



REPUBLIC OF KENYA



Kimai v Seven Four Eight Air Services Ltd (Cause 665, 664, 667, 666, 699 & 700 of 2018 (Consolidated)) [2025] KEELRC 1554 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1554 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 665, 664, 667, 666, 699 & 700 OF 2018 (CONSOLIDATED)**

CN BAARI, J

MAY 29, 2025

BETWEEN

ALICE RIZIKI KIMAI CLAIMANT

AND

SEVEN FOUR EIGHT AIR SERVICES LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimants filed causes Nos. 665, 664, 667, 666, 699 & 700 all of 2018, dated 27th April, 2018 and filed on 9th May, 2018. They seek orders for payment on account of: -
 - i. Payment to the Claimant, of 12 months' gross pay per month.
 - ii. One month's salary in lieu of notice.
 - iii. Payment in lieu of accumulated leave allowance.
 - iv. Severance pay.
 - v. Costs of the claim.
2. Although the matters were separately filed, the Court consolidated the suits vide an order issued on 24th April, 2019, and further directed that file No. 665 of 2018, be the lead file.
3. The Respondent filed a Statement of Response to the claims dated 20th December, 2018, and which it later amended on 13th March, 2023 pursuant to leave granted on 9th March, 2023, denying the Claimants claims.
4. The Claimants' case was heard on several occasions, with the first hearing being held on 4th July, 2023 by Hon. Justice Rika and concluded on 8th November, 2024 before this Court, with the Claimants in



all the claims testifying in support of their respective cases. The Respondent's case proceeded on the same day, 8th November, 2024, when the Respondent presented two witnesses, Mr. Moses Mwangi and Ms. Sofia Idd to testify in support of its case.

5. Submissions were filed for both parties and have been duly considered.

The Claimants' Case

6. The Claimants were all employees of the Respondent, employed on various dates and whose contracts were all terminated between 7th and 9th February, 2018, vide termination notices issued on various date, on the ground of poor performance.
7. They aver that it was a term of the said notification letter that the terminations were to take effect on the date of the notice, being the same day they received the notification letter.
8. The Claimants state that at no time were they ever issued with a warning letter by the Respondent related to poor performance, and no explanation was given on their poor performance. It is their case that the Respondent's reason for their termination was vague and general and does not comply with the provisions of Sections 44 and 45 of the *Employment Act*, 2007.
9. The Claimants states that there has never been any assessment in respect of their performance and if there was, they were not informed. Further, the Claimants state that if there was any assessment, which is denied, the Respondent ought to have informed them the areas in which they were under performing and given them an opportunity to improve.
10. It is the Claimants case that the Respondent's action of terminating their employment is illegal and malicious.
11. The Claimants state that they were diligent employees of the Respondent and no disciplinary process had been initiated against them in their entire employment period.
12. The Claimants state that they legitimately expected fair administrative action by the Respondent pursuant to *the Constitution* of Kenya 2010, and observance of the rule of law and democratic values and principles which include fairness prescribed under Respondent's Human Resource Manual.
13. The Claimants further aver that Respondent's act of terminating their services was not justified and it was unfair and contrary to Section 40 of the *Employment Act*, 2007. They aver that the Respondent did not act in accordance with justice and equity.
14. The Claimants avers that in the circumstances of the case, they are entitled to the remedies prescribed under Section 49(1) (a), (b) and (c) and (3) (a) of the *Employment Act*, 2007.
15. The Claimants pray that the Court awards them the reliefs listed in their claims.

The Respondent's Case

16. It is the Respondent's case that the Claimants were each paid in lieu of notice in terms of the *Employment Act*. The Respondent further avers that the Claimant had received several verbal warnings before, but there was no improvement on their performance and attitude towards work.
17. It is the Respondent's case that the termination letters complied with the *Employment Act* and puts the Claimant to strict proof of the contrary.



