



**Simon v Frodak Services Limited (Cause 367 of 2017)
[2025] KEELRC 1288 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1288 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 367 OF 2017
MA ONYANGO, J
MAY 2, 2025**

BETWEEN

EDWARD MUTSWENJE SIMON CLAIMANT

AND

FRODAK SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claim herein was instituted vide Memorandum of Claim dated 8th December 2017 by the Claimant. It seeks the following orders against the Respondent: -
 - a. A declaration that the termination process as carried out by the Respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law
 - b. Payment of sums of money claimed in the Memorandum of Claim.
 - c. Costs and interests
 - d. Any other relief that the Court may deem fit and just to grant
2. The Claimant averred that he was employed by the Respondent as a casual laborer and that he was unfairly terminated from employment without any justifiable reasons.
3. The Claimant particularized the unlawfulness of the termination of his employment as follows:
 - i. The termination was without any fair valid reason
 - ii. The termination was not in accordance with fair procedure
 - iii. No leave pay was given
 - iv. No one months' salary in lieu of notice was paid



- v. No overtime dues were paid
 - vi. No compensation for unfair termination was paid.
4. The Claimant contended that owing to the unfair and unlawful termination, he is entitled to terminal benefits which he itemized to be:
- i. One month pay in lieu of notice Kshs. 9,105
 - ii. Compensation for unfair termination Kshs. 108,000
 - iii. Unpaid house allowance Kshs 59,400
 - iv. Pro-rata leave Kshs 1,500
 - v. Overtime dues Kshs 292,480.8
 - vi. Service pay/Gratuity Kshs 1,350
 - vii. Accrued leave earned but not taken Kshs. 30,750
- Total Kshs. 502,535
5. In response, the Respondent filed a Reply to the Statement of Claim dated 3rd May 2018. In its defence, the Respondent denied that the Claimant was its employee and averred that its role was to recruit employees for prospective employers at a commission and to offer supervisory role subject to mutual agreement between the principal and agent.
6. The Respondent contended that it was not privy on the on goings at Butali Sugar Mills where the Claimant was seconded to.
7. It is the Respondent's case that since there existed no employment or contractual obligation binding the Claimant and the Respondent, the claim herein is misconceived and unwarranted.
8. The Respondent however stated that if the Claimant was dismissed from employment, it was because he participated in an illegal strike.
9. The Respondent urged the court to strike out the Claimant's case.
10. The suit was heard on 23rd May 2024. The Claimant testified as CW1. He adopted his witness statement filed with his claim as part of his evidence in chief. He also relied on the documents he filed in support of his case as his evidence.
11. The Claimant in his testimony stated that he was engaged on 4th May 2013 as a loader by the Respondent and worked until 2nd May 2017 when his employment was terminated without any notice. He stated that he was never called for a disciplinary hearing and was not issued with a letter of termination. The Claimant contended that he used to report to work from 3am and would leave work at 4pm and would sometimes work for the whole night. He stated that he was not paid overtime.
12. The Claimant denied the allegation made by the Respondent that he had participated in an illegal strike and contended that he was not issued with any letter on allegations of participating in a strike.
13. He therefore prayed to be paid the reliefs as tabulated in his Memorandum of Claim.
14. On cross examination, the Claimant stated that in his claim, he attached a gate pass, NSSF, NHIF and KRA documents which showed that he was an employee of the Respondent. He also stated that from the payroll cash listing filed by the Respondent, the payroll for February 2016 shows that he was



- paid Kshs 90 and Kshs 5,580 for March 2017. He explained that the difference in pay was because the payment was dependent on the work done. The Claimant stated that he was paid Kshs 300 per day which totaled to Kshs 9000 per month. He denied participating in the strike but admitted that he was paid some money at Kakamega Labour Office by the Respondent after he left employment.
15. On re-examination, the Claimant stated that at the labour office, he was not paid overtime, leave dues and house allowance.
 16. The Respondent on its part called George Onyango its Operations Manager who testified as RW1 on 11th June 2024. He adopted his witness statement filed on 27th April 2022. He also adopted and relied on the documents filed by the Respondent in support of its case.
 17. RW1 in his evidence stated that the Claimant was employed as a loader, was piece rated and was remunerated according to the tonnage loaded. He stated that the Claimant was paid Kshs 17 per tonnage and that payments were made fortnightly. RW1 maintained that the Claimant was paid all his dues as per the CBA and prayed for the dismissal of the Claimant's suit.
 18. During cross examination, RW1 confirmed that the Claimant was the Respondent's employee. He stated that the Claimant was not issued with a notice to show cause before he was terminated from employment. He maintained that the Claimant was paid his dues and that he was issued with a Certificate of Service.
 19. At the close of the hearing, parties filed written submissions. The Claimant's submissions are dated 18th September 2024 while the Respondent's submissions are dated 6th October 2024.
 20. In his submissions, the Claimant asserted that he testified that he was sent away from work without being told the reason and without being accorded any hearing which evidence was not rebutted by the Respondent. The Claimant submitted that the dismissal letter dated 10th May 2017 attached to the Respondent's list of documents indicated that the disciplinary hearing was held on 8th May 2017 while the purported invitation letter to the disciplinary hearing indicated that the disciplinary hearing was on 9th May 2017. According to the Claimant, the purported invitation to attend the disciplinary hearing has one line containing only the date and lacks the requirements stipulated under section 41 of the *Employment Act*.
 21. The Claimant urged the court to make a finding that he had discharged the burden of proving unfair termination of his employment by the Respondent
 22. On its part, the Respondent identified the issues for determination to be as follows:
 - i. Whether the Claimant was unlawfully and unfairly terminated
 - ii. Whether the Claimant is entitled to the reliefs sought?
 23. On the first issue, the Respondent submitted that the Claimant through his witness statement confirmed that in a show of solidarity with a deceased loader, he organized and participated in an illegal, violent and pre-meditated strike which led to the Respondent losing its business with Butali Sugar Mills Company.
 24. The Respondent averred that the Claimant was not being truthful when he testified contrary to his statement that he did not participate in the strike yet while in cross examination, he admitted to placing himself at Butali Sugar Mills premises on the date and time of the strike, despite having been assigned a different work station.



