



**Omolo v Cobra Security Company Limited (Employment and Labour Relations Cause 28 of 2015) [2025] KEELRC 1923 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1923 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 28 OF 2015**

**K OCHARO, J  
JUNE 26, 2025**

**BETWEEN**

**KENNEDY OTIENO OMOLO ..... CLAIMANT**

**AND**

**COBRA SECURITY COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through a statement of Claim dated the 31<sup>st</sup> December 2015, the Claimant sued the Respondent seeking the following reliefs:
    - a. A declaration that the Respondent’s dismissal of the Claimant from his employment was unlawful, unfair and hence null and void.
    - b. The Respondent be ordered to pay the Claimant the following:
      - I. Unpaid salary for the month of October,2014 [13 days], KShs. 9,792.
      - II. Notice pay, KShs. 9,792.
      - III. Salary underpayments, KShs. 13,960.
      - IV. Unpaid overtime for a total of 576 hours worked including public holidays and rest days per week worked, KShs. 35, 251.20
      - V. Damages for unfair dismissal, equivalent of twelve [12] months gross salary, the sum, KShs. 117, 504.
- Total .....KShs. 196,091



- c. An order recommending to the Director of Public Prosecutions to commence investigations under section 51[1] of the *Employment Act* with a view to prosecuting the directors of the Respondent for any offence committed.
  - d. An order directing the Respondent to issue the Claimant with a Certificate of Service.
  - e. Interest at court rates on [b] above from the date of filing the claim.
  - f. Costs of this suit.
  - g. Such other or further relief as this Honourable Court may deem just to grant.
2. Upon being served with the summons to appear, the Respondent entered an appearance on 28th January 2015 and filed his Statement of Defence to the memorandum of claim on 24th February 2015. In its response, the Respondent denied the Claimant's cause of action and his entitlement to the reliefs sought.
  3. At the close of pleadings, the matter got destined for hearing and was heard on merit. After the parties testified on their respective cases, the Court directed them to file submissions. The submissions have been filed.

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

4. The Claimant stated that she was employed by the Respondent as a security guard on the 21<sup>st</sup> October 2014.
5. On 20th May 2014, the Respondent unlawfully and unfairly terminated his services. The termination was carried out without complying with the provisions of Sections 41 and 45[5(a)] of the *Employment Act*. He was not subjected to any disciplinary hearing. He was not at any time informed of any allegations of misconduct against him that could serve as a basis for his termination.
6. He further asserted that he was not issued with any warning letters, with the same being copied to the labour officer and branch secretary of their Union as required by Regulation 23 of the Wages [Protective Security Services] Order.
7. At termination, his salary was KShs. 7000 per month, an amount that was significantly below the minimum wages specified in the General Wages Order for employees in the private security sector. Therefore, at all material times, he was underpaid.
8. In contravention of the stipulations of section 51 of the *Employment Act*, the Respondent refused or neglected to issue him with a certificate of service.
9. He further stated that the Respondent failed to pay him for the days that he worked in October 2014.
10. During the entire period that he worked for the Respondent, he worked from 6:00 am to 6:00 pm in a day shift from Monday to Sunday, including public holidays, without receiving a rest day per week as required under Regulation 8 of the Regulation of Wages [Protective Security Services] Order. He was not paid overtime, which was in breach of Regulation 7 of the Regulation of Wages [Protective Security Services] Order.
11. Cross-examined by Counsel for the Respondent, the Claimant stated that at the time of the termination, he was stationed at the premises of Bruce Trucks Limited.
12. Mr. Geoffrey Wanyama was a caretaker on the premises and not the Workshop manager. His role involved opening the workshop doors and the first gate.



