



**Opiyo v Amma Consulting Engineers Limited (Cause 19 of 2019)
[2025] KEELRC 1664 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1664 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 19 OF 2019
CN BAARI, J
JUNE 5, 2025**

BETWEEN

ALFRED SIMBA OPIYO CLAIMANT

AND

AMMA CONSULTING ENGINEERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant lodged this suit by a Statement of Claim dated 10th January, 2019, and filed on 15th January, 2019. He seeks the following reliefs as against the Respondent: -
 - a. A declaration that the termination of his contract was unlawful and illegal
 - b. Kshs.1,440,000/- being the amount he would have earned for the unexpired period of contract.
 - c. Kshs.160,000/- being two months salaries in areas
 - d. General damages for loss of reputation
 - e. Over time pay accrued
 - f. Costs.
2. The Respondent entered appearance on 28th February, 2019 and subsequently filed a Statement of defence dated 16th July, 2019 and filed on even date.
3. The Claimant's case was heard on 27th November, 2024, when the Claimant testified in support of his case. He adopted his witness statement and produced a list and bundle of documents filed therewith as his evidence in the matter. The Respondent's case was heard on 17th February, 2025. The Respondent presented the evidence of one Joseph Mungai Gichuru in support of their case.
4. Both parties filed written submissions, and which have been duly considered.



The Claimant's Case

5. The Claimant avers that by a written agreement dated 30th May, 2018 the Respondent employed him as a construction site Inspector at a monthly gross salary of Kshs.80,000/- for a period of 24 months with effect from 4th June 2018.
6. It is his case that under the terms of the said contract, it was his duty to supervise all persons who worked under him and to make a report on the quality of work undertaken, to the Respondent for approval.
7. The Claimant avers that on 2nd July 2018 and 27th December 2018, he was physically assaulted by known persons while supervising them and that he duly reported the incident to his superiors, who promised to act on the report.
8. The Claimant avers that on both occasions he also reported the same incidences at the Police Station and after some reconciliation he was persuaded to withdraw the complaints by the police.
9. It is his case that the said incidences of assault did not concern the Respondent in its capacity as an employer because they were acts of third parties.
10. The Claimant states that later in the month of December,2018, the Respondent unilaterally, unlawfully and without notice terminated his employment in total breach of the written agreement between them and in violation of the labour laws.
11. The Claimant further avers that the act of the Respondent in terminating his contract was unlawfully, illegal contrary to rules of national justice and a breach of contract. The Claimant avers further, that at the time the Respondent terminated his contract, his salaries were in arrears for two months, and over time was also not paid.
12. On cross-exam, the Claimant told Court that the letter terminating his contract gave reasons for the termination, and further that he was not allowed to explain himself.
13. It is his testimony that he was provided with a house and household items, which he returned after termination of his contract to the Respondent's kitchen supervisor who also received the keys of the house he lived in.
14. The Claimant further told Court that he later came to know the name of the person who assaulted him, and that he worked for the contractor of the road he was supervising.
15. It is his case that he saw a letter written by his supervisor in respect of the assault against him, and confirmed that the Respondent took steps on the assault incidences. He also told Court that his supervisor asked him through a telephone call to withdraw the complaint he had made on the assault.
16. It is his position that he briefed his supervisor on the negotiations he had with a Mr. Song; the person who assaulted him, and that he finally did enter into an agreement with his assailant and he withdrew the case.
17. He states that he disputes the computation of his final dues.
18. It is his prayer that his claim be allowed.

The Respondent's Case

19. The Respondent states that it employed the Claimant by a letter of appointment dated 30th May, 2018, with effect from 4th June, 2018 in the position of Inspector of works at the Respondent's Project known



as Uganda-Kenya-Kachorwa-Suam-Kitale & Eldoret Bypass Road and Lot 1: Eldoret Town Bypass Project.

