



**Mwangi v Maisha Beverages Limited (Employment and Labour Relations Cause E0384 of 2021) [2025] KEELRC 1396 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1396 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E0384 OF 2021**

**K OCHARO, J**

**MAY 8, 2025**

**BETWEEN**

**ROSEMARY NJERI MWANGI ..... CLAIMANT**

**AND**

**MAISHA BEVERAGES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Background**

1. By a memorandum of Claim dated 11<sup>th</sup> May 2021, the Claimant sued the Respondent herein, seeking the reliefs and orders, thus;
  - a. Gratuity @15 day's pay per year served.....kshs. 60,000
  - b. Maximum compensation for unfair termination (12 months salary).....kshs. 1,440,000
  - c. Damages caused due to loss of employment.....kshs. 2,000,000
  - d. I months' pay in lieu of notice.....kshs. 120,000
  - e. Overtime 1,425 hours .....kshs. 1,282,500
  - f. Commission at kshs. 0.50 for every bottle sold...(0.50X20,300).....kshs. 10,150
  - g. Unpaid hardship allowance (kshs. 10,000X16 months).....kshs. 320,000
  - h. Unpaid leave days (kshs. 4000X21).....kshs. 84,000
  - i. Certificate of service



j. Costs and interest.

Total kshs. 5,316,650.00

2. The Respondent resisted her claim based on the Memorandum of Reply. It denied the Claimant's cause of action against it and her entitlement to the reliefs sought.
3. After hearing the parties on their respective cases, the Court directed them to file their submissions. They obliged, and their submissions are on record.

#### **The Claimant's case**

4. The Claimant's case was that she was employed by the Respondent as a Sales Manager on September 9, 2019, at a salary of KShs. 120,000 per month and a hardship allowance of KShs. 20,000.
5. She served the Respondent dedicatedly and diligently until 26<sup>th</sup> April, 2021, when the Respondent unilaterally decided to terminate her employment. The termination was both substantively and procedurally unfair. No notice preceded the termination. He was not notified of the Respondent's intention to terminate her employment, nor were there reasons for it. Contrary to the provisions of section 41 of the *Employment Act*, he was not given a chance to defend herself.
6. The termination was without a justifiable cause. It was malicious and capricious. It wasn't valid.
7. Cross-examined by Counsel for the Respondent, the witness testified that her terms and conditions of employment were spelt out in a written contract. The contract didn't provide for a hardship allowance. Her salary was paid by cheque.
8. The contract didn't provide for overtime. However, her claim for overtime is premised on the fact that she worked beyond the contractual work hours at all material times. While in the employment of the Respondent, she didn't claim overtime at any time.
9. Her final day of employment was April 26, 2021. From April 17 to April 26, 2021, she worked in Nakuru County. She was following payments from customers who owed the Respondent for the goods they had purchased on credit. The Respondent's Director was aware of this. In the course, she met with the Respondent's salespersons. She prepared a report and handed it to the Director.
10. The customer, Kisenan Wholesalers, paid Kshs 30,000 through the Respondent's till number, not in cash to her. The allegation that she received cash and failed to remit isn't true.
11. The Respondent computed terminal dues that the Claimant was entitled to in their view. In the computation, the Respondent reduced the total amount by the sum owed to it by one of the customers. This prompted her to decline the cheque that the Respondent prepared for the terminal dues.

#### **The Respondent's Case**

12. Mr. Tanuj Raja, the Respondent's Director, testified on behalf of the Respondent. He adopted the witness statement filed herein as his evidence in chief.
13. The witness stated that the Respondent employed the Claimant as a sales and marketing manager. Her gross monthly salary was Kshs 120,000. She was also entitled to a commission of KShs. 0.50 for every bottle of soft drink sold.
14. The Claimant developed a habit of absconding from duty without any communication. For instance, she absconded from duty between 17<sup>th</sup> April 2021 and 26<sup>th</sup> April 2021.



