



Hesbon v Omaera Pharmaceuticals Limited (Employment and Labour Relations Cause 2176 of 2016) [2025] KEELRC 2037 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2037 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2176 OF 2016**

JW KELI, J

JULY 4, 2025

BETWEEN

RIANG'A MAYAKA HESBON CLAIMANT

AND

OMAERA PHARMACEUTICALS LIMITED RESPONDENT

JUDGMENT

1. The claimant, following termination of his employment filed a memorandum of claim dated 25th October 2016 against the respondent seeking the following reliefs:-
 - a. The summary dismissal of the Claimant be declared unlawful, Unfair and constructive termination and hence null and void.
 - b) The Claimant demand for payment is as hereunder:-
 - i. Interest on paragraph 3 (iii) above from the date of dismissal until payment in full at the court rates.
 - ii. Any other statutory entitlements.The Respondent to pay legal costs in this suit.
2. The claimant itemised his claims under paragraph 3 of the claim as follows:-
 - a. Maximum compensation(12 months) pursuant to Section 49(c) of *Employment Act*, 2007 for Unfair termination: $12 \times 23,000 = 276,000/-$
 - b) Accrued unpaid leave days for 1year completed at 21 day's salary annually as per Section 28 of the *Employment Act* 2007: $21/30 \times 23,000 \times 1 = 16,100/-$



- b. Unpaid house allowance for 4 years at a third's salary: pursuant to section 31 of the *employment act* 2007-1/3×23,000×12×4=367,999.99/-
 - d) Certificate of service pursuant to section 51 of the *Employment Act* 2007.
3. The application was supported by the undated claimant's witness statement filed in court on the 21st March 2017 and documents filed under list of documents dated 25th October 2016.
 4. The claim was opposed by the respondent who entered appearance and filed response dated 29th November 2016, a list of documents dated 29th November 2016 together with the bundle of documents and a supplementary list of documents dated 25th July 2016 together with the document(payslip of December 2013). The respondent filed a witness statement of Michael Muiruri dated 3rd April 2018.

Hearing and evidence

5. The claimant's case was heard on the 28th October 2021 before Justice Ocharo Kebira where the claimant testified on oath, adopted his witness statement filed in court on the 21st March 2017 as his evidence in chief and produced his documents filed with claim under list dated 25th October 2016 as C-exhibits 1-7. He was cross-examined by counsel for the respondent, Nyanhoga and re-examined by his counsel.
6. The respondent's case was heard before me on the 6th March 2025 with Michael Muiruri (RW1) testifying on oath as the respondent's witness. RW1 adopted as his evidence in chief, his witness statement dated 3rd April 2018 and produced as defence exhibits under list dated 29th November 2016 as R-exhibits 1-3 and as R-exhibit 4 the document under list dated 25th July 2021. The witness was cross-examined by counsel for the claimant, Ms Omwenga and re-examined by his counsel and the Respondent's case was marked as closed.

The claimant's case in brief

7. This was as per the witness statement of the claimant adopted as evidence in chief. -He was employed by Omaera Pharmaceuticals limited from September 2008 to December 2013 as a distributor for their surgical equipment's and pharmaceutical products. That towards the end of December 2013, the claimant among other employees was instructed to do some cleaning in the course of which some promotional products disappeared. However, the employer did not realize that the products were missing until 3rd January 2014.where, the claimant amongst other employees was assigned blame and suspended for a period of one week. After the lapse of the one week suspension they called back, only to be sent back home on the promise that they would call back. The employer however, did not communicate and proceeded to hire new personnel. Thereafter the employer withheld payments for the days he worked in January, 2014.

Respondent' case in brief

8. As per the witness statement by Michael Muiruri dated 3rd April 2018 adopted as evidence in chief at the hearing- That sometime in the course of the employment of the claimant, the Respondent noted that the claimant was not fully committed to his work and would engage in personal activities during working hours. That after several oral warnings, the Respondent issued the claimant with a warning letter dated 13th July 2012, to the effect that his conduct and activities would be monitored after noting that there was no improvement on his part after the said warnings. Annexed hereto and marked OPL 1 is a copy of the warning letter. That sometime in December 2013, the respondent



while reviewing its security footage, noted that the claimant was stealing company property. That on 4th January 2014, after employees had resumed from the holiday break, the claimant confronted the respondent with CCTV footage showing that he had been captured stealing office property. That the claimant after viewing the footage, admitted that he had indeed stolen office property and alleged that he was remorseful. That the respondent instructed the claimant to return all the company items that he had stolen, however, the claimant did not show up to work after that date and efforts by the respondent to call him for purposes of recovering its items did not meet the courtesy of response.

9. That the claimant deserted his post at the respondent company and any other allegation stating otherwise is untrue and unfounded. Annexed hereto and marked as OPL 2 is the attendance sheet. That the Respondent denies in toto all the prayers as sought by the claimant and invites strict proof thereof and particularly avers that the Claimant went on his annual leave and the prayer seeking for accrued unpaid leave days should be dismissed. Annexed hereto and marked as OPL 3 is the leave form. By reasons of the foregoing the Respondent avers that the suit herein is frivolous, vexatious and incompetent and seeks that the same be dismissed with costs.
10. The parties took directions on filing of written submissions after the hearing and both complied.