20. The Respondent states that in implementing the projects, the Respondent was working jointly with other partners including the project contractor which was China Wu Yi Co. Ltd.
21. It is its case that on 2nd December, 2018 the Claimant reported to the Respondent's then Resident Engineer, one Joseph Gichuru, an incident of an assault against him by one of the employees of the project contractor by the name Mr. Song Bo. That the assault occurred when Mr. Song attacked the Claimant while both were on duty at Maili Tisa Junction of the said project.
22. The Respondent states that through its Resident Engineer, it acted on the Claimant's report and immediately commenced investigations on the incident which included writing a letter dated 3rd December, 2018 to the said contractor, taking into account that the assault occurred when both staff were performing official duties under the project. The Respondent further states that it was aware that the Claimant reported the assault to the police for investigation at Baharini Police Post.
23. It is the Respondent's case that while it was still investigating the matter, the Claimant without any notice or recourse to it, entered into a private settlement with Mr. Song where he was paid a compensation of Kshs.350,000/= as a consequence whereof, he withdrew the criminal complaint which he had lodged against Mr. Song at Baharini Police Post.
24. The Respondent avers that the conduct of the Claimant aforesaid, was wrongful and amounted to gross violation of the Respondent's general conditions of employment and policies and his contract of employment. It avers that as a consequence of the said breach, the Respondent vide a letter dated 7th December, 2018 terminated the Claimant's contract for gross misconduct as was stipulated in the contract.
25. It is the Respondent's case that upon termination of the Claimant's contract, the Claimant did not clear with it and in particular, he did not hand over the property or goods belonging to the Respondent which were given to him for purposes of execution of his duties whose cost is Kshs. 154,902/=.
26. It states further, that as at the time of termination of his contract, the Claimant was owed salary arrears of Kshs.120,841/= which the Respondent could not pay because the Claimant did not clear with the Respondent.
27. The Respondent states that the termination of the Claimant's contract was lawful and his claim herein, is without merit.
28. On cross-exam, RW1 told Court that the Respondent did not issue the Claimant with notice of termination, but was instead, paid in lieu of notice.
29. It is his case, that as the site engineer and the Claimant's supervisor, he wrote to the contractor to remove the Claimant's assailant from the site and that the contractor wrote an apology for the assault.
30. It is RW1's evidence that the Claimant was paid Kshs.350,000 under the negotiated agreement on account of medical expenses. He avers further that the Claimant was expected to act faithfully in the interest of the Respondent/employer, and that his actions amounted to gross misconduct and insubordination.
31. The witness confirmed that at termination, the Respondent owed the Claimant two months' salary in the sum of Kshs.120,841/- which amount has to date not been settled for reason that he has never cleared and/or handed over with the Respondent.



32. The Respondent maintains that the Claimant was lawfully terminated on account of breach of his terms of contract.
33. The Respondent prays that this suit be dismissed with costs.

Analysis and Determination

34. I have considered the pleadings, the witness' oral testimonies and the submissions by both parties. The issues that arise for determination are:-
 - i. Whether the Claimant was unfairly terminated
 - ii. Whether the Claimant is entitled to the reliefs sought

Whether the Claimant was unfairly terminated

35. The Claimant's position is that on 2nd July 2018 and 27th November, 2018, he was physically assaulted by a person known to him in the course of his duties. He states that though he reported the incidences to his supervisor, the supervisor did not action. The Claimant avers that on both occasions, he reported the incidences to the police and that after some reconciliation he was persuaded to withdraw the complaints.
36. The Claimant further confirmed that he negotiated a settlement with his assailant and was paid a total sum of Kshs.350,000, and in return, he withdrew the complaint that he had made with the police.
37. It is the Claimant's assertion that later in the month of December,2018, the Respondent unilaterally, unlawfully and without notice terminated his employment in total breach of the written agreement between them, and in violation of the labour laws.
38. On its part, the Respondent contends that through its Resident Engineer, it acted on the Claimant's assault report and immediately commenced investigations on the incident which included writing a letter dated 3rd December,2018 to the contractor.
39. It is the Respondent's assertion that while it was still investigating the matter, the Claimant without any notice or recourse to it, entered into a private settlement with Mr. Song; his assailant, where he was paid a compensation of Kshs.350,000/= as a consequence whereof, he withdrew the criminal complaint which he had lodged against Mr. Song at Baharini Police Post.
40. The Respondent avers that the conduct of the Claimant aforesaid, was wrongful and amounted to gross violation of the Respondent's general conditions of employment and policies and his contract of employment, and as a consequence of the said breach, the Respondent in a letter dated 7th December, 2018 terminated the Claimant's contract for gross misconduct as was stipulated in the contract.
41. The question is whether the termination of the Claimant's contract was fair. The Court in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, set the threshold of what constitutes a fair termination in the following words:-

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

42. To meet the fairness test set out in the foregoing case, an employer has to demonstrate adherence to the mandatory provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007.



