



**Nganga v Africare Limited (Cause E037 of 2021)
[2025] KEELRC 1566 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1566 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E037 OF 2021**

**S RADIDO, J
MAY 29, 2025**

BETWEEN

VICTOR THAIRU NGANGA CLAIMANT

AND

AFRICARE LIMITED RESPONDENT

JUDGMENT

1. The questions for determination in this Cause are:
 - i. Whether the termination of the employment of Victor Thairu Ng'ang'a (the Claimant) was unfair?
 - ii. Whether Africare Ltd (the Respondent) was in breach of contract?
 - iii. Appropriate remedies.
2. The Cause was heard on 21 January 2025, 5 March 2025 and 6 March 2025.
3. The Claimant and a former Human Resource Manager with the Respondent testified.
4. The Claimant filed his submissions on 7 April 2025, and the Respondent on 5 May 2025.
5. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

6. Sections 35(1) and 41 of the *Employment Act*, 2007, underpin the termination of an employment contract.



7. Due to the Covid-19 public health pandemic, the Respondent directed the Claimant (and other employees) to proceed on unpaid leave. The Claimant was not comfortable with the directive and he raised several concerns with the Respondent.
8. On or around 6 October 2020, the Respondent requested the Claimant to report back to work effective 12 October 2020.
9. The Claimant still felt uncomfortable resuming work and he and his advocate engaged with the Respondent in writing and physical meeting. The Respondent then issued an ultimatum to the Claimant to report back on 13 October 2020.
10. There was no agreement and on 21 October 2020, the Respondent issued a show cause letter to the Claimant through his advocate, asking him to show cause why disciplinary action should not be taken against him for failing to report back to work as directed.
11. The cause requested the Claimant to respond by 23 October 2020.
12. The Claimant responded to the show cause through an email from his advocate on 23 October 2020. In the email, the advocate stated that the show cause was ill-advised and that the Claimant had been ready to resume work provided his concerns raised earlier were addressed.
13. The Respondent followed the show cause with a letter dated 28 October 2020, inviting the Claimant to attend a disciplinary hearing on 4 November 2020. The invitation notified the Claimant that he could be accompanied by a witness.
14. The Claimant's advocate replied to the invitation on 3 November 2020, stating that the disciplinary hearing was an afterthought, and that the hearing holds no water in a legal and employment setting.
15. The advocate also stated in the letter that he would not allow the Claimant to be subjected to an unwarranted and unjustified disciplinary hearing, but that he would attend the hearing on conditions outlined in the letter.
16. The Claimant and his advocate attended before the Respondent's offices on 4 November 2020, but they were informed that the hearing could not proceed due to unavoidable circumstances.
17. The Respondent then sent another invitation dated 9 November 2020, inviting the Claimant to attend a hearing on 17 November 2020.
18. The Claimant's advocate responded on 13 November 2020, stating that 17 November 2020 was not a convenient date and suggesting 26 November 2020.
19. The Claimant also stated that he was waiting for a response to the concerns he had raised with the Respondent earlier.
20. The disciplinary hearing proceeded on 17 November 2020 in the absence of the Claimant.
21. On 24 November 2020, the Respondent notified the Claimant that a hearing was held on 17 November 2020, and a decision was taken to terminate his employment.
22. The record shows that before the dismissal of the Claimant, his relationship with the Respondent had become tempestuous.
23. However, the obtaining legal framework in Kenya requires that the employer allows the employee to make representations before a decision is made to dismiss. If the devil were an employee in Kenya, the legal framework would have expected him to be given a fair chance to defend himself. Luckily, the devil



is not an employee and appears to be more of an employer, for the Bible records that he roams the world looking for recruits to his cause and souls to devour.

24. The Respondent afforded the Claimant an opportunity to make written representations. The challenge came when the Respondent opted to grant the Claimant an oral or physical hearing.
25. Despite expressing many concerns, the Claimant appeared for the initial disciplinary hearing on 4 November 2020. The hearing was aborted at the instance of the Respondent, and it was rescheduled to 17 November 2020.
26. The Claimant requested the Respondent to accommodate him and hold the hearing on 26 November 2020.
27. The minutes of the disciplinary hearing capture that the Respondent believed that the Claimant had waived his right to attend the hearing. The belief cannot be correct.
28. This is so because despite using strong language in his letter of 13 November 2020, the Claimant asked to be accommodated to attend the hearing on 26 November 2020.
29. The Respondent had caused the adjournment of the hearing of 4 November 2020. It did not explain why it could not accede to the Claimant's request for a postponement.
30. On this ground, the Court finds that the decision of the Respondent was procedurally infirm.

