



**Ahuta v Associated Construction Co (K) Ltd (Cause 1311 of 2018)
[2025] KEELRC 1373 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1373 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1311 OF 2018
NJ ABUODHA, J
MAY 5, 2025**

BETWEEN

MAXIMILLAH N. M. AHUTA CLAIMANT

AND

ASSOCIATED CONSTRUCTION CO (K) LTD RESPONDENT

JUDGMENT

1. The Claimant through a Memorandum of Claim dated 25th July, 2018 and pleaded inter alia as follows:
 - a. The Claimant averred that she was employed by the Respondent as a laboratory technician pursuant to a letter of appointment dated 12th March 2017 with effect from the 12th March 2017 for a period of 3 years under a contract No. RWC 367 for Todonyang – Loktaung- Kalakol Road Project at net salary of Kshs 80,000/= per month together with entitlements as stipulated in the letter of appointment.
 - b. The Claimant averred that it was a term of the employment contract that she would work on probation for three months and thereafter be confirmed to regular employee. That she completed her probation period and continued with her duties with all due diligence as a laboratory technician.
 - c. The Claimant averred that her salary was subsequently reduced gradually at a reducing rate from what was agreed in the employment contract to a lower figure without any justifiable explanation.
 - d. The Claimant averred that she raised a complaint to the office concerned demanding to know reasons why she was being paid less than what she was entitled to under employment contract but the defendant ignored and continued to pay her less at the reducing rate.



- e. The Claimant averred that without any tangible or justifiable reasons the Respondent to terminate his service without any warning. That the dismissal from employment was unlawful and illegal as the same resulted after she complained over the reduction of her monthly salary.
2. The Claimant in the upshot prayed for the following against the Respondent: -
 - i. One-month salary in lieu of Notice-Kshs 80,000/=
 - ii. Unlawful and illegal deductions-Kshs 168,163/=
 - iii. Unlawful termination of employment for 24 months
 3. The Respondent did not file its Response or participate in this claim hence it was undefended.

Evidence

2. The Claimant called one witness, the Claimant (CW1) herein who testified in court on the 20th November 2024. CW1 adopted her witness statement together with the pleadings filed in court dated 25th July 2018 as her evidence in chief.
3. CW1 testified that her monthly salary was Kshs 80,000/= which she noticed was reducing without a reason. That she was terminated on 24/3 /2028 and she was not given any notices.
4. CW1 testified that the reason she was given was that she had a reluctant approach to work. That she was not refunded the deductions and she was not paid terminal dues. That she was not given a certificate of service.

Claimants' Submissions

4. The Claimants' Advocates Eric Ntabo & Co. Advocates filed written submissions dated 20th January 2025. On the issue of whether the Claimant's termination was lawful and procedural, counsel submitted that the Respondent failed to adhere to due process as provided by law during termination of the Claimant's employment.
5. On the issue of whether the Claimant was an employee of the Respondent counsel submitted that the Claimant was the employee of the Respondent and produced as exhibit the letter of employment dated 12th March 2017 which the Claimant had signed after she accepted the terms and conditions of service thereon. That further the Respondent through a letter dated 5th December, 2017 gave the Claimant additional duties and responsibilities further to the ones agreed upon in the letter of employment.
6. Counsel submitted that it was evident that the Claimant had been employed by the Respondent from 12th March,2017 till 24th March, 2018 when she was given a compulsory leave. That the court should recognize the Claimant as employee of the Respondent and due procedure ought to have been followed during her termination.
7. On the issue of whether due process was followed counsel submitted that the Claimant testified that she reported to work as usual on 24th March 2018 and at the end of the day the Respondent handed a termination letter compelling the Claimant to proceed on compulsory leave and it also acted as one month's notice prior to termination.
8. Counsel submitted that the letter indicated the reason for compulsory leave was reluctant approach to work but did not give the reasons for issuing a termination and the reasons were neither communicated to the Claimant. That the area was already a hardship area therefore if indeed she was reluctant to work she would have never agreed to the offer in the first place.



9. Counsel submitted that the Claimant dutifully performed her responsibilities despite the additional responsibilities and unexplained deductions. That the Claimant was not served with any warning notices concerning her performance at work as well as show cause letter to allow her respond to any allegations regarding her work output.
10. Counsel submitted on section 41 of the *Employment Act* on the mandatory procedural requirements which must be adhered to by an employer contemplating termination. That the Respondent ought to have informed the Claimant of the reasons for her proposed termination and allow her an opportunity to respond which includes a hearing or meeting to defend herself against the proposed dismissal. That the Respondent terminated the Claimant without following the due process.
11. Counsel relied on the case of Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR and submitted that apart from issuing notice according to contract of employment an employer is duty bound to explain to an employee in the presence of another employee or union official in a language the employee understands the reason the employer is considering termination. The employee is supposed to be heard and make his/her representations.
12. Counsel submitted that Section 43 of the *Employment Act* places the burden on the employer to prove that the termination was fair. That the Respondent has never entered appearance and put in its defence and the court may treat the allegations of the Plaintiff as admitted and a judgment be granted in their favor.
13. Counsel submitted that section 41 of the *Employment Act* provides for the right of employee to be heard even on cases of summary dismissal. Counsel relied on the case of Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR and submitted on the requirement for procedural fairness.
14. On the issue of whether the Claimant was unfairly terminated, counsel submitted that the Claimant's dismissal was without a valid or justifiable reason. That the Respondent failed to provide any evidence of misconduct, poor performance or operational reasons for the termination.
15. Counsel relied on section 45(1) and (2) of the *Employment Act* that no employer shall terminate the employment of an employee unfairly and failure to prove reason for the termination is valid and fair procedure amounts to unfair termination. Counsel relied on the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR on the requirement for both procedural and substantive fairness.
16. On the issue of whether the Claimant is entitled to amounts claimed, counsel submitted on the prayers as sought in the statement of claim of one-month salary notice of Kshs 80,000/=, unlawful and illegal deduction of Kshs 168,163/= and unlawful termination of employment for 24 months. Counsel relied on section 35(1)(c) on requirement of notice or payment in lieu and section 49 on remedies for wrongful dismissal. That section 19 of the act prohibits any unauthorized deductions from an employee's salary.

