



Nannungi v Kimondo Gachoka & Company Advocates (Cause E091 of 2024) [2025] KEELRC 2012 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2012 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E091 OF 2024**

JK GAKERI, J

JULY 9, 2025

BETWEEN

MARIAT NANNUNGI CLAIMANT

AND

KIMONDO GACHOKA & COMPANY ADVOCATES RESPONDENT

JUDGMENT

1. The claimant initiated the instant suit vide a statement of claim dated 26th November, 2024 alleging unfair termination of employment and unpaid dues.
2. The claimant's case is that she was employed by the respondent under a 3 year fixed term contract effective 1st September, 2021 and served diligently and her monthly salary was Kshs.84,000 per month. According to the claimant bonus for dismissals ranged between Kshs.10,000 to 20,000 depending on the nature of injuries and was paid at the end of every month together with the salary, while transport allowance and per diem was Kshs.1,500 and Kshs.5,000 respectively.
3. The claimant averred that termination of her employment was unfair, illegal and unlawful and she was not accorded a fair hearing and the dismissal was biased, discriminatory, baseless and an afterthought.
4. The claimant prayed for salary in lieu of notice, compensation, accrued leave days, bonus for 8 files, service pay, transport reimbursement for September and October 2023, certificate of service, general damages, costs and interest.

Respondent's case

5. The respondent admitted that the claimant was its employee as an Associate Advocate effective 1st September, 2021 under a 3 year contract at Kshs.80,000 per month at the respondent's Mombasa Branch Office to handle and defend filed against the insureds of Direct Line Assurance Co. Ltd and was confirmed vide letter dated 1st March, 2022 and salary raised to Kshs.84,000.00



6. It is the respondent's case that contrary to its expectations that the claimant would perform her duties diligently, concerns regarding her performance of duties arose and issued a warning letter to the claimant dated 15th February, 2023 and a subsequent notice to show cause, responded to it, was invited for a hearing attended and a summary dismissal followed.
7. The respondent alleged that the claimant refused to attend court or file an application for stay pending appeal, failed to defend a suit on fraud and made requisitions for facilitation for court attendance for virtual hearing, which amounted to gross misconduct and failed to discharge her duties in accordance with the term of employment.
8. The respondent denied that the court had jurisdiction to hear and determine the suit as the cause of action did not arise in Kisumu and the claimant was not a resident of Kisumu and no demand letter had issued.
9. Both parties provided oral and documentary evidence in support of their respective cases.
10. On cross-examination, the claimant denied having received the warning letter dated 15th February, 2023 and went further to contest the supervisor's signature on the letter.
11. The claimant admitted having received and responded to the notice to show cause and admitted having not attended court on 8th May, 2023 saying that she was unwell but did not provide proof of the alleged sick off.
12. Equally, the claimant admitted having failed to file an application for stay of execution after filing a Memorandum of Appeal stating that she did her best. That she did not proceed on leave for 2 years and admitted having proceeded on maternity leave for 3 months.
13. The witness admitted that transport was computed per station for instance, Taveta and Voi and had no documentary evidence and could not recall the per diem for Mombasa.
13. The claimant admitted having been a member of the respondent's pension fund (Zamara) and National Social Security Fund (NSSF) and deductions were being remitted by the law firm.
14. On bonuses, the claimant admitted that it was earned when a case was dismissed and payable with the salary for the respective month but was unsure whether the employment contract provided for payment of bonus. The witness admitted that payment of bonus was discretionary.
15. On cross-examination, Mr. Allan Onsongo testified that Advocates, Legal Assistant Clerks, medical doctors and the investigation team performed different tasks. For instance, court clerks filed pleadings while doctors conducted second medical examinations.
16. RWI confirmed that although Mr. Howard Pembe, the Court Clerk filed pleadings, he was under the direct supervision of the claimant and his failure to file the application for stay of execution pending appeal was never reported by the claimant prior to these proceedings, issuance of instructions to Howard Pembe notwithstanding. The witness testified that as a consequence of the claimant's failure, the client had to pay the claim but he did not file a copy of the cheque. Similarly, the consent dated 31st May, 2023, which the respondent did not execute revealed that warrants of attachment were issued and the client was to pay the sum of Kshs.566,834, yet the matter was being appealed against on failure to defend on fraud. The witness testified that the claimant did not proceed with the case and Mr. Arasa was holding brief for her and only defended on liability excluding fraud.
17. The witness admitted that the issue of shortage of staff at the Mombasa office had been raised in a meeting and the claimant was recognized in 2022 for her court attendance.