25. It is the Respondent's submission that the Claimant was summoned to attend a disciplinary meeting with requisite explanation through a notice to show cause. That the Claimant never heeded to any of the Respondent's summoning.
26. The Respondent submitted that the sanction of dismissal imposed upon the Claimant was fair after the Claimant participated in the illegal strike.
27. The Respondent thus contended that the Claimant had not discharged the burden of proving that the termination was unlawful.
28. On the issue whether the Claimant is entitled to the reliefs he sought in his Memorandum of Claim, the Respondent submitted that the Claimant acknowledged signing all the payroll cash listing confirming receipt of all that was due to him and did not at any point challenge the contents of the same or allege coercion into signing the same.
29. The Respondent urged the court to make a finding that nothing is owed to Claimant as he was paid all his dues. In this regard, the Respondent prayed for the dismissal of the Claimant's suit with costs.

Determination

30. Upon considering the pleadings herein, the evidence of the parties, the submissions and the authorities cited, I find that the issues for determination are: -
 - i. Whether the Claimant's employment was unfairly terminated
 - ii. Whether the reliefs sought should issued
31. Before I delve into the issues falling for the court's determination, it is imperative that I address a pertinent issue that arose in the pleadings as to the relationship between the Claimant and that Respondent. The Respondent in its reply to the Statement of Claim denied that the Claimant was its employee but during the course of these proceedings and particularly in the evidence of RW1 it became clear that the Respondent had engaged the Claimant as a loader during the period it is alleged that he partook in an illegal strike. Further, in the Respondent's list of documents dated 20th April 2021, the Respondent attached the Claimant's employment contracts as well as the payroll listings showing that the Claimant was indeed engaged by the Respondent.
32. It is therefore clear that the Claimant was the Respondent's employee.

Whether the Claimant's employment was unfairly terminated

33. In his undated witness statement filed with his claim which the Claimant adopted as part of his evidence, he states that "I remember on 1st April, 2017 I reported to work at 4 am. I worked as a loader. That day while at work there was a strike, one of the loaders was knocked down by the company tractor the previous day and died so we the loaders were striking in solidarity with the deceased loader.

While at strike the company called the police officer who chased us from the company premises. After that our chairman by the name Mukweyi called me informing there was no work."

34. At the hearing the Claimant on the one hand adopted the averments in his witness statement as part of his evidence and on the other hand denied that he participated in any strike or that there was any strike at all. This creates doubt as to the truthfulness of his evidence. The court is inclined to believe



what is stated in the witness statement which was prepared at the time of filing suit close to the date of occurrence of the events that are the subject of this suit.

35. Section 80 of the *Labour Relations Act* provides for consequences of participating in an unprotected strike as follows:

80. Strike or lock-out not in compliance with this Act.

- (1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and—
 - (a) is liable to disciplinary action; and
 - (b) is not entitled to any payment or any other benefit under the *Employment Act* during the period the employee participated in the strike.
- (2) A person who refuses to take part or to continue to take part in any strike or lock-out that is not in compliance with this Act may not be—
 - (a) expelled from any trade union, employers organisation or other body or deprived of any right or benefit as a result of that refusal; or
 - (b) placed under any disability or disadvantaged, compared to other members or the trade union, employers' organisation or other body as a result of that refusal.
- (3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.

36. From the averments in the witness statement, the Claimant admittedly participated in the strike in solidarity with the deceased loader. Obviously, the strike was not called in accordance with the provisions of sections 76 to 79 of the *Labour Relations Act* which provide for what constitutes a protected strike and what does not.