Substantive fairness

31. Sections 43 and 45 of the *Employment Act*, 2007, place a burden on the employer to prove the validity and fairness of the reasons for a termination of employment.
32. The reason given by the Respondent for terminating the Claimant's employment was absconding from duty.
33. Around 19 March 2020, the Respondent requested some employees, including the Claimant, to apply for annual leave as well as proceed on unpaid leave because of the declaration of the COVID-19 public health pandemic.
34. The Claimant declined to sign in agreement with the instruction.
35. On 30 April 2020, the Respondent met all employees and informed them that, because of the effects of COVID-19, some employees would proceed on unpaid leave.
36. The Claimant was issued a letter directing him to proceed on Leave of Absence. The Claimant declined to sign to proceed on the leave of absence. The Claimant gave his reasons.
37. The Claimant, his advocate and the Respondent's Managers met on 8 May 2020. The Claimant maintained at the meeting that he would not proceed on leave and mentioned that the Respondent had just recruited a Human Resource Manager.
38. The Respondent demanded that the Claimant hand-over and proceed on leave. The Claimant declined and at the same time made certain demands, including a response to a letter he had written on 4 May 2020.
39. The Respondent disabled the Claimant's email account and paid him some monies.
40. On 6 October 2020, the Respondent directed the Claimant to report back to work on 12 October 2020.



41. The Claimant, through his advocate, raised certain concerns on 10 October 2020 which he insisted had to be addressed before resuming work. The Claimant met with the Respondent's Managers on 12 October 2020.
42. The parties could not agree. The Respondent demanded that the Claimant report the next day.
43. The Claimant insisted that his concerns be addressed before he could resume work. The Respondent then issued the show cause dated 21 October 2020 which culminated in the termination of employment.
44. The Claimant had what he believed were genuine concerns that he wanted the Respondent to address before he could concede to the ultimatum to resume work.
45. The legal question therefore arises, can an employee fail to report to work because of grievances against the employer?
46. Reporting to work is a fundamental obligation on the part of the employee. If an employee believes that an employer is not meeting its obligations or is breaching the terms of contract, the employee ought to assert breach of contract or resign and claim constructive dismissal, and may be, approach a Court of law, but not go ahead and create a situation where the employee is also in breach of contract.
47. By insisting that the Respondent satisfactorily address his concerns before resuming duty, the Claimant was in breach of his contractual obligations. In fact, the issues he had raised could have been discussed mutually while he was at work.
48. The Court finds that the Respondent had and has proved valid and fair reasons to terminate the Claimant's employment.

Salary in lieu of notice

49. The Respondent did not grant the Claimant a fair hearing, and the Court will allow the equivalent of 1-month salary in lieu of notice in the sum of Kshs 100,000/-.

Compensation

50. The Court has concluded that the process leading to the termination of the Claimant's employment was procedurally infirm.
51. The Claimant served the Respondent for about 3 years and in consideration of the length of service, the Court is of the view that the equivalent of 3 months' gross salary as compensation would be appropriate (gross salary was Kshs 100,000/-)

Mistreatment and harassment

52. The Claimant prayed to be awarded general damages for mistreatment and harassment.
53. The Claimant did not situate this prayer for general damages within any known cause of action. He did not place before the Court an evidential basis for this relief and relief is declined.

Breach of contract

Unpaid salary

54. The Claimant made a pitch for Kshs 700,000/- being unpaid salaries from May to November 2020.



55. The country was in the grip of COVID-19 health pandemic at the material time.
56. The government had issued certain protocols to address and ameliorate any hardships to business and employees during the material time.
57. The Respondent sent its employees on unpaid leave during part of the period and the employees resumed work in October 2020.
58. The Claimant did not indicate whether the 48 employees sent on unpaid leave were eventually paid salaries during the period.
59. The Claimant did not provide services during the interlude.
60. The Court declines to allow this head of the claim.

Service pay

61. The Claimant pleaded an entitlement to service pay for 3 years of service, amounting to Kshs 150,000/-.
62. The Claimant's contract provided that the salary would be subjected to statutory deductions. Statutory deductions include contributions to the National Social Security Fund.
63. The Claimant did not testify that he was not contributing to the Fund and by dint of section 35(5) and (6) of the Employment Act, 2007, the Court declines to award service pay.

Certificate of Service

64. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant.

Conclusion and Orders

65. The Court finds and declares that the termination of the Claimant's employment was procedurally unfair.
66. The Claimant is awarded:
 - i. Pay in lieu of notice Kshs 100,000/-
 - ii. Compensation Kshs 300,000/-Total Kshs 400,000/-
67. The award to attract interest at court rates from the date of judgment until payment in full.
68. The Respondent to issue a Certificate of Service within 30 days.
69. The Claimant to have costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 29TH DAY OF MAY 2025.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Shako & Co. Advocates

For Respondent Kazi Advocates LLP