13. Contrary to Mr Wanyama's claim, on 9th October 2014, he was at work and did not attempt to steal any lorry battery or load it into a lorry. If that had been true, it would have been easier for him to provide the Registration Number of the truck simply.
14. According to him, he didn't know a Mr. Simiyu. He was not his supervisor at any time.
15. Following the alleged incident, he was transferred to another station within the city. Without much fuss, he reported to the new station.
16. He further testified that he worked for the Respondent for a total of five months, three of which were during probation.
17. He reiterated that he was not taken through any disciplinary process. The Respondent refused to pay him for the days he worked in October 2014, citing the alleged theft.
18. He worked during all the public holidays that fell within the five months he worked for the Respondent. He worked up to 13<sup>th</sup> October 2014.

### **Respondent's case**

19. The sole witness, Mr. James Ngwalla, testified on his behalf. Like the Claimant, the witness adopted his witness statement as his evidence in chief. Additionally, he tendered into evidence the documents filed by the Respondent as its documentary evidence.
20. The witness stated that on 9th October 2014, the Claimant, who had been employed by the Respondent as a Security Guard since 21st May 2014 and stationed at Bruce Truck Limited Company's premises, was seen by the Workshop manager hiding a lorry battery in the building next to the main gate. The battery had been removed from one of the lorries parked within the compound.
21. The Workshop manager reported the incident to the Respondent company, and an officer, Mr. Simiyu, was dispatched to the scene to investigate the matter. The Claimant admitted to attempting to steal the battery and wrote a statement to that effect. The Claimant was instructed to report to the office the following day, 10 October 2014, but did not do so. He absconded from duty, never to report back to work.
22. After failing to report to work on the 10<sup>th</sup> October 2014, the Respondent had no other option but to terminate the employment of the Claimant on the grounds of gross misconduct.
23. At the time of dismissal, the Claimant had worked with the Respondent for only 5 months. He never worked overtime at any time, and according to the terms of his employment contract, he was entitled to one rest day per week, which he was allowed to enjoy.
24. He was paid his salary for the days worked in October 2014.
25. Cross-examined by Counsel for the Claimant, the witness admitted that he did not witness the incident in question. His testimony is based on the report prepared by Mr Jeremiah, which the Respondent has not presented before the Court.
26. As the battery was recovered, the Respondent's Client didn't want the matter to be escalated any further, which was the reason why the matter was not reported to the police.
27. The contract presented to the court by the Respondent isn't a complete document. It lacks figures.
28. The minimum wage at the material times was KShs. 9,780. The Respondent was paying him KShs. 7000. The amount was contractually agreed upon.



29. The Client’s premises had two gates, the outer and the inner. The Claimant was manning the inner one.

**Analysis and Determination.**

30. I have carefully considered the pleadings and evidence by the parties, and the submissions by their respective counsels, and the following issues emerge for determination:
- i. Whether the Claimant’s employment was unfairly terminated.
  - ii. Whether the Claimant is entitled to the reliefs sought.

**Analysis and determination.**

31. There is no dispute that the Claimant was an employee of the Respondent for five months. However, there was no convergence regarding how the termination of the Claimant’s employment occurred. The Claimant avers that the Respondent summarily dismissed him, while the Respondent contends that the Claimant deserted duty after attempting to steal its Client’s lorry battery. The Respondent had no other choice but to terminate his employment.
32. The law is clear that when an employer alleges that the termination of their employee’s employment was due to the employee’s desertion of duty, they must prove this claim convincingly in court. They must demonstrate the efforts made to get the employee back to work, or inform him that disciplinary action is being contemplated against him based on the desertion or continued desertion.
33. In *Felistas Acheha Ikatwa v Charles Peter Otieno* [2018] eKLR, elaborating on this, the Court stated;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.
38. The Respondent did not state in its case that when they noted that the Claimant had deserted duty, they made any of the efforts mentioned above. In situations like this, it cannot be held that the employer [Respondent] managed to discharge their statutory duty under section 43 of the *Employment Act* [proving the reason for the termination], and 45[2] [that the reason was valid and fair]. Having failed to discharge the twin legal burden, I hold that the termination of the Claimant’s employment was substantively unfair.
39. Without losing sight of the fact that, whenever a Court is called upon to interrogate a claim for unfair termination, it behoves it to consider two statutory aspects, substantive justification for the termination and procedural fairness in the process leading to the decision to terminate, I now turn to consider whether or not the termination of the Claimant’s employment was procedurally fair.
40. Section 41 of the *Employment Act* sets out the procedure that an employer contemplating terminating or summarily dismissing an employee must follow. There is now established jurisprudence that this procedure is mandatory. Any failure to adhere to it will undoubtedly render the termination or dismissal unfair. Procedural fairness embodies three components: first, notification—the employer intending to dismiss or terminate must inform the employee of this intention and the grounds for it; second, the hearing—the employee must be given a sufficient opportunity to make representations regarding the grounds; and third, the consideration—the employer must consider the representations made by the employee before reaching a decision.



