



**Chirchir v Avsi Foundation (Employment and Labour Relations Cause E093 of 2024) [2025] KEELRC 2287 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2287 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E093 OF 2024**

**BOM MANANI, J**

**JULY 31, 2025**

**BETWEEN**

**OLIVIA CHEPWOGEN CHIRCHIR ..... CLAIMANT**

**AND**

**THE AVSI FOUNDATION ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The parties to the suit had an employment relationship which started on 1<sup>st</sup> August 2022 when the Respondent hired the Claimant's services as a Project Coordinator. The relation was for a fixed term of approximately one year and three months.
2. The Claimant has presented documents which show that the parties' first formal engagement was on probationary terms for approximately three months from 1<sup>st</sup> August 2022 to 14<sup>th</sup> November 2022. It is unclear whether they temporarily halted the relation between 15<sup>th</sup> November 2022 and 30<sup>th</sup> December 2022. However, on 23<sup>rd</sup> December 2022, the Respondent issued the Claimant with a letter of appointment for a term of one year effective from 1<sup>st</sup> January 2023.
3. The Claimant contends that she worked diligently until 4<sup>th</sup> October 2023 when the Respondent terminated her contract prematurely. She avers that the decision to terminate the contract was without valid reasons and violated her right to fair procedure.
4. The Claimant avers that the Respondent did not formally invite her to respond to the charges that it leveled against her. It is her case that she was not issued with a notice to show cause.
5. The Claimant contends that the Respondent did not notify her that she was to appear before a Disciplinary Committee for a disciplinary hearing. She contends that the Respondent only sent her a general invite on 2<sup>nd</sup> October 2023 for a meeting scheduled for 4<sup>th</sup> October 2023. She avers that she



- thought the proposed meeting was one of the routine office meetings only to learn during the session that it was a disciplinary hearing against her.
6. The Claimant contends that when she realized the purpose of the meeting, she unsuccessfully sought to have it adjourned in order for her to prepare her defense. As such, she was forced to proceed with the session, albeit unprepared.
  7. The Claimant further contends that the Respondent did not inform her beforehand of her right to attend the meeting in the company of a fellow employee of her choice. She also avers that she was not allowed to cross examine the witnesses who testified against her during the session.
  8. The Claimant contends that the Respondent terminated her services without offering her the opportunity to appeal the decision. She contends that she was sent away with nil pay. As a result, she contends that she suffered depression and was forced to seek medical care which cost her Ksh. 58,200.00.
  9. The Claimant asserts that the Respondent's actions violated the law. As such, she claims the various reliefs that are set out in the Statement of Claim.
  10. In response, the Respondent contends that the Claimant's contract of service was terminated for valid reasons. It contends that the Claimant reported to work on the afternoon of 6<sup>th</sup> September 2023 whilst intoxicated contrary to its human resource policies. As a result, it avers that she was subjected to a disciplinary hearing which resulted in the decision to summarily dismiss her from employment.
  11. The Respondent asserts that on 2<sup>nd</sup> October 2023, it formally invited the Claimant for a disciplinary session scheduled for 4<sup>th</sup> October 2023. It contends that the Claimant was informed of the charges against her and asked to appear for the disciplinary hearing.
  12. The Respondent avers that the Claimant was accorded an opportunity to be heard before the decision to terminate her contract was arrived at. It avers that the Claimant admitted having been drunk on the afternoon of 6<sup>th</sup> September 2023 and blamed the incident on alleged personal problems.

### **Issues for Determination**

13. After evaluating the pleadings and evidence on record, the following issues present for determination:-
  - a. Whether the Claimant's contract of service was improperly terminated.
  - b. Whether the Claimant is entitled to the reliefs that she seeks through this action.