18. On composition of the disciplinary committee, the minutes did not indicate that the Claims Manager was represented by another person.
19. On re-examination RWI testified that the claimant's sick sheet was not availed prior to the disciplinary hearing or with the response to the notice to show cause and it was her duty to ensure that the application for stay was filed to protect the client's interests.
20. That the consent procured included payment of the claim which ought not to have been the case and warrants of attachment were issued and enforced.
21. That the leave days taken as per the client's electronic diary were 11 not 9 and bonus/payment had a closure period and the claimants claim was late.

Claimant's submissions

22. As to whether termination of employment was unfair and unlawful, the claimant's counsel submitted that she had prepared the application to reinstate the dismissed application but it was the Court Clerk's responsibility to file the same.
23. On the procedure during the hearing, the claimant argued that the respondent did not conduct the proceedings pursuant to clause 19(c) as the claimant's supervisor was not present as dictated by the clause and the reasons were not explained and had no representative.
24. Reliance was placed on the provisions of Section 41 and 45 of the *Employment Act* and the sentiments of the court in *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR on the requirements for explaining the grounds of termination of employment in a language understood by the employee and in the presence of another employee chosen by the claimant or a union official and be heard and the representations made considered.
25. Sentiments of the court in *Council of Civil Servants Union v Minister of Civil* [1985] AC 2 were also cited on what constitutes procedural impropriety.
26. On reliefs, the claimant submitted that since the termination of her employment was procedurally flawed, she was entitled to all the reliefs prayed for.

The respondent did not file submissions.

Analysis and determination

27. It is common ground that the claimant was an employee of the respondent from 1st September, 2021 to 26th October, 2023 when his employment was terminated by the respondent on 3 grounds.
28. The notice to show cause dated 24th August, 2023 accused the claimant of failure to prosecute an application on 8th May, 2023, which was dismissed and she did not file an application to reinstate the dismissed application in KG REF019522/000001 which led to attachment of the claimant's goods.
29. As regards KG REF 16575/01, an appeal was recommended against the decision delivered on 22nd February, 2023 and no application for stay of execution pending appeal was filed leading to payment of auctioneers costs.
30. Concerning KG REF 019804/000006, the claimant was accused of having failed to defend on fraud as there was a revocation letter availed in August 2022 and costs were incurred.



31. As regards KG REF 017708/000009, the claimant was accused of failure to defend and a revocation letter had been availed and the defence was not amended to reflect the fraud element and the client incurred costs.
32. On request for facilitation for virtual hearings, the claimant was accused of falsely claiming for facilitation to voi 8/06/2023, and 6th July, 2023, 14th July, 2023, 25th July 2023 and 26th July, 2023, 22nd June, 2023 and 21st July, 2023.
33. In her response the claimant stated that in relation to KG 1952211, she did not attend court owing to indisposition, prepared the application to reinstate and instructed the Court Clerk to file but he did not.
34. The claimant alleged that that others created the mess and she was blamed.
35. As regards KG 1675/1, the claimant admitted that no application for stay of execution pending appeal was filed after the Memorandum of Appeal was filed due to workload and she had negotiated a consent.
36. On KG1980416, the claimant admitted that she did not proceed with the matter when the plaintiff was testifying but called the driver to testify and it could have been hard to challenge a revocation produced by consent.
37. Equally, the claimant alleged confusion when AA was proceeding as the file was in red colour as opposed to orange.
38. That as regard KE465291, the revocation letter was not attached and the authentication Report was finalized on 15th August, 2022, 9 months later.
39. On facilitation, the claimant stated that no memo had been issued to the effect that no facilitation was not payable when proceedings were virtual and in any case courts were hybrid, physical and virtual and only responded to one request, 22855 leaving out the other two unexplained.
40. During the hearing the minutes revealed that the claimant did not avail a sick sheet as proof of her indisposition and as regards 16575/01, the review of the files escaped her mind.
41. As regards 019804/06 the claimant proceeded with the defence only.
42. As regards 017708/09, the court closed the file due to lack of re-examination of the plaintiff.
43. The committee found that the claimant was negligent and unremorseful, and unanimously resolved that she be summarily dismissed.
44. From the foregoing, it is discernible that the claimant did not attend court on 8th May, 2023 nor file an application to reinstate the application for stay dismissed on that day for non-attendance.
45. Puzzlingly, the claimant cited indisposition but neither attached the sick sheet or sick off to her response to the notice to show cause in August 2023 nor avail a copy during the hearing, a fact she admitted during cross-examination.
46. In sum, the claimant did exculpate herself from the charges.
47. Similarly, as regards KG16575/01, the claimant pleaded workload and having negotiated a consent which merely accorded the client 30 days to pay the claim or face execution since warrants had already been issued.



