



**Kinyanjui v Mukawa Holdings Nairobi Safari Club (Cause
1988 of 2015) [2025] KEELRC 1375 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1375 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1988 OF 2015**

K OCHARO, J

MAY 9, 2025

BETWEEN

JAMES MWAURA KINYANJUI CLAIMANT

AND

MUKAWA HOLDINGS NAIROBI SAFARI CLUB RESPONDENT

JUDGMENT

Background

1. Contending that at all material times, he was an employee of the Respondent as a cashier, whose employment the Respondent terminated unfairly on or about 12th August, 2025, the Claimant sued the Respondent seeking declaratory and compensatory reliefs. Some of the reliefs were sought independently of the claim for unfair termination.
2. Through their Amended Statement of Defence, dated 10 August 2021, the Respondent resisted the claim, asserting that the Claimant was neither its employee nor employed for the length of time alleged. His entitlement to the reliefs sought was denied.
3. After hearing the parties on their respective cases, this Court directed them to file their written submissions. They followed the directions, and their written submissions are on record.

The Claimant's Case.

4. The Claimant stated that the Respondent employed him on 4 August 2008 as a cashier stationed at Nairobi Safari Club in the food and beverages department, at a monthly salary of Kshs. 13, 280/=.
5. Upon confirmation of employment, the Claimant was entitled to enter the company retirement benefits scheme, and the minimum contribution requirement was 5%, which could be increased to 7.5% or 10%. In either case, the company would match the Claimant's contribution respectively.



6. Without any valid justification and in violation of Sections 43 and 45 of the *Employment Act*, 2007, as well as contrary to the terms and conditions of service of the Respondent, the Respondent summarily terminated his employment, effective 12th August 2015, based on an alleged desertion of duty.
7. The dismissal was unlawful, arbitrary, and malicious. The Respondent didn't accord him any hearing to defend himself against the allegations. The dismissal was without any valid and justifiable reason.
8. The Claimant asserted by reason of the circumstances of the matter, he is entitled to the following reliefs;
 - a. One month's salary in lieu of notice...KShs. 13,280/
 - b. Unpaid house allowance (15% x 13,20 x 84 months).....KShs. 167,328/=
 - c. Service pay (3,280/30 x 15 x7) KShs. 46,480/=
 - d. Unpaid leave (13,280/(13,280/30X21X7) KShs. 65,072/=
 - e. Compensation for unfair termination (13,280 x 12).....KShs. 159,360.
 - f. Underpayments
 - i. April 2008 (13,833- 13,280) X 8 monthsKshs 4,424/
 - ii. 2009 (13,833-13,280) X 12 months KShs. 6,636.
 - iii. 2010 (15,216-13,280)X 12 months KShs. 23,232.
 - iv. 201 (17, 118- 13,280) X 12 months KShs. 46,056.
 - v. 2012 (19,360.5- 13,280) X 12 months KShs. 72,960.
 - vi. 2013 (22,070.95- 13,280) X 12 months KShs. 105,491.4.
 - vii. 2014 (22,070.95-13,280) X 12 months KShs. 105,491.4.
 - viii. 2015 (24,719.5-13,280) X 18 months KShs. 91,516/=

The Respondent's Case.

9. Cross-examined by Counsel for the Respondent, the Claimant stated that he began working for the Respondent on 4 August 2008. The recommendation letter by the Respondent dated 24 August 2015 is a testament to this fact. He wasn't a casual worker, as the Respondent alleged. He worked six days a week, therefore with one day off.
10. When asked about his monthly earnings, he stated that he had no document to demonstrate that he was earning KShs 13,280 per month. He could be paid at the end of the week and sometimes at the end of the month.
11. He further testified that she worked for the Respondent until 12 August 2015, when the Human Resource Manager informed him that work had diminished and that, therefore, he had to be discharged. She undertook that he could be recalled as and when the situation improved. This, she did verbally. As purported by the Respondent's documents, he never worked on the 17th and 18th of August 2015. His last day of work was the 12th August 2015.



12. Re-examined by his Counsel, the Claimant testified that the Respondent didn't give him any written employment contract. Further, a pay slip at any time. The duty to provide the documents was on the Employer [Respondent], not him.

