



**Achesa v Radar Limited (Cause 1788 of 2015)
[2025] KEELRC 1531 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1531 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1788 OF 2015**

**AK NZEI, J
MAY 16, 2025**

BETWEEN

GERALD AMBOKA ACHESA CLAIMANT

AND

RADAR LIMITED RESPONDENT

JUDGMENT

1. The suit herein was filed by the Claimant vide a Statement of Claim dated 7th October, 2015 and filed in this Court on even date. The Claimant pleaded:-
 - a. That he was employed by the Respondent on 25th July, 2012 as an Operation Controller based at Nairobi; to carry out and to manage all activities in the control room so as to maintain good relationship between the Respondent, the clients and guards in accordance with contractual agreements; at a starting salary of Kshs.25,000/= (gross).
 - b. That the Claimant was confirmed into permanent employment in November 2012 at a monthly salary of Kshs.35,000/=, which was subsequently adjusted to Kshs.38,500/= per month effective 1st July, 2013.
 - c. That the Claimant was to report on duty at 0700 hours to 1800 hours, or alternatively from 1800 hours to 0700 hours.
 - d. That contractual notice period was four (4) weeks or four (4) weeks' pay in lieu of notice.
 - e. That the Respondent falsely and maliciously prosecuted the Claimant for theft, necessitating summary dismissal. That the Respondent subsequently made verbal demands for Kshs.117,757.40, allegedly received by the Claimant on behalf of the Respondent and allegedly unremitted to the Respondent; which amount the Claimant had no knowledge of.



- f. That the Claimant was verbally terminated, but on demanding for a termination letter, he was, in April 2015, issued with a termination letter back-dated to April 2014.
 - g. That while in employment with the Respondent, the Claimant had secured business for the Respondent from various quarters and was entitled to commissions, which commissions the Respondent never paid.
 - h. That the Claimant's summary dismissal from employment was a clearly scripted plan by the Respondent to advance false and malicious allegations of misconduct against the Claimant, leading to summary dismissal, in order to avoid paying the Claimant's accrued commissions.
2. The Claimant sought the following reliefs against the Respondent:-
- a. Unpaid commissions:-
 - i. commission due on business secured from Kenya Revenue Authority Kshs.1,008,000/=.
 - ii. commission on business secured from Raiply Limited (Eldoret) Kshs.130,000/=.
 - iii. commission on business secured from Parklands Sports Club – Nairobi Kshs.50,400/=.
 - iv. commission due from West Kenya Sugar Company.
 - v. commission due from Sukari Industries.
 - vi. commission due from China Wu Yi Company Limited.
 - b. Unpaid salary:-
 - i. for the month of March 2014 Kshs.38,500/=.
 - ii. for the month of April 2014 Kshs.38,500/=.
 - c. Unpaid annual leave Kshs.38,500/=.
 - d. Unpaid standard overtime for eleven months Kshs.82,500/=
 - e. One month salary in lieu of notice Kshs.38,500/=.
 - f. 12 months' wages in damages for unfair/unlawful termination Kshs.462,000/=.
 - g. Service for 2 years at the rate of 15 days' pay for every year worked Kshs.38,500/=.
 - h. General damages for unlawful detention of the Claimant's original documents and an order for release of the documents (full particulars whereof the Respondent is in the know).
 - i. Issuance of a Certificate of Service.
 - j. Costs and interest.
3. Documents filed alongside the Claimant's statement of claim included the Claimant's affidavit in verification of the claim, the Claimant's witness statement dated 7th October, 2015 and an evenly dated list of documents, listing 11 documents. The listed documents included copies of the Claimant's job card and National identity card, employment contract dated 23rd July, 2012, job description dated 25th July, 2012, confirmation letter (dated November 2012), salary increment letter dated 30th July, 2013,



summary dismissal letter dated 5th April, 2014, the Claimant's letter to the Respondent dated 15th May, 2014, clearance certificate, a letter by the Respondent dated 9th July, 2015 and the Claimant's letter to the Respondent dated 10th July, 2015.

4. The Respondent entered appearance on 10th November, 2015 and subsequently filed a Memorandum of defence on 3rd December, 2015. The Respondent also filed an undated witness statement of one Sharon Sambu on 17th July, 2017 and an undated list of documents listing some six documents whose copies were not filed with the said list. The listed documents included a contract of appointment, various payslips, various work-sheets and leave application reports, various correspondence between the Claimant and the Respondent, investigation report and dismissal letter.
5. The Court's record shows that on 22nd May, 2022, the Claimant filed an amended statement of claim, dated 2nd May, 2024 and expressed to have been amended pursuant to leave granted on 11th April, 2024. I have perused the Court's typed and certified proceedings for 11th April, 2024 as well as the Court's Ruling delivered on the said date, and I have not seen any order granting leave to the Claimant and/or to the parties to amend their pleadings. Further, I have perused the Claimant's Notice of Motion dated 9th March, 2022, pursuant to which the Court delivered a Ruling on 11th April, 2024, and I have noted that the same did not even contain a prayer for leave to amend pleadings. The suit herein will, therefore, be determined on the basis of the statement of claim dated 7th October, 2015 and set out in paragraphs 1 and 2 of this Judgement.
6. Further, and without leave, the Claimant filed a supplementary list and bundle of documents dated 2nd May, 2024. In the absence of the Court's leave to file those supplementary documents, filed over 8 years from the date of closure of pleadings, the said documents are irregularly on record, and cannot be considered by the Court in determining the suit herein.
7. The Court's record shows that on 27th May, 2024, the Court (Dr. Jacob Gakeri, J), in the presence of Counsel for both parties, fixed the suit herein for hearing on 9th October, 2024; by consent.
8. When the suit came up for hearing before me, however, only the Claimant and his Counsel attended Court virtually. Neither the Respondent nor its Counsel attended. The Claimant testified and adopted his filed witness statement, which replicates the averments in his statement of claim, as his testimony. He also produced in evidence the documents referred to in paragraph 3 of this Judgment. The Claimant closed his case, and the Court closed the Respondent's case and directed that written submissions be filed within set timelines. The Claimant filed his written submissions dated 23rd December, 2024.
9. The evidence presented by the Claimant in support of his claim stands unrebutted and uncontroverted as the Respondent did not participate in the trial, and deliberately so as the hearing date had been fixed in Court by consent of both parties. It is clear from the documentary evidence produced by the Claimant that the Claimant was employed by the Respondent vide a contract of employment executed on 20th July, 2012, that the Claimant's starting monthly salary was subsequently adjusted to Kshs.38,500/= with effect from 1st July, 2013, and that the Claimant was summarily dismissed vide a summary dismissal letter dated 5th April 2014 for gross misconduct. The summary dismissal letter reads as follows:-

