



**Lukalia v West Kenya Sugar Company Limited (Cause 217 of 2018)
[2025] KEELRC 1416 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1416 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 217 OF 2018
MA ONYANGO, J
MAY 15, 2025**

BETWEEN

MOHAMED ALOICE LUKALIA CLAIMANT

AND

WEST KENYA SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 11th June, 2018 the Claimant avers that he was employed by the Respondent, a limited liability company incorporated in Kenya under the *Companies Act*, as a Mill Cane Driver of a tractor. The employment was on contract commencing July, 2007. He was paid a daily wage of Kshs. 429 making a total of Kshs.12,870 per month.
2. The Claimant avers that he served the Respondent with loyalty, diligence and full dedication until 21st June, 2016 when the Respondent wrongfully, unprocedurally and unlawfully terminated his services and refused to pay his terminal dues.
3. The Claimant avers that the Respondent's agents and/or employees caused and/or instigated the Claimant's arrest by the police on false and/or malicious allegations of stealing the Respondent's property.
4. The Claimant avers that he was arraigned in court on 21st June, 2016 on a charge of stealing and was subsequently prosecuted in Butali Senior Resident Magistrates' Court Criminal Case No. 718 of 2016.
5. The Claimant states that upon his arrest the Respondent arbitrarily dismissed and or unlawfully terminated the Claimant's employment without due regard to the Claimant's rights and/or privileges. That the termination was illegal, unfair and unlawful for failure to comply with sections 41(1), 43 and 44(4) of the *Employment Act*. The Claimant further avers that the Respondent did not act with justice and equity and thus violated section 45 of the *Employment Act*.



6. The Claimant tabulated his terminal dues as set out below:

- a. One month pay in lieu of notice
Basic salary + House Allowance
 $12,870 + (15\% \times 12 \times 870)$
 $12870 + 1930.50$ Ksh.14,800.50
 - b. Compensation for unfair termination
Section 49(c) of the *Employment Act*
Gross pay x 24 months
 $14,800.50 \times 24$ months Ksh.355,212/=
 - c. House allowance
15% of the basic salary x Number of months worked
 $(15/100 \times 12,870) \times 108$ months
 1930.50×108 Kshs.208,494/=
 - d. Service pay
 $15/30 \times$ basic salary x No. of completed years worked
 $15/30 \times 12,870 \times 9$ Ksh.57,915/=
 - e. Leave Dues
Section 28 of the *Employment Act*
21 days' pay per annum
for the year 2007-2016
 $21/30 \times 12,870 \times 9$ years Ksh.81,081/=
- Total Kshs.717,502.50

7. The Claimant prayed for the following remedies:

- a. Declaration that the Claimants' service were unprocedurally, unlawfully and unfairly terminated and in the circumstance the Claimant is entitled to compensation of his terminal dues as outlined above;
- b. The sum of Ksh. 717,502/= as set out above;
- c. Cost of this suit and interests at court rates from time of filing the suit until payment in full and
- d. Any other further and better relief the Honourable Court may deem just and fit to rant.

8. The Respondent filed a Memorandum of Defence dated 25th July, 2018 in which it denies that it employed the Claimant as alleged in the Memorandum of Claim or that it paid him as alleged. It further denies that the Claimant served it with loyalty, diligence and dedication as alleged. It further denies that it terminated the employment of the Claimant as stated in the Memorandum of Claim or that its agents caused the arrest and prosecution of the Claimant as alleged in the Memorandum of Claim.



9. The Respondent denies all averments in the Memorandum of Claim including the particulars of terminal dues as set out therein.
10. The Claimant filed a Reply the Respondent's Memorandum of Response dated 8th August, 2018 in which he joins issues with the Respondent.
11. By consent of parties on 20th February, 2019 the parties agreed to dispose of the suit by way of written submissions. The Claimant's submission are dated 8th March, 2019 while the Respondent's submissions are dated 27th March, 2019.