18. The Respondent avers that the Claimant performance deteriorated immediately after the staff probation assessment was done, and that the Claimants were duly assessed, advised of the outcome of the assessment and given an opportunity to improve, but they never did.
19. The Respondent states that the Claimant's job description required her to ensure proper management of the department and compliance with the Respondent's Manual.
20. It is the Respondent's position that the nature of the Claimant's job was administrative and supervisory, and her astuteness was supposed to be relied upon by the Respondent to ensure that the department was properly managed and its operations properly run.
21. The Respondent states that it was merely exercising fairness by issuing the Claimants with a good Certificate of Service under the provisions of the *Employment Act*, 2007.
22. The Respondent further avers that the Claimants were procedurally and lawfully terminated as they failed to perform basic duties required of them as per the Respondent's Manual, and also failed to advise the Management of the Key Performance Indicators aligned to their jobs thereby creating gaps and affecting the smooth running of the Respondent's operations.
23. The Respondent further states that the Claimants were unable to learn or adopt to new technological skills in the use of PUMAs adopted by the Respondent in its operations, and that they took no initiative or effort to learn the new technological skills in the use of FUMA thereby impacting negatively on the Respondent's operations.
24. The Respondent denies that the Claimants had any accumulated and outstanding leave allowance, and further denies that they are entitled to severance pay under the law as claimed or at all.
25. The Respondent avers that the Claimants were not subjected to a disciplinary process because the parties mutually agreed to separate by consent, and the Claimants agreed to discharge the Respondent from any claims arising from termination of their employment upon receiving their final dues.
26. The Respondent avers that the Claimants were not terminated due to redundancy and therefore, Section 40 of the *Employment Act* does not apply.
27. The Respondent states that it is engaged in a viation business which involves carrying passengers, and whose safety cannot be compromised by inefficient and poor performing staff and their continued employment would have compromised the safety of its passengers and crew, and put their lives at risk.
28. The Respondent states that the Claimants in the six matters subject of this judgment have all since been able to get comparable alternative employment.
29. On cross-examination, RW1 told court that the Respondent has assessments of the Claimants' poor performance, but which were not filed before court. He further confirmed that he did not have evidence showing that the Claimants were called and explained for the allegations of poor performance or that they were given opportunity to improve.
30. It is RW1's position that the Claimants supervisor gave evidence of their poor performance though informally, and that he did not have prove of the same.
31. The witness also confirmed that the drafts of the discharge vouchers were not shared with the Claimants, but that they did sign the discharges. He further told court that he had no explanation on why the Claimant's did not have their witnesses sign the discharge vouchers and admitted that it was an oversight.



32. RW2 on her part confirmed that she did not issue the Claimants with warning letters or notices to show cause. She further confirmed that she did not accord the Claimants a chance to be heard.
33. The witness also told this court that there were no appraisal procedures and had no evidence that the Claimants were allowed to defend the allegations of poor performance levelled against them.
34. It is the Respondent's prayer that the Claimants claims herein be dismissed with costs.

Analysis and Determination

35. I have carefully considered the pleadings, the witnesses' oral testimonies and the rival submissions. The issues for determination are:-
 - i. Whether the Claimant's termination was fair
 - ii. Whether the Claimant is entitled to the reliefs sought

Whether the Claimant's termination was fair

36. The Claimants in the six (6) suits subject of this judgment, were all terminated between 7th and 9th February, 2018, on the grounds of poor performance. The Claimants contend that they were terminated without just reason, and that they were not issued with any warning letters prior to termination. It is their case that they were never accorded an opportunity to be heard, and the Respondent did not attempt to point out to them the areas that they under performed in nor given them an opportunity to improve.
37. It is their position that the termination violated not only the Respondent's Human Resource Manual, but also *the Constitution* and the *Employment Act, 2007*.
38. The Respondent on its part, argues that the Claimants' performance deteriorated immediately after probationary assessment was done, and that they were duly assessed, advised of the outcome of the assessment and given an opportunity to improve, but they never did.
39. On cross-examination however, RW1, the Respondent's managing Director, told court that although the Respondent carried out assessments of the Claimants' performance, the appraisals were not filed before court. He further confirmed that he did not have evidence showing that the Claimants were called and explained for the allegations of poor performance or that they were given opportunity to improve.
40. RW2, the Respondent's Human Resources Manager, further told this court that she did not issue the Claimants with warning letters or notices to show cause, and nor did she allow them a chance to be heard. The witness also told this court that there were no appraisal procedures and had no evidence that the Claimants were allowed to defend allegations of poor performance.
41. Section 41 of the *Employment Act, 2007* states thus: -
 - "(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance (emphasis own) 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."