48. Since the judgment was delivered on 22nd March, 2023 and an appeal recommend and the claimant filed a Memorandum of Appeal on time and being aware of the possibility of execution by the decree/holder at any time, the respondent found the claimant negligent.
49. On failure to defend on fraud, the claimant admitted that she defended on liability only notwithstanding the availment of a revocation letter.
50. Relatedly, the claimant did not defend KGREF 0177081 and additional cost ensued.
51. The termination letter identified three (3) reasons for termination of the claimant's employment, specifically non-attendance of court on 8th May, 2023 and failure to take remedial steps and provide evidence of the alleged illness. Failure to file an application for stay of execution pending appeal after filing Memorandum of Appeal in KG 0165575/01 and failure to defend KG 019804/06 on fraud as instructed and had the necessary documentation.
52. The charge on requisitioning of facilitation appear to have been dropped.
53. In sum, the respondent was satisfied that it had a valid and fair reason to terminate the claimant's employment summarily for gross misconduct.

Section 45 of the *Employment Act* provides:

1. No employer shall terminate the employment of an employee unfairly.
 2. A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
54. Similarly, in *Walter Ogal Anuro v Teachers Service Commission Ndolo J* held that for a termination of employment to pass the fairness test it must be demonstrated that the employer had a substantive justification for the termination and the same was conducted in accordance with a fair procedure. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd [2017] eKLR*.
 55. The requirement of a valid and fair reason for termination of employment is further amplified by the provisions of Section 43 of the *Employment Act* which places the burden of proof on the employer. This provision is clear that if the employer fails to prove the reason(s) for terminating an employee's employment, the termination is deemed to have been unfair.
 56. However, the provisions of Section 43(2) of the *Employment Act* appear somewhat to lessen the employers burden of proof by providing that;
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.



57. This provision has been interpreted to mean that all the employer is required to show is that it genuinely believed that there were reasonable grounds to act in the manner it did in terminating employee's employment.
58. In *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] eKLR, the Court of Appeal expressed itself as follows:
- “The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services. That is a party subject test...”
59. See in this regard *Bamburi Cement Ltd v William Kilonzi* [2016] eKLR, *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR and the guidelines in *Halsbury's Laws of England 4th Edition vol. 16(1B) Paragraph 642* on the range of reasonable responses test, *CFC Stanbic Bank Ltd v Danson Mwashako Mwakuwona* [2015] eKLR.
60. In the court's view and based on the evidence on record, the respondent employer has demonstrated that it genuinely believed that there were reasonable and sufficient grounds to terminate the claimant's employment for gross misconduct, having admitted that she failed to attend court on 8th May, 2025, failed to file an application for reinstatement of the application dismissing the matter owing to the claimant's absence, and failed to file an application for stay of execution pending appeal leading to execution among other infractions and the disciplinary committee found the claimant culpable.
61. On procedural fairness, the court is guided by the sentiments of the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR thus:
- “...It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. This section provides for;
“Notification and hearing before termination on grounds of misconduct...”
62. Four elements must thus be discernible for the procedure to pass muster: -
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee”.
63. In the instant case, the respondent issued a notice to show cause to the claimant dated 24th August, 2023 and a response was required within three (3) days, by 27th August, 2023 and a disciplinary hearing was scheduled for 31st August, 2023 at 9:00am.
64. The claimant was notified of his right to be accompanied by a fellow employee of her choice.
65. The claimant responded vide a letter dated 26th August, 2023 and a further undated amended response.
66. From the contents of the letter of summary dismissal, the disciplinary hearing took place on 28th September, 2023 and the dismissal letter was dated 26th October, 2023.