15. As a sales manager, she was responsible for submitting weekly reports. However, she only submitted four reports in the four months leading up to her termination.
16. She was supposed to follow up on payments for products she had sold on behalf of the Respondent and remit the amounts collected to the Respondent. On various occasions, she failed to follow up on the payments, and on other occasions, she failed to remit full amounts that the Respondent's customers paid. On 26<sup>th</sup> March 2021, she collected from one of the customers a sum of Kshs. 31,500 and only remitted KShs. 20,000.
17. On February 26, 2021, he called the Claimant into his office, informed her of the Respondent's intention to terminate her services, and asked her to make any representations she had regarding the allegations. The representations were insufficient, and as a result, he decided to terminate her employment.
18. While clearing the Respondent's premises, she received a cheque for her April salary along with one month's salary in lieu of notice, delivered within a letter. However, she requested to be paid her salary in cash and indicated that she would return later to collect a cheque for the notice pay. She was paid her salary. However, she never returned to collect the cheque for notice pay.
19. The termination of the Claimant's employment was neither unfair nor unlawful; it was carried out in accordance with the stipulations of the law.
20. Cross-examined by Counsel for the Claimant, the witness asserted that the Claimant's employment was terminated for the reason, among others, that she had become unproductive. Her performance had dwindled.
21. She was always untruthful and careless.
22. While explaining the reasons for her termination, the Claimant was alone without any colleague present.
23. Between 17<sup>th</sup> -26<sup>th</sup> April 2021, she was absent from duty without authority.

### **Analysis and Determination**

24. I have carefully considered the pleadings, evidence and the submissions by the parties, and the following issues emerge for determination;
  - a. Whether the Claimant's employment was fairly terminated.
  - b. Is the Claimant entitled to the reliefs sought?
25. The *Employment Act*, 2007, places various legal burdens on the part of the employer in a dispute regarding termination of an employee's employment, which the employer must discharge if the termination has to be considered fair. Elaborating on this, the Court of Appeal, in the case of Pius Isindu Machafu vs Lavington Security Guards Limited [ 2017] eKLR, stated:

“ There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligation on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/ dismissal [section 43]; prove the reasons are valid and fair [section 45]; prove that the grounds are justified [section 47[5], amongst other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination. The Act also provides for most of the procedures to be followed, thus



obviating reliance on the *Evidence Act* and *Civil Procedure Act*/ Rules. Finally, the remedies for breach set out under section 49 are fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the Preamble;

“.....to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.”

Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.”

26. Undoubtedly, the termination will be considered unfair if the employer fails to meet any of the legal obligations. From the decision mentioned above, it is clear that the employer must fulfil obligations pertaining to procedural and substantive fairness.
27. Section 41 of the Act outlines a mandatory procedure the employer must follow when terminating an employee's employment. The termination will be deemed unfair according to section 45 of the Act if not adhered to. This procedure consists of three key components. First is the notification component, where the employer must inform the affected employee about the intended termination and the reasons behind it. Second, the hearing component requires the employer to provide the employee sufficient time to prepare and present their case regarding the reasons given. Additionally, employees have the right to be accompanied during the hearing by a colleague of their choice or a trade union representative, if applicable. Lastly, the employer is obligated to consider the employee's representations before making a final decision. Failing to consider these representations may render the purpose of the process meaningless. See also *Krenfrieht [E.A] Limited v Benson K. Nguti*[2016]eklr.
28. The Claimant asserted that the termination of her employment was procedurally unfair. She holds this position due to the matters outlined above. The Respondent's witness stated that on 26th April 2021, he invited the Claimant to his office, explained the charges, and allowed her to defend herself. The Respondent didn't present material to demonstrate the invitation and the hearing. Furthermore, the witness admitted that the Claimant was not accompanied by a colleague during the meeting.
29. Not all meetings lead to disciplinary hearings. Therefore, when an employer claims that a disciplinary hearing took place, they must present adequate evidence to show that the meeting was indeed held for that purpose. In this instance, I am not convinced that the evidence from the Respondent's witness sufficiently supports the conclusion that the meeting, if it occurred, was a disciplinary hearing against the Claimant.
30. Not difficult, therefore, to conclude that the termination of the Claimant's employment was procedurally unfair.
31. Section 43 of the *Employment Act* stipulates that, in disputes concerning an employee's termination of employment, the employer is obligated to substantiate the reasons for the termination. Furthermore, in conjunction with this legal responsibility, Section 45 requires the employer to demonstrate that the reasons provided were valid and fair.
32. The Respondent asserted that the Claimant's employment was due to poor performance, untrustworthiness, and unauthorised absenteeism.
33. It is now trite that an employer's assertion that the employee's employment was terminated for the reason of her or his poor performance can only succeed if they can sufficiently establish on a balance of probabilities the existence of certain specific aspects, thus;