42. It is evident that the Respondent based the Claimants' terminations on poor performance. It is also not disputed that they were neither issued notices to show cause nor allowed opportunity to defend themselves against the allegations of poor performance, which in any event, was never before the date of their termination, brought to their attention.
43. The Respondent's witnesses plainly admitted not according the Claimants opportunity to be heard on the allegations against them, and which allegations, they were also not notified of. It is then safe to say that the Respondent did not attempt to adhere to the tenets of fair process espoused under Section 41 of the *Employment Act*.
44. The Court concludes that the terminations were outrightly unlawful and procedurally unfair.
45. On whether the Respondent had valid grounds to terminate, poor performance is no doubt a valid and fair ground for termination, subject to the employer showing that there were attempts to address the poor performance through a structured system that sets targets that are achievable by the employee. It must also be shown that the employee knew beforehand what the expected standards were, that the standards are reasonable and that the employee had sufficient opportunity to meet the standards.
46. In the case of Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010) the Court opined thus: -
- “The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”
47. The burden of proof that poor performance was a fair reason for dismissal rests on the employer. It is the responsibility of the employer to put in place corrective mechanisms through employee coaching before any form of disciplinary action can be taken. (See Jane Simba Mukala v. Oltukai Lodge Limited (2013) eKLR).
48. The Court of Appeal in Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause No. 823 of 2010(2010)LLR 255 (ICK) held:-
- “.....The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance...It will not suffice to say that one has been terminated for poor performance as the effort leading to this decision must be established.”
49. The Respondent's assertion that it terminated the Claimants for reason of poor performance is not backed by an iota of evidence. Termination letters were issued and they took effect the same day. Nothing points to any assessments/appraisals and/or notification of the poor performance. There is also no evidence that the Respondent ever set targets for the Claimants which formed the basis for termination on the grounds of poor performance.
50. It then follows that the termination of the Claimants contracts was not based on any reason at all. The Claimants in the 6 suits were no doubt summarily dismissed for no reasons known to them and without being allowed an opportunity to be heard in gross violation of Articles 41 and 47 of *the Constitution* and Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007.
51. The Claimants' termination is thus found unfair, wrongful and unlawful both substantively and procedurally.



Whether the Claimant is entitled to the reliefs sought

52. The Claimants seek payment of 12 months' gross pay for the unfair termination, one month's salary in lieu of notice, payment in lieu of accumulated leave allowance, severance pay and the costs of the claim.
53. The Respondent contends that the Claimants signed discharge vouchers under which the Claimants agreed to discharge the Respondent from any claims arising from termination of employment upon receiving their final dues.
54. The Court of Appeal in the case of *Nation Media Group Limited v Munene (Civil Appeal E603 of 2021)* [2025] KECA 114 (KLR) (24 January 2025) (Judgment) stated thus: -
- “Lastly, it also ought to be emphasised that the remedy of compensation for unfair termination is separate and distinct from any terminal dues that were due to the respondent as a result of the termination, whether by redundancy or otherwise. The terminal dues compensate the employee in view of the service rendered until the date of termination, and are set down by law and the contract of employment. Compensation for unfair termination compensates an employee for wrongful loss of employment, and are mainly at the discretion of the court, after consideration of the guidelines set down in section 49 of the *Employment Act*. It is also notable that the remedy of compensation for unfair termination was introduced by the *Employment Act*.”
55. The same Court in *Thomas De La Rue (k) Ltd v. David Opondo Omutelema (2013) eKLR*, held: -
- “We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”
56. The Respondent's witness confirmed that the drafts of the discharge vouchers were not shared with the Claimants, and that they had no explanation on why the Claimant's did not have their witnesses sign the discharge vouchers and admitted that it was an oversight.
57. The Claimants' assertion that they did not voluntarily sign the discharge voucher was corroborated by the Respondent's witnesses. It is also true that the Claimants seek compensation for unfair termination in addition to payment of a month's salary in lieu of notice, leave allowance and redundancy pay.
58. The Claimants admitted that they each received payment of one month salary in lieu of notice, and their claim herein on that account fails.
59. Further, although the Claimants sought an award of severance pay, there is no indication that these were cases of redundancy. The Respondent has stuck its ground that the terminations were on the ground of poor performance. The Claim for severance pay is thus not legally founded and is dismissed.
60. None of the parties urged the claim for leave allowances. It is thus not clear to court how many days of leave the Claimants claim and neither did the Respondent lead any evidence on the issue. I will thus dismiss this claim on this account.
61. On the claims for compensation, it is evident that the Claimants were actually summarily dismissed. It is also evident that the tenets of procedural fairness were recklessly thrown out the window, and so



was the need to justify the grounds for the terminations. Nothing in my view prepared the Claimants for what befell them.

62. The Claimants confirmed to this Court that they have all since been able to get comparable alternative employment, and on this account, I deem an award of seven (7) months' salary sufficient compensation for the unfair termination.

63. In whole, I find the Claimant's claims merited, and grant orders as follows: -

- i. A declaration that the Claimants were unfairly terminated
- ii. That the Respondent pays each of the Claimants in Causes Nos. 665, 664, 667, 666, 699 & 700 OF 2018 seven (7) month's salary as compensation for the unfair termination.
- iii. The awards herein are subject to statutory deductions.
- iv. Costs shall be borne by the Respondent.

64. Judgment of the Court.

DATED, SIGNED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 29TH DAY OF MAY, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Ngichabe present for the Claimants

Mr. Ochieng Ogutu present for the Respondent

Ms. Esther S - CA

