witness, RW1 admitted that the Claimants were employees of the Respondent.
40. On whether the Claimants were unlawfully, unprocedurally and unfairly terminated from employment by the Respondent, the Claimants submitted that they were never given show cause letters nor invited to a disciplinary hearing before they were terminated from employment.
41. It is the submission of the Claimants that the reasons given for their termination by the Respondent was that they misappropriated farmers money based on an alleged investigation and audit report of 2012 and 2013. According to the Claimants, they were not record or book keepers of the Respondent's records. That RW1 stated that there was an employee in the Respondent's society mandated to keep records of milk and other sources of funds for the Respondent and not the Claimants. The Claimants therefore submitted that none of the reasons given for their termination was proved since no hearing was conducted.



42. On the third issue, the Claimants submitted that they had demonstrated that they were unlawfully and unprocedurally terminated from employment and were therefore entitled to the reliefs they sought.
43. The Claimants submitted that they should be awarded costs of the suit.

Respondent's Submissions

44. In its submissions dated 12th September 2024, the Respondent framed the issues for determination to be:
 - i. Whether the 2nd Claimant was an employee of the Respondent
 - ii. Whether the 1st Claimant was unfairly terminated
 - iii. Whether the 1st Claimant is entitled to the reliefs sought
45. On the first issue, the Respondent submitted that the 2nd Claimant did not produce any written contract between himself and the Respondent to prove that he was an employee of the Respondent. The Respondent submitted that the 2nd Claimant failed to establish that he was an employee of the Respondent. The court was urged to dismiss the 2nd Claimant's claims for lack of proof of employment.
46. On whether the 1st Claimant was unfairly terminated, the Respondent submitted that vide a letter dated 10th April 2013, it notified the Claimant of the reasons as to why he was being sent on compulsory leave. It is further submitted that vide a letter dated 17th March 2014, it issued to the 1st Claimant a letter indicating the reasons for the termination of his employment.
47. It is the Respondent's submissions that it had very reasonable ground to terminate the 1st Claimant's employment.
48. The Respondent submitted that it followed due process in terminating the services of the 1st Claimant as he was found to have swindled the Respondent's farmers money which was a valid ground for dismissal.
49. Lastly, on the issue whether the 1st Claimant is entitled to the reliefs sought, the Respondent submitted that the termination of the 1st Claimant from employment was justified for reason that he misappropriated the Respondent's Kshs 717,648. The court was urged to dismiss the entire claim.

Analysis and Determination

50. From the pleadings of the parties herein, the evidence adduced and the submissions filed by the parties, the issues that present themselves for determination are:
 - i. Whether the 2nd Claimant was the Respondent's employee, if so;
 - ii. Whether the termination of the Claimants from employment was fair both substantively and procedurally
 - iii. Whether the Claimants are entitled to the reliefs sought.

Whether the 2nd Claimant was the Respondent's employee

51. In its Statement of Defence, the Respondent denied that the 2nd Claimant was its employee and maintained that he was employed by the 1st Claimant's. On its part, the 2nd Claimant in his testimony stated that he was employed on 3rd January 1995 as a clerk by the Respondent and worked until 14th August 2014 when he was terminated from employment by the Respondent.



52. Section 2 of the Act defines an employee as: –
- “a person employed for wages or a salary and includes an apprentice and indentured learner.”
53. The evidence on record, and particularly the payment vouchers listed as item (f) in the 2nd Claimant’s list of documents dated 19th September 2015 show that the 2nd Claimant was indeed paid salaries by the Respondent.
54. Further, section 2 defines “contract of service” to mean an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time...
55. From the evidence on record, the 2nd Claimant was an employee of the Respondent having been paid salary and having been dismissed from employment by the Respondent.
56. It is therefore the finding and holding of the court that the 2nd Claimant established and proved that there was an employment relationship between him and the Respondent.

Whether the termination of the Claimants from employment was fair both substantively and procedurally

57. The Respondent through its witness RW1 contended that it was justified in terminating the employment of the Claimants after it established that the Claimants had misappropriated the Respondent’s farmers milk funds.
58. Substantive justification is provided for under sections 43 (1) and 45(2) of the Employment Act. Section 43(1) of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair, while section 45 (2) provides that a termination of employment 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 employee was terminated in accordance with fair procedure.
59. In order to establish whether the Claimants were terminated from employment on valid reasons, it is important that the court analyses the evidence presented by the Respondent in support of its defence that it was justified to terminate the Claimants from employment.
60. I have perused the documents filed by the Respondent and particularly the inspection report dated July 2013. Among the recommendations in that report was that action be taken against the secretary manager for failing to forward all accounting documents for bookkeeping and audit purposes. There are letters addressed to the Claimants dated 7th May 2014 which refer to the said audit report accusing the Claimants of misappropriating the farmers money.