Claimant's Submissions

12. The Claimant submitted on the following issues:
 - i. Whether the Claimant was an employee of the Respondent
 - ii. Whether the termination declared by the Respondent was unfair, unlawful and illegal
 - iii. Whether in effecting the termination the Respondent complied with the law
 - iv. Whether the Claimant is entitled to the reliefs sought
 - v. Who should pay costs and interest.

Whether the Claimant was an employee of the Respondent

13. The Claimant submitted that in the Memorandum of Response the Respondent denied that it ever employed the Claimant. The Claimant submitted that he produced documents proving that there was an employer/employee relationship between the parties being NHIF Card and NSSF provisional Statement.
14. He submitted that his employment terminated on 21st June, 2016 when the Respondent instigated criminal charges against him.
15. The Claimant further submitted that in Butali PMCC No. 718 of 2016 the Respondent through its agents affirmed the Claimant's employment.

Whether the termination declared by the Respondent was unfair, unlawful and illegal

16. The Claimant submitted that sections 41 and 43 of the *Employment Act* emphasize 3 cardinal mandatory requirements being sufficient notice to the employee of the intention and reasons for the anticipated termination; the right of the employee to representation (of choice) upon notice; and, transparency and participation.
17. It is submitted that section 45 further provides that no employer shall terminate the employment of an employee unfairly and that termination is unfair if the employer fails to prove that the reason for termination was a valid and fair reason.
18. The Claimant submitted that upon the instigation of the Respondent he was charged with stealing contrary to section 275 of the *Penal Code* and Handling stolen property contrary to section 322(1) and (2) of the *Penal Code*.
19. The Claimant submitted that from the evidence adduced in the criminal trial against him there was no evidence linking him to the alleged offences. That this informed the acquittal of the Claimant under section 215 of the *Criminal Procedure Code*.



Whether in effecting the termination the Respondent complied with the law

20. The Claimant submitted that the termination of his employment did not comply with the law as submitted above.

Whether the Claimant is entitled to the reliefs sought

21. The Claimant submitted that having proved his case he is entitled to the prayers sought.

Who should pay costs and interest.

22. On the final issue the Claimant submitted that a successful litigant is entitled to costs of the suit. He urged the court to find his prayers deserved.

Respondents Submissions

23. The Respondent submitted that it admitted in the witness statements that the Claimant was its employee. That the only aspect of the employment not admitted is that the Claimant was employed on contract as a tractor driver from 2012 to 2016.
24. It is the Respondent's case that the Claimant was a daily waged employee paid per piece work. That the piece work was computed weekly or after a fortnight. That the Claimant was a casual employee paid at the rate of Kshs. 429 per day. Relying on section 18(1) and (2) the Respondent emphasized that the Claimant was a casual employee paid per piece-work and on daily basis.
25. On the issue whether the Claimant's employment was ever terminated and if the termination was fair and legal, the Respondent submitted that the Claimant committed a criminal act and destruction of the company property, was arrested and prosecuted in Butali SRMC CR. 718 of 2016. That he abandoned his work upon his arraignment and never went back to work.
26. It is the Respondent's position that the Claimant left employment voluntarily as he was never prevented from accessing the Respondent's premises for the purpose of undertaking his duties.
27. The Respondent further submitted that section 35(1) of the *Employment Act* provides that a casual employee's contract is terminable without notice. That consequently even if the contract of the Claimant was terminated, which is denied, he is not entitled to any notice.
28. It is further the Respondent's submission that even though the Claimant's employment was not terminated, it had justifiable reason to terminate the employment under section 44(4)(g) of the Act as he was reasonably and for sufficient reason suspected of having committed a criminal offence to the substantial detriment of the Respondent.
29. It is submitted that the Claimant was suspected of stealing the Respondent's trailer registration No. ZD1507 after the Respondent's Security Manager conducted investigations and found every reason to report to the police as evidenced by the Incident Report of 27th June, 2016. That upon the police investigating the incident the Claimant was arrested. It is submitted that the mere fact that the Claimant was acquitted of the charges is not proof of malice. That any acquittal cannot be attributed to the Respondent but the police too.