Determination.

17. The court has reviewed and considered the pleadings, testimony and submissions by the Claimant's counsel. The court has also considered authorities relied on by Counsel. The matter was undefended however this does not mean that the court should not interrogate the Claimant's evidence on merit.
18. On Whether the Claimant was unfairly terminated, It is the Claimant's case that the Respondent sent her on compulsory leave on allegation that she had a reluctant approach to her assigned duties and was subsequently summarily dismissed from her employment with no reason given.



19. The Respondent through the letter dated 24/3/2018 appeared to send the Claimant on compulsory leave as well as issue notice for termination concurrently. The reason thereon was that the Claimant's reluctant approach to her duties. The same was to serve the Claimant with one month notice as per condition 18b and c of the employment contract with the notice taking effect on date of the letter.
20. It is now a well-established principle that for termination to pass fairness test there must be both substantive and procedural fairness reference being made to the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR among others.
21. The court is also guided by the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:

“ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
22. On the substantive test the employer must give a fair and valid reason as per section 43 of the Employment Act. Section 45 of the Employment is clear that where there is no valid and fair reason such termination is unfair. Section 44 of the Employment Act, 2007 stipulates when summary dismissal can occur and particularly 44(4) lists actions that may amount to gross misconduct including insubordination and poor performance.
23. Courts have spoken severally on the issue of poor performance while stating that merely citing poor performance is not enough; the employer must show that they took steps to help the employee meet expectations. In this case nothing shows that the Claimant performed poorly and if she was placed on any PIP and failed to perform as required. To this end the Respondent failed to prove that the Claimant was aware of performance standards, efforts were made to support improvement, and time was given for the employee to make necessary improvements.
24. In the case of Periosteum Bheekhoo v. Linksoft Group [2015] eKLR: Cause No.1232 of 2014 at Nairobi it was held that in cases of alleged poor performance leading to termination, the employer must prove that the employee was aware of performance standards, efforts were made to support improvement, and time was given for the employee to make necessary improvements.
25. In this case, if the Respondent relied on the reason for compulsory leave of “reduced productivity” to amount to poor performance, then proper procedure should have been followed as held in the above case of Pius Machafu.
26. Regarding procedural fairness section 41 of the Employment Act is the guiding principle which provides for notification and hearing before termination on grounds of misconduct which provides that the employee to be explained the reason for termination in language he/she understands and consider the representations by such an employee who should have an employee of his choice.
27. It is the Claimant's case that she was neither issued with any notices nor taken through a disciplinary hearing. There were no warning letters given on the said issue to the Claimant. This court also notes that an employer cannot send an employee on compulsory leave and also suggest that the same act as a notice for termination without taking the employee through the mandatory process under Section 41 of the Employment Act.



28. The Court finds that the Respondent was enjoined in mandatory terms to comply with the provisions of section 41 of the Act and therefore arrives at a finding that the Claimant’s dismissal was unlawful both substantively and procedurally.

Whether the Claimant is entitled to reliefs sought.

29. Having established that the Claimant was unfairly terminated the court proceeds to award her damages for unlawful termination as per section 49 of the *Employment Act*. When making an award under section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. This court also takes in to account the considerations under section 49(4) of the Act and notes that the Claimant worked for the Respondent for one year and the nature of the termination and awards her three months’ salary as compensation for unlawful termination.

30. On the prayer for notice pay, the Claimant confirmed that the same was not paid as per her termination letter as she was advised to proceed on compulsory leave as a notice period which is unheard of. The court awards the Claimant the said notice pay as per section 35 and 36 of the Act.

31. On the prayer for unlawful and illegal deductions, the court notes that the Claimant’s salary was being deducted with no reason given as to why. The Claimant provided email correspondence as well as a letter indicating complaint on the same which was not acted upon. This was against section 19 of the *Employment Act* which prohibits such deductions. The Court therefore orders refund of the said deductions as prayed.

32. Certificate of service to issue as of right under section 51 of the *Employment Act*.

33. In conclusion the Claimant’s claim is hereby allowed with costs as follows: -

- i. Notice Pay.....Kshs 80,000/=.
 - ii. Unlawful deductions.....Kshs168,163/=.
 - iii. 3 months compensation for unlawful termination of EmploymentKshs. 240,000/=.
 - iv. Certificate of Service
 - v. Costs and Interests of the suit
- TOTAL.....KSHS 488,163/=

34. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2025

DELIVERED VIRTUALLY THIS 5TH DAY OF MAY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