43. Section 41 of the *Employment Act*, demands that before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity, an employer must explain to an employee in a language the employee understands, the reason(s) for which termination is being considered, and grant the employee an opportunity to make representations, either in the presence of a colleague or representative of a trade union if he is a union member.
44. The Respondent through its witness confirmed to the Court that the Claimant was not given notice and that he was to be paid one month salary in lieu of notice.
45. It is now settled that it is no longer enough to terminate employment solely by giving one month's notice pursuant to Section 35 of the *Employment Act*. Even when notice is given, an employer remains under obligation to accord an employee procedural fairness and substantively justify the termination.
46. In the case of *Benson K. Nguti v. Kenfreight (E.A) Limited (2016) eKLR* the Court of appeal held that even where an employer complies with the contractual notice period, the termination may still be deemed unfair for lack of procedural fairness and substantive justification.
47. Further in *Mary Mutanu Mwendwa v Ayuda [2013] eKLR* the Court held that the *Employment Act* has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is being contemplated, and is entitled to have a representative present.
48. For reason that the Respondent admitted that it did not accord the Claimant an opportunity to present his case, nor did it in any way attempt to adhere to the tenets of procedural fairness, I have no difficulty finding the Claimant's termination procedurally unfair, and which I hereby do.
49. On whether the Respondent had valid, fair and justified grounds to terminate the Claimant, the Claimant contends that the incidences of assault against him did not concern the Respondent in its capacity as an employer because they were acts of third parties, hence him negotiating a settlement with his assailant did not justify his termination.
50. The Respondent's position is that the Claimant did not act in the interest of the Respondent's company in entering into a settlement agreement with his assailant while the Respondent was still investigating the issue, and without informing the Respondent about the negotiations, and further proceeding to receive payment of Kshs.350,000 under the negotiated agreement.
51. The test as to the fairness and validity of reasons warranting termination of employment was spelt out by Lord Denning in *British Leyland UK Ltd v. Swift [1981] IRLR 91* as follows:-

“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”
52. The Respondent's witness told this Court that the Claimant was paid by his assailant on account of medical expenses that the Claimant had incurred. The Claimant on his part testified that his supervisor had asked him through a telephone call to withdraw the complaint that he had filed with the police.



53. The evidence before Court further shows that the Claimant had reported the assault incidences to his employer expecting that the employer would come to his aide, and it is evident that indeed, the Respondent through the Claimant's immediate supervisor took steps to address the issue.
54. It was therefore in my view dishonest of the Claimant to involve the employer, and while the employer was investigating the issue, he proceeds to enter into a settlement without recourse to the employer's role in attempting to resolve the dispute.
55. The Claimant's action in my view, justified the Respondent's decision to terminate his employment contract.
56. I therefore reach the conclusion that the termination of the Claimant's contract is substantively fair.

Whether the Claimant is entitled to the reliefs sought

57. The Claimant sought a declaration that the termination of his contract was unlawful and illegal, an order for payment of Kshs.1,440,000/- being the amount he would have earned for the unexpired period of contract, Kshs.160,000/- being two months salaries in areas, general damages for loss of reputation, overtime pay accrued and costs.
58. On the claim for payment for the unexpired term of contract, the Claimant did not render service and payment of wages is made for labour that has been provided. There is also no basis for the Claimant to assume that he would have served to the end of his contract if not for the termination, as to justify such payment. The claim for the unexpired term of contract is therefore not tenable.
59. I will instead, proceed to award the Claimant premised on the finding of an unfair termination. The Claimant was appointed to the service of the Respondent effective 4th June, 2018, and terminated in December, 2018. Considering his short stint at the Respondent's employ, I deem an award of four (4) months' salary sufficient compensation for the unfair termination, and which is hereby awarded.
60. On the two months salary claim on account of salary arrears, the Respondent admitted that the Claimant was owed two months' salary, but which was not paid on the basis that he did not clear with the Respondent, and that he owed the Respondent Kshs.154,902/- being the value of household items that the Claimant allegedly did not surrender after his termination.
61. The Claimant's contention is that he handed over the Respondent's house with all the household items and the keys to the Respondent's housing supervisor before he left.
62. This evidence was not in any way controverted, hence it is the Respondent's word against the Claimant's. For this reason, and with the Respondent's admission that the Claimant was not paid salaries for two months, I find his claim merited and allow the same as prayed.
63. No evidence was led to prove the claims of damages for loss of reputation and overtime accrued. They both fail, and are dismissed.
64. In the end, the Claimant's claim succeeds and orders granted as follows: -
 - a. A declaration that the Claimant's dismissal was unfair on account of procedure.
 - b. That the Respondent pays the Claimant four (4) months' salary as compensation for the unfair termination at Kshs.320,000/=
 - c. That the Respondent pays the Claimant's salary arrears of Kshs.160,000/-



- d. The Respondent shall bear the costs of the suit and interest from the date of this judgment until payment in full.

65. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 5TH DAY OF JUNE, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Owiti h/b for Ms. Wamukore for the Claimant

Mr. Wakla present for the Respondent

Ms. Esther S-C/A