The Respondent's case

13. The Respondent presented MARCUS OPIYO, its Security Manager at the Nairobi Safari Club, to testify in support of its defence. He stated that he had held the position since February 2014.
14. The Claimant was a casual employee in the Food and Beverage Department. He worked as a waiter in the Respondent's Annex Bar and Restaurant before being deployed as a cashier at the Car Wash.
15. The Car Wash was one of the Respondent's business outlets along Koinange Street. The facility had cashiers who collected revenue for the Respondent; the Claimant was one of them.
16. On 4 August 2015, he was instructed by the Respondent's then General Manager, Allan Mugambi, to conduct internal investigations into suspicious dealings by cashiers at the Car Wash. It was believed that money collected by the cashiers from the Car Wash was not being remitted to the Respondent.
17. A client informed the General Manager to investigate suspicious activities at the Car Wash. The client suspected that money collected by cashiers was not being remitted to the Respondent. The client received services at the Car Wash on 3rd August 2015, but was given a receipt with an earlier date.
18. On 5th August 2015, he commenced investigations. He took statements from the Car Wash security guards and cashiers and compiled a report dated 13th August 2015.

The investigations revealed that:

- a. On Monday, 3rd August 2015, Charity Kiama, a casual employee in the Food and Beverages Department, was rostered to work as a cashier at the Car Wash. However, while travelling to work from Nyeri that day, she received a telephone call from the Claimant, James Mwaura, who insisted on taking her place at work without any prior agreement or communication to their supervisor, Mr. Kariuki. She disagreed with the exchange of work assignments but had to return home, as the Claimant had already forcefully reported to work.
- b. The Claimant had reported to work on the last three Mondays., 27th July 2015 and 3rd August 2015.
- c. The Claimant had been on duty on the 3rd of August 2015 during Shift B and reported that he concluded his duties with a total of 28 vehicles that were washed on that day.
- d. The security personnel assigned to the car wash on August 3, 2015, reported that a total of 35 vehicles were registered as entering the car wash; however, only 34 vehicles were washed.
- e. The summary statement prepared by the Claimant, who served as the cashier on that day, indicates that a total of 25 vehicles were washed and paid for in cash. Additionally, four other vehicles were allegedly washed using redeemed points, which the Claimant did not account for in his statement.
- f. The Claimant failed to inform the Respondent about the vehicles washed on redeemed points, resulting in a lack of accounting and potential fraud related to the other vehicles that were washed but not accounted for, contrary to the Respondent's policies.
- g. The Claimant was unable to explain the discrepancy and prove that the additional cars were washed using redeemed points.



- h. The Claimant insisted on working on Mondays as that was the day that the most cars were washed, and he further failed to properly account for the number of cars washed, thus creating a conduit for the business to lose money.
19. The Claimant was last seen at the Respondent's hotel on 12 August 2015. Owing to his discovered fraudulent activities, he felt guilty and ceased reporting to work and disengaged from the Respondent.
20. The Respondent had a fair and valid reason to terminate the employment, but could not pursue a disciplinary process as the Claimant stopped reporting to work due to investigations to avoid disciplinary action.
21. The Claimant chose not to resume work and asked the Respondent's Human Resources manager for a certificate of service that includes a recommendation to help him secure alternative employment.
22. The Respondent complied with the *Employment Act* 2007 while managing employment processes.
23. The Claimant has no valid claim against the Respondent for his alleged termination of services; his dues were fully settled, and a certificate of service was issued to him.
24. Cross-examined by Counsel for the Claimant, the witness testified that the Claimant was employed as a casual employee. However, he could not tell the exact date of his employment. Further, his last day of work.
25. He was not the Claimant's immediate supervisor. Therefore, the immediate supervisor could appropriately answer any issues regarding the Claimant's employment.
26. He admitted that the Claimant was employed on 4 August 2008, but he could not tell whether he worked continuously.
27. The Claimant was not dismissed from employment. He simply ceased to report to work. However, the Respondent didn't issue him with a show cause letter at any time.
28. The investigation report was not provided to the Claimant. He [the witness] didn't write to the Claimant asking him to appear before him, and the report didn't specifically point out any fraudulent activity by the Claimant.
29. He couldn't tell whether the Human Resources Manager invited the Claimant for a disciplinary hearing.
30. He concluded his testimony under cross-examination by stating that his evidence was only intended for the investigations and the Report he prepared, not the matters the Claimant has raised in his pleadings.