61. The court of Appeal in the case of *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR, cited with approval, the Canadian case of *Mc KINLEY –VS- B.C. TEL* [2001] 2 S.C.R 161 in which it was held as follows;

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

62. In the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91 Lord Denning described the test of reasonableness in the following words: -

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

63. Flowing from the above authorities and the facts presented in the instant case, there is sufficient evidence that the Respondent genuinely believed that the Claimants had misappropriated its funds. I find that the Respondent had valid reasons and was justified in terminating the Claimants employment as misappropriation of funds is a valid reason for termination of employment.

64. On whether the termination of the Claimants from employment was procedurally fair, section 41(1) the *Employment Act* makes specific requirements with regard to the process to be complied with by an employer as follows: -

“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

65. The letters of dismissal of the Claimants are dated 7th May, 2014. The letter of the 1st Claimant which is similar to that of the 2nd Claimant is reproduced below:

Emgwen Farmers Co-operative Society Ltd

EMF/ADM/staff/9/014

Mr. Barnaba Rop

Emgwen Farmers Co-operative Society Ltd

box 252 -30300



Kapsabet

Dear Sir,

Re: Misappropriation of the Farmers Money

Ref our letter addressed to you dated 15/8/2013.

After through investigation and the outcome of the Audit report of the financial year 2012/2013, It is now obvious that you misappropriated the farmers money to the tune of Kshs.449,541/=.

You are therefore dismissed as the society Manager for being fraudulent and dishonest.

The management will meet to determine cause of action to take against you and on how to recover the lost money.

Yours faithfully,

On and on behalf of Emgwen Farmers' Cooperative Society Ltd.

Signed

R. Tarus – Chairman

N. Sagem – Secretary

J. Ruto -Treasurer

cc.

1. Subcounty Co-op Officer
2. C.I.D Kapsabet

66. From the letter there is no indication that the Claimants were taken through a disciplinary hearing. It therefore follows that the termination of the Claimants from employment was procedurally unfair.

Whether the Claimants are entitled to the reliefs sought

67. Having found that the Claimants were unfairly terminated from employment, they are entitled to compensation for unfair termination. In their Statement of Claim, the Claimants prayed for similar reliefs which I address as hereunder in separate heads.

1st Claimant - Barnabas Rop

- i. A declaration that the termination of the Claimant from employment by the Respondent was malicious, unlawful, unfair and unprocedural.

I declare the termination of the Claimant's employment unfair in view of the fact that he was not taken through a disciplinary hearing.

- ii. One month pay in lieu of Notice

Having found that the termination of the 1st Claimant's employment was unfair, he is entitled to pay in lieu of notice. I therefore award him Kshs 11,065 under this head.

- iii. Compensation for unfair termination

The Claimant sought maximum compensation of 12 months' salary. However, taking into considerations the circumstances of this case, I think it would be unconscionable



to award the 1st Claimant any compensation for unfair and unlawful termination, the evidence having pointed to his misappropriation of funds of the Respondent.

iv. Unpaid salary from April 2012 to date

The 1st Claimant is entitled to his salaries from the date of suspension to the date of termination. The Respondent would however be entitled to recover any amount proved to have been misappropriated by the 1st Claimant.

v. Underpayment of wages

In his testimony, the 1st Claimant did not lead any evidence that he was underpaid

vi. Severance pay

This claim was dropped by the 1st Claimant and therefore I do not need to address it.

vii. Leave prorata

No evidence was tendered to prove that the 1st Claimant is entitled to this prayer.

2nd Claimant - Lawrence Kiplimo

i. A declaration that the termination of the 2nd Claimant from employment by the Respondent was malicious, unlawful, unfair and unprocedural.

I declare the termination of the Claimant's employment unfair in view of the fact that he was not taken through a disciplinary hearing.

ii. One month pay in lieu of Notice

Having found that the termination of the 1st Claimant's employment was unfair, he is entitled to pay in lieu of notice. I therefore award him Kshs. 15,837.8 under this head.

iii. Compensation for unfair termination

The Claimant sought a maximum compensation of 12 months' salary. However, taking into considerations the circumstances of this case, I think it would be unconscionable to award the 2nd Claimant any compensation for unfair and unlawful termination, the evidence having pointed to his misappropriation of funds of the Respondent.

iv. Unpaid salary from April 2012 to date

The 1st Claimant is entitled to his salaries from the date of suspension to the date of termination. The Respondent is however at liberty to recover any monies proved to have been misappropriated by the 2nd Claimant from the amount due to him.

v. Underpayment of wages

The 2nd Claimant did not lead any evidence to prove that he was underpaid during the cause of his employment.

vi. Severance pay

This claim was dropped by the 2nd Claimant and therefore I do not need to address it.

vii. Leave prorata

No evidence was tendered to prove that the 2nd Claimant is entitled to this prayer.



68. Each party shall bear its costs of the suit.

69. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF APRIL 2025

MAUREEN ONYANGO

JUDGE