### **Analysis**

14. The basis for the decision to terminate the Claimant's employment was her alleged intoxication on 6<sup>th</sup> September 2023. According to the Respondent, the Claimant reported to work from her lunch break while drunk. The Respondent alleges that the Claimant was so drunk that she was unable to attend to her duties. As such, it contends that she was assisted by a friend to go home.
15. The Respondent alleges that the Claimant admitted to the fact of drunkenness during the disciplinary hearing. It contends that this was sufficient proof that she was drunk whilst on duty.
16. In response, the Claimant vehemently denies the accusation of drunkenness against her. She denies that she reported to work on the afternoon of 6<sup>th</sup> September 2023 whilst drunk. She further denies that she admitted the charge of drunkenness during the disciplinary hearing that was conducted on 4<sup>th</sup> October 2023.



17. The Claimant contends that she is a teetotaler. As such, she contests the accusation leveled against her.
18. Being drunk whilst at work constitutes gross misconduct for which an employee may be summarily dismissed from employment. However, ingesting an alcoholic drink is not a ground for dismissal of an employee from duty unless this renders him either unwilling or incapable of discharging his duties (see section 44 (4) (b) of the *Employment Act*). As such, for the employer to rely on intoxication as a ground for termination of an employee's contract, he must cogently demonstrate that the employee was drunk to the point of being unable or unwilling to execute his duties.
19. Under section 43 of the *Employment Act*, the employer bears the burden of demonstrating that he had a valid reason to terminate an employee's contract of service. By virtue of section 43(2) of the *Act*, the employer is deemed to have discharged this burden if he is able to demonstrate that he had genuine reasons to believe that the employee had committed the infraction that he is accused of. In other words, it is not a requirement that the employer provides infallible evidence of commission of the infraction before he can terminate the contract. It is sufficient if he demonstrates that he had cogent evidence to spur a genuine belief in a reasonable employer that the employee had committed the infraction in question (*Kenya Revenue Authority v Reuel Waitbaka Gitahi & 2 others* [2019] eKLR).
20. Whilst the Respondent asserts that the Claimant was drunk on the afternoon of 6<sup>th</sup> September 2023, the Claimant vehemently denies this accusation. The Respondent contends that the Claimant admitted this fact during the disciplinary hearing. It relies on the purported minutes of the session to anchor its contention.
21. However, the Claimant denies that she admitted the charge. She contends that the minutes produced by the Respondent were fabricated to support the narrative that she conceded that she was drunk.
22. I have looked at the impugned minutes. They were not signed by the Claimant. They only bear the signatures of members of the Disciplinary Panel. As such, it is not possible to validate them. Given that they were not signed by the Claimant, the court cannot ascertain whether they are a true representation of what transpired on 4<sup>th</sup> October 2023.
23. The Respondent ought to have ensured that the Claimant signed the minutes in order to validate their content. Absent this, the court is not able to rely on them to find that the Claimant admitted the charge of drunkenness.
24. The Respondent further relies on the representations of some of its employees from the Meru office to contend that the Claimant was drunk on the material day. These are the Claimant's supervisor (RW2) and one Caroline Wangu (RW3).
25. According to RW2, when he resumed work from his lunchbreak around 2.00 pm, he saw the Claimant leave for lunch. He says that when she came back to the office, she was looking drunk. He says that he was however in a hurry to leave the office to meet a supplier. As such, he contends that he purposed to follow up on the Claimant's conduct the following day.
26. RW2 however says that before he left the office, he saw the Claimant collect her items in readiness to leave the office. He further says that the Claimant left for lunch later than the ordinary lunch hour.
27. On the other hand, RW3 states that she was at the office on 6<sup>th</sup> September 2023 and saw the Claimant leave for lunch around 1 pm. She states that the Claimant was in the company of a friend. The witness says that the Claimant came back to the office around 3 pm in the company of her friend and that the two went to the Boardroom. She says the Claimant was not looking well and was unable to walk properly.