“It has come to the attention of the Management that in the month of April, you received Kshs.177,757.40 from China Wu Yi (K) Co. Ltd on behalf of the company but failed to remit the same to the office.



Be advised that stealing from the company is tantamount to Gross Misconduct which leaves the company with no other alternative but to summarily dismiss you from employment under the [Employment Act](#) 2007 of the Laws of Kenya.

Arrange to return all company property in your possession before payment of your final dues.”

10. The Claimant pleaded unlawful/unfair termination. The Claimant is not shown to have been accorded an opportunity to be heard on the accusation levelled against him by his employer, and the mandatory procedure set out in Section 41 of the [Employment Act](#) is not shown to have been adhered to by the Respondent in terminating the Claimant’s employment.

11. Section 45(1) and (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.

12. Section 43(1) of the [Employment Act](#) on the other hand provides as follows:-

- “(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.”

13. Issues that present for determination, in my view, are:-

- a. Whether termination of the Claimant’s employment by the Respondent was unfair.
- b. Whether reliefs sought by the Claimant are merited.

14. On the first issue, it was held as follows in the case of Walter Ogal Anuro – vs – Teachers Service Commission [2013] eKLR:-

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”



15. On procedural fairness, the Claimant's employment was terminated on ground of alleged gross misconduct. The Respondent, was therefore, obligated to adhere to the mandatory procedure set out in Section 41 of the Employment Act, which provides as follows:-
- “(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 provisions 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.”
16. Failure by the Respondent to adhere to the foregoing mandatory statutory procedure rendered termination of the Claimant's employment procedurally unfair. It ought to be noted that the foregoing procedure ought to be adhered to by an employer even before effecting a summary dismissal. Section 41(2) of the Act states as much.
17. Substantive fairness, that is, the validity of the reason for terminating the Claimant's employment, was not demonstrated by the Respondent. The Respondent did not attend Court on the date fixed for hearing of the suit. The Claimant's evidence was neither rebutted nor controverted by the Respondent. The Respondent's filed statement of defence and witness statement remained mere unsubstantiated statements of fact in the Court's record, which the Court could not consider in determining the dispute herein.
18. I return a finding that termination of the Claimant's employment by the Respondent was substantively and procedurally unfair, and I so hold.
19. On the second issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of six (6) months' salary being compensation for unfair termination of employment. That is, Kshs.38,500/= x 6 = Kshs.231,000/=, which I award the Claimant.
20. The claim for accrued commissions was not proved, and is therefore declined.
21. The claim for unpaid salary for the months of March and April 2014, being unrebutted, is hereby allowed, and the Claimant is awarded Kshs.77,000/= being the said unpaid salary for the months of March and April 2014.
22. The claim for unpaid leave is declined. The Claimant did not specify the period during which the alleged unpaid leave was earned.
23. The claim for overtime was not proved, and is declined.
24. The claim for one month salary in lieu of notice is allowed pursuant to Section 35(1)(c) of the Employment Act, and the Claimant is awarded Kshs.38,500/= being one month salary in lieu of notice.



25. The claim for 2 years' service pay was not proved, and is declined. The Claimant did not demonstrate that he was entitled to service pay, either under his contract of employment or under a CBA that applied to his employment with the Respondent.
26. The claim for general damages was not proved, and is declined.
27. The prayer for issuance of a certificate of service is hereby allowed pursuant to Section 51 of the *Employment Act*.
28. Having considered written submissions filed on behalf of the Claimant, Judgment is hereby entered for the Claimant against the Respondent for:-
 - a. Compensation for unfair termination of employment
Kshs.231,000/=
 - b. Unpaid salary Kshs. 77,000/=
 - c. Payment in lieu of notice Kshs. 38,500/=TotalKshs.346,500/=
29. The awarded sum shall be subject to statutory deductions applicable to the Claimant at the time of termination, pursuant to Section 49(2) of the *Employment Act*.
30. The Respondent shall issue the Claimant with a certificate of service pursuant to Section 51 of the *Employment Act*, within thirty days of this Judgment.
31. The Claimant is awarded costs of the suit and interest on the decreed sum. Interest shall be computed at Court rates from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2025

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Amany for the Claimant

No appearance for the Respondent