- a. Before deciding to note the employee's poor performance, they had a policy or practice in place to measure good performance against poor performance.
  - b. The employee, utilising established mechanisms grounded in policy and practice, was assessed and determined to exhibit subpar performance.
  - c. The employee was notified of their poor performance and called upon to defend a decision to terminate an employee for reasons of poor performance, the employee shall be called, and the reasons for the termination shall be explained to them in the presence of another employee of their choice.
34. I have carefully considered the evidence presented by the Respondent's witness. All that he did was baldly state that the Claimant had become unproductive. The witness didn't assert that the Claimant had specific targets delineated for her to achieve, that there was a mechanism in place that could and was used to assess her performance to ascertain whether or not she was meeting the targets. Further, their performance was found unsatisfactory upon evaluation, using the policy or practice established mechanisms.
35. The Respondent's witness labelled the Claimant untrustworthy. Alleging that she could collect money from the Respondent's customer without remitting the same to the Respondent. In my view, the Respondent was accusing the Claimant of defrauding it. A serious accusation, depicting the Claimant as a criminal. Such an accusation can only be considered valid where cogent evidence is produced to establish it; mere allegations cannot suffice. If indeed there were such incidents of fraud, nothing could have been easier for the Respondent than to obtain documentary evidence from the customer[s] that could demonstrate it. Further than to counterclaim, for the money, as money had and received.
36. In the upshot, I am unconvinced that the Respondent had a valid and fair reason to terminate the Claimant's employment.
37. The Claimant sought gratuity. Time and again, this Court has held that gratuity is a contractual benefit only available to the employee if provided for in their contract or a Collective Agreement, Bargaining Agreement. It is not the equivalent of service pay under section 35 of the *Employment Act* or severance pay under section 40, both of which are statutory benefits. As gratuity was not a benefit specified in her contract, this Court will have no justification to award it to her.
38. The Claimant's employment was terminable by a notice [28 days'] per section 35 of the *Employment Act*. There is no doubt that the notice was not issued, and the Respondent admits her entitlement to notice pay. I grant her one month's salary in lieu of notice.
39. Section 49 [1][c] of the *Employment Act* bestows upon the court the authority to grant compensatory relief for unfair termination of employment. However, it is essential to note that the authority is discretionarily exercised, depending on the circumstances of each case. I have carefully considered the length of service of the Claimant, how the termination was effected, which lacked compliance with the dictates of the law, and the fact that the Claimant didn't in any proven manner contribute to the termination and conclude that she is entitled to the relief, to the extent of six months gross salary.
40. She further claimed a hardship allowance. In my view, this claim appears to have been merely thrown into court. The Claimant did not sufficiently demonstrate the basis for the claim, as it was not a contractual term. It is declined.
41. The Claimant asserted that she worked 1,425 overtime hours and sought compensation. I have carefully examined the pleadings; this relief only appears in the relief section. No factual basis was established for it in the body of the pleadings. Furthermore, no factual basis was provided in the



witness's statement for the remedy. The Claimant didn't present any material demonstrating how she arrived at the hours.

42. The Respondent didn't give evidence to discount the Claimant's claim that she could not proceed for her annual leave. I award the relief as sought.
43. She sought the Commission on the crates sold. This was a specific claim that required specific proof. It was not proven, so it is hereby declined.
44. A certificate of service is a legal entitlement for an employee who has left his or her employment, regardless of the circumstances. The Respondent did not demonstrate that it was issued. It has an obligation under section 51 of the Act to issue it.
45. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
  - i. A declaration that the termination of her employment was procedurally and substantively unfair.
  - ii. Compensation pursuant to section 49[1][c] of the *Employment Act*, six months' gross salary, KShs. 720,000.
  - iii. One month's salary in lieu of notice, KShs. 120,000.
  - iv. Compensation for earned but untaken leave days, KShs. 80,000.
  - v. The Respondent is to issue her a service certificate within 30 days of this Judgment.
  - vi. Costs of the suit
  - vii. Interest at court rates, from the date of this judgment till full payment.

**READ, SIGNED, AND DELIVERED VIRTUALLY IN MOMBASA THIS 8<sup>TH</sup> DAY OF MAY, 2025.**

**OCHARO KEBIRA**

**JUDGE**