42. It is worth stating that the legal burden to prove that the termination was procedurally fair lies on the employer, by dint of the provisions of section 45[2][c] of the *Employment Act*. Though the Respondent alleged that the dismissal was fair, I state without any fear of contradiction that it didn't present any evidence to demonstrate that. Discharge of a legal burden is only possible where sufficient evidence is presented, unless there is an admission on the matter that needs to be proved or the Court takes judicial notice thereof. Where no evidence is placed before the trier, one can't claim that the burden was discharged.
43. Based on the above premises, I conclude that the termination was procedurally unfair.

#### Of the Reliefs

44. The Claimant sought compensation for unfair termination of her employment, amounting to twelve months' gross salary. Under the provisions of section 49[1][c], the relief sought by the Claimant is one of those contemplated thereunder. However, it is worth noting that an award of this relief is discretionary, depending on the circumstances of each case. This court has carefully considered how the Claimant was terminated, which, in my view, clearly constitutes unfair practice, the extent to which the Respondent deviated from both the expected substantive and procedural fairness, and the fact that the Claimant worked for the Respondent for five months. I conclude that he is entitled to the award, specifically to the extent of 4 months' gross salary, amounting to KShs. 39, 120.
45. The Claimant claimed for one month's salary in lieu of notice pursuant to the provisions of section 35 of the *Employment Act*. There is no doubt that the employment of the Claimant was terminated without the notice contemplated in the section. I have no reason to decline to award the Claimant one month's salary in lieu of under the section, as read with Section 36. The amount, the Respondent's witness, as the minimum wage order at the relevant time, KShs. 9,780.
52. It is important to note that under the provisions of the *Labour Institutions Act*, the employer has no authority to contract out of the minimum wages specified in Wage Orders. The provisions consider the minimum wages as part of the employment contract, even if the contract offers a lower remuneration or less favourable conditions. Therefore, employers cannot insist on paying wages below the minimum wage stipulated in the Wage Orders simply because a lower amount was contractually agreed upon.
53. Although the Respondent's witness claimed that the Claimant received his salary for the days worked in October, no evidence was presented that confirms this. Therefore, the Claimant's assertion that he was not paid was not rebutted. I award him KShs 4,238.
54. Service pay under Section 35 of the *Employment Act* is a statutory benefit that employees are entitled to when their employment ends, except for those specifically excluded because they fall under schemes outlined in the provision. The Respondent did not demonstrate that the Claimant falls into any of these categories. Therefore, I have no reason to deny his entitlement to the benefit. He is hereby awarded KShs. 2,037.50.
55. In the upshot, judgment is hereby entered for the Claimant in the following terms;
- a. That the termination of his employment was both procedurally and substantively unfair.
  - b. One month's salary in lieu of notice, KShs. 9,780.
  - c. Compensation pursuant to the provisions of section 49 [1][c], 4 months' gross salary, KShs. 39,120.
  - d. Unpaid salary for the month of October 2014, KShs. 4,238.



- e. Service pay, KSHS. 2,037.50.
- f. Costs of this suit.
- g. Interest at court rates on the sums awarded from the date of this judgment till full payment.

**READ, SIGNED, AND DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**OCHARO KEBIRA**

**JUDGE.**