Entitlement to the reliefs sought

30. The Respondent submitted that the Claimant is not entitled to pay in lieu of notice as he was not employed on a monthly basis. That the Claimant's engagement did not require a written contract under Part III of the Act.
31. It was submitted that the Claimant is not entitled to compensation as the termination of his employment was not unfair relying on the decision in *Karume Enock v Diesel Injection Services Limited* [2016] where the court declined to award the Claimant compensation on grounds that the termination was not unfair.
32. The Respondent further relied on the decision in *Sarah Wanyanga Muchiri v Henry Kathii* 7 another [2014] where the court awarded 6 months' salary as compensation.
33. The Respondent further relied on the decision in *Kadenge Karisa Konde v Coast Clay Works Limited* [2016] where the court awarded minimal compensation of 2 months' salary on grounds that the employer had valid reason to terminated but failed to comply with fair procedure.
34. On the prayer for service pay the Respondent submitted that under section 35(6) the Claimant is not qualified for the same as he was a member of NSSF.
35. On the prayer for leave pay the Respondent submitted that the Claimant's contract did not qualify for annual leave as it was intermittent and could not aggregate 12 months.
36. The Respondent submitted that in the unlikely event that the court found in favour of the Claimant he should be paid as follows:
 - i. Salary in Lieu of Notice..... Ksh.12,870/=
 - ii. Compensation for unfair termination ...Ksh.12,870/=
 - iii. Service PayKsh.18,305/=
 - iv. Leave Pay.....Kshs.27,027/=Total Kshs.....Ksh.71,072/=

Analysis and Determination

37. I have considered the pleadings and submissions on record. It is not in dispute that the Claimant was an employee of the Respondent. this was admitted in the witness statements of the Respondents and was also the basis of the criminal charges against the Claimant in *Butali SRMC CR. 718 of 2016*. What is in dispute is for how long the Claimant was an employee of the Respondent and the nature of his employment contract. The other issue in dispute is whether the termination of his employment was unfair and if he is entitled to the prayers sought.
38. On the first issue the Claimant stated he was employed as a contractual tractor driver from July 2007 and worked until 2016 when he was arrested and arraigned in court on charges of stealing and handling stolen property which he denied and which he was acquitted of.
39. The Respondent's counsel was emphatic that the Claimant was "a casual employee paid per piece work and on daily basis". The Respondent relied on section 18 of the *Employment Act* which provides for when wages are due. Subsection (1) and (2) which the Respondent relied on provide:



- (1) Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled—
 - (a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or
 - (b) in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.
 - (2) Subject to subsection (1), wages or salaries shall be deemed to be due—
 - (a) in the case of a casual employee, at the end of the day;
 - (b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;
 - (c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;
 - (d) in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier, and on the completion of the journey, respectively.
40. Section 2 of the Act defines a casual employee as “a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”.
41. In the instant case the Respondent submitted that the Claimant “was paid per piece work on wage computed weekly or after a fortnight and on quantum of work done.” I am trying to imagine what counsel intended to explain by this submission, as a casual employee is clearly defined to mean a person paid by the day. If he is not paid by the day then he cannot be a casual. Section 37(1) is explicit that
- (1) Notwithstanding any provisions of this Act, where a casual employee—
 - (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month;
 - (b) or performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
42. The Respondent further did not explain what it meant by piece rate, whether the Claimant was paid per trip or per load or per day. The Respondent further mixed-up payment per day and payment per piece rate.
43. What is obvious from the evidence on record is that the Claimant was neither a casual employee nor a piece rate employee. The Claimant was on a daily wage. It is not clear from the record whether the payment was made weekly, fortnightly or monthly. What is clear is that he was not paid by the day.