28. RW3 says that at around 4 pm, the Claimant's accompanier came out of the Boardroom to order for a motor bike to take the Claimant home as she was heavily intoxicated. She avers that the Claimant could not walk by herself.
29. During cross examination, RW2 said that the Claimant left for lunch after 2 pm. On the other hand, RW3 stated that she (the Claimant) left for lunch around 1 pm. It is also noteworthy that whilst RW3 maintained that the Claimant was in the company of a friend both at the time she broke for lunch and the time she came back to the office drunk, RW2 did not, at any one time, assert that the Claimant was in the company of a third party that afternoon. These are significant contradictions in the testimonies of the two witnesses who claim to have been present on the afternoon that the Claimant is said to have committed the infraction in question.
30. The inconsistencies in the evidence of the two witnesses for the defense weakens their evidence. In the face of these contradictions, the court cannot rely on their evidence to find that the Claimant was drunk on the material day. This is more so given that there is no scientific evidence such as alcohol test results to support the claim that the Claimant was drunk on the material day. As such, the court finds that the Respondent has not presented cogent evidence to demonstrate that the Claimant was either drunk or that her conduct caused it (the Respondent) to genuinely believe that she was drunk.
31. The record shows that the Respondent did not issue the Claimant with a formal notice to show cause as would be expected of an employer proposing to take disciplinary action against an employee. When cross examined on the matter, the Respondent's witnesses alleged that the Claimant was issued with an oral show cause. In the absence of a written show cause letter, the court cannot verify the assertion that the Claimant was issued with a show cause.
32. A show cause letter is critical in a disciplinary process because it notifies the employee of the infraction he is accused of and gives him the first opportunity to respond to the accusation before the employer can decide whether to escalate the issue into a full blown disciplinary hearing. As such, absent a show cause letter, an employee is justified to contend that he had no proper notice of the accusations against him.
33. The record further shows that the Respondent sent the Claimant an invite on 2<sup>nd</sup> October 2023 for the session of 4<sup>th</sup> October 2023. However, the invite did not state that the meeting of 4<sup>th</sup> October 2023 was intended to be a disciplinary session. As such, the Claimant is justified to contend that the Respondent failed to warn her in advance that she was coming for a disciplinary hearing on 4<sup>th</sup> October 2023 in order for her to adequately prepare her defense.
34. It was unfair for the Respondent to have sent the Claimant a blind invite only for her to be confronted with the charges against her on the morning of the disciplinary hearing. This violated her right to fair procedure.
35. It is also evident that the invite of 2<sup>nd</sup> October 2023 did not inform the Claimant that she was entitled to attend the meeting of 4<sup>th</sup> October 2023 in the company of an employee of her choice. This deprived her of the opportunity to elect whether or not to be accompanied to the session in contravention of section 41 of the *Employment Act*.
36. The Respondent contends that the Claimant came to the session in the company of RW2, her immediate supervisor. However, the evidence on record shows that RW2 was invited to the session by the Respondent as one of its witnesses. As such, it cannot be contended that he attended the session at the instance of the Claimant.