37. The Claimant having participated in the unprotected strike, he was liable to disciplinary action. The Respondent therefore had valid reason for terminating the employment of the Claimant.

38. Even though the Respondent had valid reason to terminate the Claimant's employment, it was obliged to comply with section 41 of the *Employment Act* in relation to the procedure for termination. The Respondent's witness stated that following the strike there was a meeting between representatives of Butali Sugar, representatives of the workers and representatives of the Respondent. That the representatives of the workers walked out of the meeting in defiance. That the issue was thereafter reported to the Kakamega County Labour Officer who after hearing the parties, came to the conclusion that the strike was unmerited, illegal. That the employees together with their representatives again walked out of the meeting at the County Labour Office in defiance.

39. It was the Respondent's case that because of the strike the management of Butali Sugar incurred heavy losses and declined to allow the employees who participated in the strike to work in their premises. That this led to the termination of the employment of the Claimant together with all the other striking employees.

40. From the foregoing it is the finding of the court that in the prevailing circumstances and taking into account the number of employees involved which was over 300, it was not possible to expect the Respondent to strictly comply with section 41 of the *Employment Act*. The fact that Butali Sugar



declined to admit the employees back to work left the Respondent with no option other than to terminate the employment of all the employees including the Claimant.

41. In the circumstances and noting that the Claimant participated in an unprotected strike, it is my finding that the Claimant has not proved that the Respondent unfairly terminated his employment.

Whether the Claimant is entitled to the prayers sought in the Memorandum of Claim

42. In his Memorandum of Claim, the Claimant prayed for a declaration that the termination process as carried out by the Respondent is unlawful and payment of terminal benefits as enumerated in paragraph 4 of this judgment. The reliefs will be addressed in separate heads as hereunder:

- i. A declaration that the termination process as carried out by the Respondent is unlawful and that during his employment with the Respondent, he was not remunerated as required by law
Having found that the termination of the Claimant's employment was not unfair and/or unlawful he is not entitled to this prayer.

- ii. One month pay in lieu of notice

RW1 testified that the Claimants were paid one months' salary in lieu of notice based on 50% of the last pay. The correct payment should have been one month's salary as the Claimant was not a casual, his contract having been for 3 months renewable and was indeed renewed severally. He is therefore entitled to Kshs. 296.20 x 30 being Kshs. 8,886. I award him the same.

- iii. Compensation for unfair termination

Having found that the termination of the Claimant's employment was not unfair he is not entitled to compensation.

- iv. Unpaid house allowance

The Claimant was paid on the basis of the quantity of work done. His contract states that he was paid Kshs. 17 per tonne of cane loaded. The pay was therefore inclusive of house allowance. He is not entitled to house allowance.

- v. Pro-rata leave

The Claimant did not state the period for which the prorata leave is sought. The court however notes that there is no evidence on record that the Claimant ever went on paid annual leave or was ever paid in lieu thereof. The Claim for pro rata leave was however never proved.

- vi. Overtime

In view of the fact that the Claimant was paid per tonnage he is not entitled to overtime as his pay was not dependent on the time worked but on the quantity of work done.

- vii. Service pay/Gratuity

The prayer for service pay fails as there is evidence on record showing that the Claimant was a registered member of the National Social Security Fund to which monthly contributions was made by the Respondent. The court however notes from the evidence by RW1 that the Respondent on its own volition decided to pay the service pay none the less. The court directs that the same be adjusted to be based on the rate of Kshs. 296.20 per day for 15 days amounting to Kshs. 4,443 per year worked. Since the Claimant worked from 1st June, 2013 to 1st May, 2017, a period of 4 years, he is entitled to (4443x4) Kshs. 17,772. I award him the same. The



Respondent is however to deduct the amount already paid to the Claimant in respect of service pay.

viii. Accrued leave earned but not taken

As stated above there is no evidence on record that the Claimant ever went on paid annual leave or was ever paid in lieu thereof. From the evidence adduced by the Respondent the Claimant worked for the Respondent from 1st June, 2013 to 1st May, 2017, a period of 4 years. He is entitled to annual leave for the period in the absence of proof that he was either given leave or paid in lieu. I award him 84 days based on 1.75 days per month provided for in section 28(1) of the *Employment Act*. Since the Claimant was on piece rate I base this pay on the minimum daily wage applicable for a loader at the time the Claimant left employment in May, 2017 which was (296.20 x 84) Kshs. 24,880.80.

43. Consequently, judgment is entered for the Claimant in the following terms:

- i. Pay in lieu of notice Kshs. 8,886
- ii. Service pay/Gratuity Kshs. 17,772
- iii. Accrued leave earned but not taken Kshs. 24,880.80.
- iv. The Respondent is directed to issue the Claimant with a certificate of service within 30 days if the same has not yet been issued to him.
- v. The Respondent shall meet the Claimant's costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 2ND DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

