



Kariuki v New Palea Wholesalers Limited (Employment and Labour Relations Cause E017 of 2023) [2025] KEELRC 1922 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1922 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E017 OF 2023**

SC RUTTO, J

JUNE 27, 2025

BETWEEN

MICHAEL GACU KARIUKI CLAIMANT

AND

NEW PALEA WHOLESALERS LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim which was amended on 20th November 2024, the Claimant avers that he was employed by the Respondent as a General Manager at its conglomerate transport business from April 2013.
2. According to the Claimant, he discharged his responsibilities religiously without any complaint ever being raised against him.
3. The Claimant avers that on or around February 2017, he was subjected to great humiliation on account of allegations that he was involved in the theft of the company's motor vehicle registration number KCF 022F. He wrote a resignation letter as he felt the working conditions were not conducive and his work relationship with the Respondent had deteriorated terribly.
4. The Claimant avers that the Respondent later sought him to return to his workplace. He accepted and his salary was negotiated to a tune of Kshs 100,000/= and an allowance of Kshs 15,000/=. It is the Claimant's contention that the Respondent stopped paying him the allowance in 2021 despite asking for the same.
5. It is the Claimant's case that on 28th May 2021, the Respondent asked him on phone to vacate his place of work immediately for reasons he was not privy to. That if he failed to honour the same, the Respondent would mobilize the drivers and mechanics to chase him out of the premises forcefully. Fearing for his life, he left the premises immediately, leaving behind his belongings to avoid getting hurt.



6. The Claimant avers that on 15th June, 2021, he was served with a Notice to Show Cause but was not made aware of the reasons why he was forcefully evicted and threatened by the Respondent.
7. It is the Claimant's contention that he was never given a chance to explain himself in a fair and public hearing.
8. It is against this background that the Claimant seeks the following reliefs against the Respondent:
 - a. A declaration that the Respondent's actions of unilaterally terminating the Claimants' employment was unfair and lawful.
 - b. An order that the Respondent do issue the claimant with the benefits payable upon termination of his employment.
 - c. An order that the respondent do pay the Claimant;
 - i. His full salary arrears of his salary for the month of May, 2021 being Kshs100 000.
 - ii. Salary in lieu of notice Kshs 300 000
 - iii. All statutory deductions accruing for the 8 years of employment, unpaid leave both travelling and telephone allowances from the time when he stopped paying the Claimant the same as calculated.
 - a. A sum of Kshs 300 000= Kshs.300,000
 - b. Monthly statutory deductions NHIF, NSSF= Kh218.880
 - c. Statutory paid annual leave days =Kshs 560 000
 - d. Telephone and travelling allowance =Kshs.552,000

Total - Kshs.1,630,880
 - iv. Severance pay on account of work done for 8 years calculated as follows 3,333/-per day for 15days=49,995/-annually 8 years Kshs.399,960.
 - v. An order directing the Respondent to pay to the Claimant General damages for unfair termination.
 - vi. Costs of this cause
 - vii. Interest on all monetary payments and at courts rates.
 - viii. The Claimant prays for any other relief[s] that this Honourable court may deem fit and in the interests of justice to grant.
9. The Respondent filed a Statement of Response dated 17th February 2023 in opposition to the Claim. In its Response, the Respondent has denied the Claimant's assertions that he performed his duties religiously without complaints from his employer. The Respondent further avers that contrary to the Claimant's assertions, his time in employment was marred by numerous complaints arising from his incompetence and inability to work or cooperate with his fellow employees, juniors and supervisors, as well as his constant absenteeism from duty without permission.
10. The Respondent further avers that it is the Claimant who sought to return to work after his resignation and the Respondent allowed it on condition that the Claimant would perform his duties diligently and would cooperate with his supervisors and fellow workers but which undertaking he failed to abide by.



11. Putting the Claimant to strict proof, the Respondent denies withholding the Claimant's dues.
12. According to the Respondent, it did not terminate the Claimant's employment but rather, he is the one who absconded duty when he was called upon to tender his reasons for absconding duty.
13. The Respondent has further averred that while still in employment, the Claimant created irreconcilable differences with his colleagues due to the unscrupulous manner in which he went about his duties and as a consequence, all the drivers who were under his immediate supervision signed a petition expressing their rejection of the Claimant as their General Manger and even declined to work on that day.
14. On the basis of the foregoing, the Respondent prays that the Claimant's suit be dismissed with costs.
15. In his Reply to the Statement of Response, the Claimant has denied the Respondents' assertions in the Statement of Response and reiterated his averments in the Statement of Claim. As such, the Claimant prays that the Statement of Response be dismissed with costs and judgment entered in his favour as prayed in the Statement of Claim.
16. During the hearing on 5th March 2025, both parties called oral evidence.