67. Although the claimant's statement of claim states that she was not accorded a fair hearing, the written witness statement is silent on what it is the respondent did not do.
68. During the hearing it emerged that claimant's immediate supervisor/manager was not a member of the Disciplinary Committee under clause 19(c) (iii) of the Contract of Employment dated 1st September, 2021 and was not represented as the attendees were one partner, Head of firm, the Legal Manager and the Human Resource Assistant.
69. Did the absence of the claimant's immediate supervisor prejudice the claimant's defence? The court is not persuaded it did because the charges against the claimant were grounded on documentary evidence and related to the acts or omissions of the claimant in specific circumstances.
70. Relatedly, the claimant did not challenge the competency of the committee a right she had as an employee and as an advocate.
71. Finally, although the claimant did not sign the minutes of the meeting she signed the attendance sheet confirming that the disciplinary hearing took place on 28th September, 2023. The claimant participated in the proceedings and appeared alone by choice as the minutes indicated.
72. The claimant did not challenge the contents of the minutes including the observation that she was unremorseful.
73. Section 47(5) of the *Employment Act* provides that;
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
74. This provision means that the employee must establish a prima facie case that his or her employment was terminated by the employer or was dismissed by the employer and the termination or dismissal from employment was unfair or unlawful.
75. Granted that the claimant availed no evidence to explain the non-attendance of court on 8th May, 2023, did not file an application to reinstate the application dismissed by the court due to her absence or file an application for stay of execution pending appeal and did not defend KG 019804/06 on fraud contrary to instructions, the court is satisfied that the respondent had reasonable and sufficient grounds for the genuine belief that it had reasons to terminate the claimant's employment.
76. Similarly, applying the range of reasonable responses test, the court is persuaded that a reasonable employer in similar circumstances would not have acted otherwise.
77. The upshot of the foregoing is that the court is satisfied that the respondent has evidentiary demonstrated that it had a substantive justification to terminate the claimant's employment and did so in accordance with a fair procedure.

Appropriate Relief

78. Since the bulk of the claimant's prayers relate to accrued rights the court proceeds as follows:

Salary in lieu of notice

79. Having found that the claimant has failed to prove that termination of her employment by the respondent was unfair or unlawful, the claim for pay in lieu of notice is unsustainable and it is declined.



80. The foregoing applies on all fours to the claim for compensation for unfair termination. It is declined.
81. As regards unpaid leave allowance 30 days per month Kshs.248,000, the claimant admitted on cross-examination that she did not proceed on leave for 2 years but proceeded on maternity leave.
82. Similarly, leave records produced by the respondent reveals that in 2023, the claimant utilized 11 days.
83. Consequently, the claimant is entitled to annual leave pay for 2 years less 11 days; thus; $84,000 \times 2 = \text{Kshs.}168,000.00 - \text{Kshs.}30,800.00 = \text{Kshs.}137,200.00$.
84. The claim for overtime was unsubstantiated and no computation was availed. The claim is dismissed.
85. Concerning unpaid bonuses, the claimant testified on cross-examination that she was unaware that the same was provided for by the contract of employment but admitted that payment of bonus was discretionary.
86. RWI admitted that bonus was payable on dismissal of a case and file closed and was a systems generated report.
87. The claimant had raised the issue via email and although payment was made, it was not reflected on the claimants pay slip.
88. Regrettably, the claimant did not disclose how the sum of Kshs.120,000.00 was arrived at. Were all the cases fatal multiple injuries or soft tissue?
89. Since the maximum bonus was Kshs.15,000 and the claimant earned bonus in relation to the 8 files, the court is persuaded that the sum of Kshs.10,000 per file is reasonable, total Kshs.80,000.
90. As regards service pay, having confirmed that the claimant was a member of the respondent's pension scheme, Zamara, as well as the National Social Security Fund (NSSF) and deductions were being remitted, the claim for service pay is patently unsustainable by dint of Section 35(6) of the [Employment Act](#).

The claim is dismissed.

91. Concerning unpaid reimbursement for transport allowance for September and October 2023, the claimant did not demonstrate how the sum of Kshs.200,000 was arrived at or the journeys it related to. For instance, how many times did the claimant travel to voi and how much was payable to Taveta, Kaloleni, Mariakani or other places?
92. Being a species of special damages, the sum of Kshs.200,000 had to be strictly proved.
93. See Hahn v Singh [1985] KLR 716, Richard O. Kuku v South Nyanza Sugar Co. Ltd [2013] eKLR, Coast Bus Service Ltd v Murunga & others NRB [CA No. 192 of 1992](#), Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 Eldama Ravine Distributors Ltd & another v Chebon Civil Appeal No. 22 of 1991 among others.
94. The claim was unproven and it is declined.
95. The claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#).
96. The claim for general damages for breach of contract is unsustainable in an employment relationship where employment has been terminated.
97. Equally, the [Employment Act](#) does not envision an award of general damages when an employment relationship comes to an end at the instance of the employer.



The claim is dismissed.

98. In the end the following awards commend themselves:

- a. Unpaid leave days Kshs.137,200.00
- b. Bonuses Kshs.80,000.00
Total Kshs.217,200.00
- c. Certificate of service.

Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 9TH DAY OF JULY, 2025.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

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