37. There is also no suggestion that the Respondent allowed the Claimant the opportunity to contest the decision of the Disciplinary Panel on appeal. Yet, this is a right that should have been accorded to her.
38. In the end, the court finds that the Respondent's decision to terminate the Claimant's contract did not accord with the dictates of equity and justice as is required under section 45(5) of the Employment Act. As such, it is declared unfair.
39. The next issue for determination relates to whether the Claimant is entitled to the reliefs which she seeks through the Statement of Claim. According to the Statement of Claim, the Claimant seeks the following reliefs: a declaration that the decision to terminate her contract was unfair; an order for reinstatement; unpaid salary; pay in lieu of notice; compensation for unfair termination of her contract; reimbursement of Ksh. 58,200.00 incurred towards medication; general and exemplary damages; leave commutation; costs of the case; and interest.
40. As previously discussed in the judgment, the Respondent did not act in accordance with the principles of equity and justice whilst terminating the Claimant's contract of service. As such, it is hereby declared that the decision to terminate the Claimant's employment was wrongful.
41. Although the Claimant had prayed for reinstatement to her position, she acknowledged during cross examination that this relief was not tenable since the one year term of her fixed term contract had, in any event, lapsed. As such, the court declines the prayer.
42. The Claimant has prayed for compensation for the unfair termination of her contract. Section 49 of the Employment Act entitles an employee whose contract of service is unfairly terminated to compensation which does not exceed his salary for twelve months.
43. The evidence on record shows that when the Claimant's contract was terminated on 4<sup>th</sup> October 2023, she had a balance of three months to work under the said contract before it was to lapse through effluxion of time. As such, the court awards her compensation for the unfair termination of her contract which is equivalent to her salary for three months, that is to say, Ksh. 370,800.00.
44. The Claimant has claimed for reimbursement of Ksh. 58,200.00 on account of medical expenses she allegedly incurred for treatment of depression following termination of her contract of service. However, she did not tender evidence in the form of either treatment chits or a medical report to demonstrate that she was actually treated for depression. Further, there is no evidence to demonstrate that there was a causal link between the decision to terminate her contract of service and the depression she suffered, if at all. In the premises, the court declines to award this amount
45. The Claimant has sought general and exemplary damages for unprocedural termination of her employment. However, this is not one of the remedies that is provided under section 49 of the Employment Act. In any event, general and exemplary damages are not, as a general rule, recoverable in cases of breach of contract (see Micro-City Computers Limited & another v National Social Security Fund Board of Trustees & another (Civil Appeal 49 & 59 of 2020 (Consolidated)) [2024] KECA 444 (KLR) (12 April 2024) (Judgment) (with dissent) & Gichaba v Lexis Investment Limited (Civil Appeal 131 of 2019) [2024] KEHC 479 (KLR) (29 January 2024) (Judgment)). As such, the prayers for general and exemplary damages are declined.
46. The Claimant has prayed for commutation of unutilized leave days. However, besides including this claim in the Statement of Claim, she did not tender evidence on the matter either through her witness statement or her oral testimony in court. Absent such evidence, the court cannot entertain the claim. As such, the relief for leave commutation is declined.



47. The Claimant prays for salary in lieu of notice to terminate her contract. As has been demonstrated earlier, the decision to terminate her contract was wrongful. As such, she is entitled to pay in lieu of notice to terminate her contract in accordance with sections 35 & 36 of the Employment Act as read with clause eight of her contract. In the premises, the court awards her (the Claimant) Ksh. 123,600.00 on account of notice pay.
48. The amount awarded to the Claimant is subject to the applicable statutory deductions.
49. The Claimant is awarded interest on the amount awarded at court rates from the date of this decision.
50. The Claimant is awarded costs of the case.

### **Summary of the Findings and Orders**

51. After evaluating the evidence on record, submissions by the parties and the applicable law, the court makes the following findings and attendant orders:-
  - a. The court declares that the Respondent wrongfully terminated the Claimant's contract of service.
  - b. The court declines to reinstate the Claimant to her position within the Respondent's establishment.
  - c. The court awards the Claimant compensation for the unfair termination of her contract which is equivalent to her salary for three months, that is to say, Ksh. 370,800.00.
  - d. The court declines the Claimant's prayer for reimbursement of Ksh. 58,600.00 on account of medical expenses purportedly incurred in treatment of depression as a result of the Respondent's decision to terminate her contract of service.
  - e. The court declines the Claimant's prayers for general and exemplary damages.
  - f. The court declines the claim for accrued leave pay.
  - g. The court awards the Claimant Ksh. 123,600.00 on account of notice pay.
  - h. The amount awarded to the Claimant is subject to the applicable statutory deductions.
  - i. The Claimant is awarded interest on the amount awarded at court rates from the date of this decision.
  - j. The Claimant is awarded costs of the case.

**DATED, SIGNED AND DELIVERED ON THE 31<sup>ST</sup> DAY OF JULY, 2025**

**B. O. M. MANANI**

**JUDGE**

**Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