Claimant's Case

17. The Claimant who testified in support of his case, sought to adopt his witness statement as well as the list and bundle of documents filed alongside his Memorandum of Claim to constitute his evidence in chief.
18. It was the Claimant's evidence that throughout his employment, he had no disciplinary case against him or warning as he strictly served in accordance with the Company's policies and procedures.
19. That due to the nature of his work, he had to attend to gory accidents involving the company's vehicles, and as such, he risked his life travelling at night to different parts of the country with no extra pay for that risk.
20. The Claimant averred that sometimes in 2016, while he was attending to the company's bus registration number KBB 164W, he slipped and fell at the door steps and as a result broke his ribs, which necessitated him to be taken to Guru Nanak Hospital, where he spent the sum of Kshs. 350,000/= . That despite the ugly accident and bad injury, the company did not take care of the hospital bill and neither did they reimburse him the money spent.
21. The Claimant further averred that for the 8 years he was in employment, the Respondent never submitted any statutory deductions. That further, he never went on leave during the entire period except for two months.
22. The Claimant further stated that on 15th June 2021, the Respondent, through the Human Resources, addressed a Notice to Show Cause to him after forcefully evicting him from his workplace and threatening his life. In the Claimant's view, this was malicious.
23. According to the Claimant, the Respondent has caused him great mental anguish and emotional distress because no explanation has been given for his termination, even though he greatly served the company and helped it grow in leaps and bounds under his management.
24. The Claimant added that when he joined the Respondent company, it had 11 buses and 45 trucks. This increased to a fleet of 160 buses and about 280 units of trucks. The Claimant attributed this growth to his leadership and management.



Respondent's Case

25. The Respondent called oral evidence through its Director, Mr. Patrick Njiru, who testified as RW1. Similarly, he adopted his witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute his evidence in chief.
26. RW1 told the Court that upon employment, the Claimant was deployed to work under Mapping Trading Company Limited, a sister company to the Respondent herein, as the General Manager in charge of transportation and the immediate supervisor to all the drivers who worked for the Respondent.
27. RW1 averred that sometime in 2021, the Claimant, without permission and without notification to the Respondent or any of his immediate bosses, absconded duty and declined to show up at work. That the Claimant was served with a letter dated the 14th of June 2021, to show cause why disciplinary measures should not be taken against him for failing to turn up at work.
28. Instead of the Claimant responding to the said show cause letter and explaining why he was absent from work without permission, he ignored the same and he has since then never returned to work.
29. According to RW1, the Claimant terminated his own employment by absconding duty and abandoning his employment without any notification and/or communication to his employer and he cannot now turn around and blame the Respondent for the same.
30. In RW1's view, the Respondent is a stranger to the allegations of any work-related accident involving the Claimant as contrary to Section 21 of the *Work Injury Benefits Act*, the Respondent was never informed of any such accident for its further action.
31. RW1 further contended that in any case and even if the said accident occurred sometime in 2016 as alleged by the Claimant, no competent claim can arise therein as the same is time-barred due to his own indolence.
32. RW1 further averred that throughout the period that the Claimant was in the Respondent's employment, it duly remitted all statutory deductions as required.
33. RW1 was categorical that at no point has he ever called to threaten and/or forcefully evict the Claimant from his employment as alleged.

Submissions

34. The Claimant submitted that he was not issued with any notice prior to termination or given a valid reason for his termination. That further, no disciplinary hearing was held. The Claimant further posited that it was not until 14th June 2021 that he was issued with a Notice to Show Cause after he had already been forcefully removed from his place of work.
35. Citing the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the Claimant posited that his termination was not only unfair, but malicious.
36. On the Respondent's part, it was submitted that the Claimant did not in any way provide evidence that his employment was terminated. In support of this position, reliance was placed on the case of *David Moshi Inganga v Association of Gaming Operators - Kenya [AGOK]* [2021] eKLR.
37. It was the Respondent's position that the evidence is overwhelming that it is the Claimant who absconded duty and absented himself from work without leave.



38. Referencing the case of Felix Muchemi Thirima v Kenya Pipeline Company Limited [2020] eKLR, the Respondent further submitted that at all material times, it had a valid reason for terminating the Claimant's employment as he absconded duty and/or absented himself without any notice and/or communication to his employer and for all intents and purposes deserted his duties.
39. It was the Respondent's further submission that to date, the Claimant has never responded to his employer's queries or answered the Notice to Show Cause issued against him and as such, there is no basis upon which he can claim unfair termination of his employment.

Analysis and Determination

40. Flowing from the pleadings, the evidentiary material on record, and the rival submissions, the Court singles out the following issues for determination:
- i. Whether the Claimant absconded duty or was unfairly terminated from employment;
 - ii. Is the Claimant entitled to the reliefs sought?

Abscondment of duty or unfair termination?