Analysis and Determination

31. I have carefully considered the pleadings and the evidence by the parties, and their Counsel's written submissions, and the following issues emerge for determination;
- I. When did the Claimant first join the employment of the Respondent?
- II. What was the nature of the Claimant's employment with the Respondent?
- III. Was the Claimant's employment terminated at the initiative of the Respondent, and if so, was the termination unfair?
- IV. Is the Claimant entitled to the reliefs sought?



32. Before proceeding with a more thorough examination of the identified issues, it is imperative to underscore from the outset that the Employment Act of 2007 is structured in such a manner that the burden of proof concerning specific matters is allocated to either the employer or the employee. Nevertheless, in my evaluation, the burden imposed on the employer is considerably greater than that placed on the employee in most respects. In order to fulfil this burden, the employer is expected to present sufficient evidence through a witness who is competent to provide testimony on the matter. I assert without hesitation that the Respondent in this case did not present such a witness to testify—a witness capable of addressing the Human Resources function issues raised by the Claimant. Indeed, the Respondent’s witness conceded during cross-examination that he was not the appropriate type of witness.
33. In its pleadings, the Respondent explicitly denied that the Claimant commenced employment on 4th August 2008. Throughout the proceedings, the Claimant consistently asserted that this is the actual date on which he began his employment with the Respondent. I find that his testimony on this matter was not undermined; rather, it was corroborated by the evidence provided by the Respondent’s witness during cross-examination, in which he stated that he was not disputing the fact that this date was indeed the commencement of the Claimant’s employment.
34. The Respondent asserted in its pleadings that the Claimant was a casual worker who could be called to work whenever there was work and didn’t work continuously as he alleged. Counsel for the Respondent submitted that the burden of proof lay on the Claimant to demonstrate that he was a term employee. She relied on the Court of Appeal decision in *Rashid Mazuri Ramadhan & 10 others v Doshi & Company [Hardware] Limited & Another* [2018] eKLR to fortify this submission. I have carefully considered this decision, and the matters therein that the Court rendered itself on, and conclude that it isn’t helpful in the circumstances of the instant matter.
35. In this decision referred to by Counsel, unlike the current case, the employer and the employees acknowledged that the latter were casual workers. The crux of the dispute between the parties centred on whether, according to section 37 of the Employment Act, the Claimants’ casual employment had transitioned into term employment.
36. Counsel’s argument overlooks that the Court of Appeal did not indicate that the burden of proof rests with the employees. Additionally, section 10[7] of the Employment Act clearly outlines who bears the burden in cases like this one, where the employer (Respondent) failed to provide an employment contract, and there is a dispute over a term of the Claimant’s employment. The section provides;
- “If in any legal proceedings an employer fails to produce a written contract or 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.”
37. The Respondent presented a witness to testify on its behalf who rightly admitted that he was not qualified to give evidence of the matters that the Claimant was raising, specifically those outside of his investigation report as a Security Officer. Given the issues in controversy, one wonders why the Respondent failed to call its Human Resource Manager, or a person conversant with the Human Resources Management function, to address issues that were in controversy. Two inevitable conclusions present themselves here. First, the Respondent didn’t therefore discharge the onus under section 10[2], and second, an adverse inference can be made, which I hereby make, that had such a person been called, his or her evidence couldn’t have been helpful to the Respondent’s case but prejudicial.