44. Based on section 37 of the Act the Claimant's employment had converted to a monthly paid contract and he was entitled to payment of notice for termination as provided under section 35(1)(c) which provides:
- where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.
45. Having established that the Claimant's employment had converted under section 37(1) of the Act to a monthly paid employee or what is normally referred to as "permanent employment", the next issue is for how long he was in employment. The Claimant's position is that he was employed in July, 2007 while the Respondent's position is that he was employed in 2012. The Respondent relied on the NSSF Statement filed by the Claimant.
46. NSSF Statement is not evidence of date of employment but of the date when an employer started remitting the same. Under section 10(7) of the *Employment Act* "If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."
47. The Respondent having failed to produce employment records to prove its averment that the Claimant started working in 2012 as opposed to the Claimant's position that he started working for the Respondent in July, 2007, the court adopts the Claimant's position that he started working in July, 2007.

Was the termination unfair?

48. The Respondent's position was that the Claimant was arrested after committing a criminal offence to the detriment of the employer and that it had reason to terminate the Claimant's employment. The Respondent further submitted that the Claimant voluntarily left employment as there is no evidence that he was prevented from accessing the Respondent's premises for work.
49. The Respondent's duty under the law is to subject the employee to disciplinary process where such employee is suspected of a criminal offence to the detriment of the employer or absconds duty. If the employer takes no action it cannot defend itself by alleging it took no action or by transferring the burden of proof to the employee by alleging the employee did not prove he was prevented from accessing the Respondent's premises. The duty of terminating an employee for misconduct can only be exercised by the employer. If he fails to do so, he is guilty of unfair termination under section 45(2) of the Act which provides that the employer must prove both valid reason and fair procedure failing which the termination is unfair.
50. I have read the judgment in Butali SRMC CR. Case No. 718 of 2016. The Hon. Magistrate was very clear that the Claimant was arrested while at work and that the tractor he was driving on the date he was alleged to have committed the criminal offence was faulty and did not leave the yard. The Claimant was never placed anywhere near the trailer Registration No. ZD 1507 which he is alleged to have stolen or handled dishonestly as stolen property. He was not connected with any theft or handling stolen property as alleged in the charges against him.
51. From the foregoing there was no valid or any reason to terminate the Claimant's employment. The Claimant was further not taken through any disciplinary process. The termination of his employment was therefore both procedurally and substantively unfair. I find and declare accordingly.



Reliefs Sought

52. The Claimant prayed for one months pay in lieu of notice. He is entitled to the same under section 49(1) and section 35 as read with 36 of the Employment Act. I award him Kshs.12,870 being the daily wage of 429x30.
53. The Claimant further prayed for house allowance. He is not entitled to the same as daily rates of pay under the Regulation of Wages (General) Order are consolidated and therefore inclusive of house allowance. The prayer is thus declined.
54. The Claimant prayed for service pay. Having been a member of NSSF he is not entitled to the same as provided in section 35(5) as read with section 35(6) of the Act. This prayer is declined.
55. The Claimant prayed for compensation for unfair termination. Having found the termination unfair and taking into account all the factors set out in section 49(4) of the Act and all other facts in the case including his length of service and the manner in which he lost his employment, the terms under which he worked and the fact that the Claimant was kept on casual terms throughout the period he was in the service of the Respondent, further taking into account the amount of salary he earned and the fact that he had no other terminal benefits, it is my view considered view that compensation of 10 months' salary in the sum of Kshs. 128,700 is reasonable compensation and I award him the same.
56. The Claimant further prayed for leave dues. Section 28 of the Act provides for annual leave for any employee who works for a minimum of 2 months. The Claimant worked for more than 2 months and was therefore entitled to annual leave. The Respondent stated that the Claimant's terms of employment did not attract annual leave meaning that there was an admission that the Claimant never went on annual leave. The Claimant having worked for the Respondent for the entire period from 2007 to 2016 without leave, I award him the same at 21 days per year being 189 days. Based on Kshs. 429 per day he is entitled to Ksh. 81,081 which I award him.
57. In summary I award the Claimant the following:
 - a. Pay in lieu of notice Kshs. 12,870
 - b. Compensation 10 months' salary Kshs. 128,700
 - c. Annual leave 189 days Ksh. 81,081
58. The Respondent shall in addition pay the Claimant's costs.
59. Interest shall accrue from date of judgement at court rates.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 15TH DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