41. Both parties have taken different positions with regards to this issue. On his part, the Claimant has stated that on 28th May 2021 at 8:30 am, RW1 called him on phone and asked him to vacate his place of work, failure to which he would mobilise the drivers and mechanics to chase him out of the premises forcefully. That it is on this basis that he hurriedly left his place of work as he feared for his life.
42. This position has been disputed by the Respondent, who contends that the Claimant was not terminated from employment and that he is the one who absconded work without permission from his immediate supervisors hence he was issued with a Notice to Show Cause why disciplinary action should not be taken against him on that account.
43. The Respondent has further averred that while in employment, the Claimant created irreconcilable differences due to the unscrupulous manner in which he went about his duties and responsibilities and consequently, all the drivers under his immediate supervision signed a petition expressing their rejection of the Claimant as their General Manager and even declined to work on that day.
44. Both parties exhibited a copy of a petition bearing the names of drivers and mechanics who had allegedly rejected the Claimant as their General Manager. Notably, the said petition does not indicate the date it was signed, hence it is not possible for the Court to decipher its bearing on the employment relationship between the Claimant and the Respondent.
45. What is apparent from the record is that the Claimant was issued with a Notice to Show Cause dated 14th June 2021, in which it was alleged that he had absconded duty for the second day as at the date of that letter. Essentially, the Claimant was being cited for absconding duty from 13th June 2021 or thereabout.
46. The Claimant has admitted that he received the Notice to Show Cause dated 14th June 2021, citing him for absenteeism from work. Cross-examined, the Claimant stated that he did not tender his response to the same.
47. As the Claimant has stated that he left his work following the threats issued to him by RW1, it was reasonably expected that, upon being issued with the Notice to Show Cause, he would seize the opportunity and set the record straight by explaining the real reason for his absence from work. Indeed,



if the Claimant's version of events is to be believed, why didn't he respond to the Notice to Show Cause indicating his reasons for being away from work?

48. From the record, there is no letter terminating the Claimant's employment following the issuance of the Notice of Show Cause. Seemingly, things went quiet from there until the institution of this suit.
49. Pursuant to Section 47[5] of the *Employment Act*, the employee bears the burden of proving that an unfair termination or wrongful dismissal has occurred. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal.
50. The Court of Appeal considered the import of Section 47[5] aforesaid in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, and had this to say: -

“So that, the appellant[employee] in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 [1]: "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

51. In view of the foregoing, it goes without saying that the Claimant herein was required to prove in the first instance that he had been terminated from employment in order for the Respondent to be required to prove the reason for the termination and that such reason was fair and valid within the meaning of Section 45 of the *Employment Act*.
52. All things considered, the Court finds that the Claimant herein has failed to prove that he was terminated from employment.
53. Having found as such, the fairness and lawfulness of the termination of employment does not arise in this case.
54. I now turn to consider whether the Claimant is entitled to any of the reliefs sought.

Reliefs?

Salary for days worked in May 2021

55. The Claimant has sought to be paid salary for the month of May 2021. As there is no evidence from the Respondent's end that it duly remitted the Claimant's salary for the month of May 2021, the claim under this head succeeds.

Leave pay

56. With respect to the claim for leave, the Respondent failed to produce the Claimant's leave records despite its statutory obligations under Section 74 [1] [f] of the *Employment Act*. Consequently, this claim succeeds but in light of Section 28[4] of the *Employment Act*, the leave period shall be limited to 18 months prior to the Claimant leaving employment.

Notice pay and compensatory damages

57. As there has been no finding of unfair termination, the claim for notice pay and general damages for unfair termination cannot be sustained.



Telephone and travelling allowance

58. The claim for telephone and travelling allowance is similarly declined as the Claimant has not laid down a basis for its award. In this regard, the Claimant did not prove that the same was contractually agreed upon.

Severance pay

59. The claim for severance pay is declined as the same is only payable to an employee where termination from employment is pursuant to redundancy, which was not the case herein.

Statutory deductions

60. The claim for statutory deductions similarly collapses as the Respondent exhibited statements from the National Social Security Fund and the National Health Insurance Fund as proof that it duly made the remittances to the relevant statutory bodies. In any event, the said deductions being statutory in nature, cannot be awarded to the Claimant even where the Court finds that there was a default by the employer in making the remittances. In such a case, the Court will order that the same be remitted to the relevant statutory bodies.

Orders

61. In the final analysis, the Court disallows the Claimant's claim for unfair termination and only awards him unpaid salary for the month of May and unpaid leave, as follows:

- a. Unpaid salary for May 2021, being Kshs. 100,000.00
- b. Unpaid leave for 18 months being Kshs. 105,000.00
- c. The total award is Kshs. 205,000.00.
- d. Interest shall apply on the amount in [c] at court rates from the date of Judgment until payment in full.

62. As the Claim herein has substantially failed, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2025.

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Nekesa instructed by Mr. Omari

For the Respondent Mr. Bulowa

Court Assistant Millicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article



159[2][d] of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act* [Chapter 21 of the Laws of Kenya] which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