38. The Respondent's Counsel argued that the documents provided by the Respondent demonstrated that the Claimant's employment was on a causal basis and elaborated further on these documents. However, this Court finds that the documents do not significantly aid this argument, as they do not cover the entire duration of the Claimant's employment with the Respondent. Additionally, the Respondent's witness failed to clarify the documents in his testimony or indicate their significance to the defence. It's important to recall that submissions cannot replace evidence. See *Daniel Toroitich Arab Moi vs Mwangi Stephen Mureithi & Another* [2014] eKLR.
39. For the reasons stated above, I determine that the Claimant was engaged in term employment, as he stated, not in casual employment, as the Respondent claimed.
40. The Claimant asserted that the Respondent terminated his employment, a decision verbally communicated to him by the Human Resources Manager, Ruth. As indicated hereinabove, the Respondent's witness's evidence didn't discount the matters raised by the Claimant. Considering the Claimant's evidence on lack of procedural and substantive fairness for the decision, weighed against the evidence of the Respondent's witness, it isn't difficult to conclude that he discharges his legal burden under section 47[5] of the *Employment Act*.
41. Having discharged his burden under section 47[5] of the *Employment Act*, the evidential burden shifted to the Respondent to establish the reason[s] for the termination [section 43], that the reasons[s] were fair and valid [section 45], the termination was justified [section 47[5]], and that the termination was procedurally fair [section 41 and 45].
42. Section 41 of the *Employment Act* requires employers considering terminating an employee's contract to follow the outlined procedure. This includes notifying the employee of the intention and reasons behind the intended termination, providing the affected employee with a reasonable opportunity to present their case, accompanied by a colleague of their choosing or a union representative, if applicable, and considering the representation before reaching a final decision.
43. The Respondent's witness was clear. The Claimant was neither issued a show cause letter nor subjected to a disciplinary hearing. Easy to conclude, therefore, that the termination of the Claimant's employment was procedurally unfair.
44. Section 43 of the *Employment Act* mandates that an employer involved in a termination dispute must demonstrate the reason for the termination, and additionally, as stipulated by section 45, prove that the reasons were both valid and fair. Time and again, this Court has stated that when the law imposes a legal burden of proof on a party, that party satisfies this burden only if they present adequate evidence, there is an admission by the adversary regarding the matter at hand, or the Court takes judicial notice of the fact that must be established. The Respondent's witness admitted he was not the appropriate individual to address the disputed issues; instead, the Human Resources manager should have testified. In my opinion, his testimony was insufficient for the Respondent to meet its legal obligations under sections 43 and 45 of the *Employment Act*.
45. By reason of the foregoing premises, I come to an inescapable conclusion that the termination of the Claimant's employment was substantively unjustified.
46. Having found as I have hereinabove, I now turn to consider whether the Claimant is entitled to the reliefs sought.
47. The Court found has hereinabove that the Claimant's employment was under a term employment contract. Therefore, his employment was terminable by notice under section 35 of the *Employment*



Act, with twenty-eight days' notice. There is no doubt that the notice wasn't issued. He is entitled to notice pay under section 36 of the Act.

48. Under Section 31 of the Employment Act, the employer is obligated to provide accommodation for its employees or to give them a reasonable house allowance to enable them to obtain accommodation. Corollary to the duty, therefore, is the employees' statutory right to the accommodation or house allowance, whichever is applicable. The Respondent didn't place forth evidence to demonstrate that it accommodated the Claimant or that he was being paid a house allowance. The Claimant's claim for compensation for unpaid house allowance succeeds.
49. Service pay constitutes a statutory benefit accessible to an employee who has departed from their employment, unless the individual is classified under one or more categories delineated in section 35[5] of the Employment Act. The Respondent did not assert or demonstrate that he fits into any of the specified categories of employees. The relief under the head, service pay, is awarded to the Claimant.
50. Section 49[1][c] of the Employment Act bestows on the court the authority to grant an employee who has successfully challenged their employer's decision to terminate their employment, compensatory relief to the maximum extent of that employee's twelve months' gross salary. However, it is pertinent to note that the authority is exercised discretionarily, depending on the circumstances of each case.
51. I have carefully considered the circumstances in which the Claimant's employment was terminated, the fact that he didn't contribute in any proven manner to the termination, his length of service to the Respondent of about seven years, and the Respondent's non-adherence with the dictates of the law regarding procedural and substantive fairness, and conclude that he is entitled to the remedy, seven month's gross salary.
52. The Claimant asserted that at all material times, the Respondent did not allow him to enjoy his statutory right under section 28 of the Act, annual leave, and consequently, sought compensation for leave days earned but not taken. The Respondent provided no proof that the Claimant could proceed with yearly leave or that he was paid in lieu of it whenever he did not take it. I find no challenge in awarding relief under this head.
53. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
 - a. A declaration that the termination of the Claimant's employment was procedurally and substantively unfair.
 - b. One month's salary in lieu of notice..... KShs. 13,280.
 - c. Compensation for unpaid house allowance..... KShs. 167, 328.
 - d. Service Pay KShs. 46, 480.
 - e. Compensation for earned but untaken leave days.....KShs. 65,072.
 - f. Compensation pursuant to the pursuant to section 49[1][c] of the Employment Act, for unfair termination of employment, seven months' gross salary, KShs. 96, 831.
 - g. Costs of the suit.
 - h. Interest at court rates from the date of this Judgment till full payment.

READ SIGNED AND DELIVERED THIS 9TH DAY OF MAY 2025.

OCHARO KEBIRA



JUDGE