Determinatio

Issues for determination

11. The court having perused the pleadings and submissions by the parties was of the considered opinion that the issues placed before the court by the parties for determination in the dispute were:-
 - a. Whether the termination was lawful and fair
 - b. Whether the claimant was entitled to reliefs sought Whether the termination was lawful and fair
12. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- ‘45(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 employees 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.’” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

Substantive fairness

13. Section 43 provides for proof of reasons for termination as follows:- ‘43. Proof of reason for termination
 - (1) In any claim arising out of termination of a contract, the employer shall be required 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.



- (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.”

The claimant’s submissions

14. The claimant herein was suspended orally. He was told to go home and he will be called back by the company. The company did not call him and proceeded to fill in his position. The procedure enshrined in the Employment Act 2007 as regards handling of employee disputes was not followed in violation of the claimant's fundamental rights enshrined in Article 41 and 47 of the Constitution. Article 41 of the Constitution provides that every person should be accorded fair labour practices, fair remuneration for work done and such employment is not adversely compromised without notice or a hearing. Despite the respondent being aware of that they suspended the claimant and proceeded to fill in his position contrary to the principles of fair labour practices. The Respondent has made allegation of theft against the claimant. There is no evidence of said theft. It has not been stated what exactly was lost that belonged to the Respondent. On cross-examination, the Respondent's witness confirmed that there is no evidence to show that there was an investigation into the alleged loss and how the Claimant was involved. The Respondent claims that the same was on CCTV. No evidence was availed to that effect even at the time of filing this case in 2016. There is no evidence that a theft actually occurred at the Respondent's premises. There is no evidence to show that the Claimant was involved in the alleged theft. There are no minutes for the alleged meeting where the Respondent alleges that the Claimant allegedly admitted the theft and allegedly promised to return the items. There is no inventory to show the alleged items that were allegedly stolen. The claimant was working together with other employees, so even if there were missing items, there is no evidence to point that the Claimant is the one who took them. There is no evidence to link the Claimant with the allegation of theft. The allegation that the claimant was seen on CCTV has been denied by the claimant and there is no evidence to show how the alleged took place as there was no footage that was availed. There no report that was made either internally or to the police. The upshot is that there is no evidence that the claimant was involved in any theft, no evidence to show that the reason of termination was communicated and there is no evidence that that the claimant was put on notice as regards the said reason whatsoever or at all. Substantively, the Respondent has not proven any reasonable cause to deprive the claimant of his source of income.

Respondent’s Written Submission

15. This Honourable Court is acquainted with the enduring principle that the employment relationship is anchored on mutual trust and fidelity. It is this intangible yet indispensable thread that binds employer and employee, shaping the expectations of accountability, honesty, and diligence on both sides. Without it, the relationship is rendered untenable. However, when such trust and responsibility is breached, this Court has always been called upon to empirically question the situation, provoking an employer to bring such a delicate relationship to its inevitable end.
16. While the Claimant now seeks to cloak this matter in the garb of wrongful dismissal, the Respondent urges this Honourable Court to look beyond the superficial characterizations and reflect on the core issue: whether an employer should be compelled to retain an employee who has undermined the very foundation of the employment relationship. In this instance, the Claimant disregarded his core responsibilities and deliberately broke that inescapable garment of trust and responsibility. His actions culminated in the unauthorized taking of company property and were followed by a deliberate and unexplained absconding from duty, conduct wholly incompatible with the obligations of a diligent and trustworthy employee. Consequently, the Respondent was left to shoulder the consequences of the Claimant’s abrupt and unjustified absconding, which disrupted operations and undermined the



integrity of the workplace. Therefore, while the Claimant has opted to water down this narrative, the Respondent submits that based on the circumstances before it, the Respondent acted with a degree of reasonableness, having had a fair and just reason to summarily dismiss the Claimant on account of his gross misconduct, breach of trust, and willful desertion of duty.

17. The Respondent submitted that given the Claimant's absconding of duty, this Court to be guided by the Court of Appeal's rationale in *Judicial Service Commission -V- Gladys Boss Shollei & Anor* [2014] e KLR in determining that the Claimant's dismissal was fair and valid in reason and process "... It can be seen that the core question for determination is whether an employee engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional - dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship."
18. The Respondent submitted that the claimant voluntarily abandoned employment That Section 47 (5) of the *Employment Act* read together with Section 41 and Section 43 of the Act provide for the foundation of substantive and procedural justice in addressing termination of employees from employment. To discharge this burden, the employee must first demonstrate that the termination occurred by an act of the employer, before moving further to show that it was unfair. In affirming the test for a fair and valid dismissal, the Court in *Michael Karanja Wanguru -V- Safaricom Kenya Limited* [2022] eKLR, cited with authority *Walter Ogal Anuro Versus Teachers Service Commission* [2013] eKLR where it stated that: - "For termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect termination." The Respondent vehemently submits that it did not terminate the Claimant's employment. The Claimant abandoned his duties voluntarily and refused to return to work. The Claimant testified that his employment was allegedly terminated on 3rd January 2014 after being confronted with glaring evidence that he took part in theft of company property and being allegedly suspended. However, the attendance records indicate that he reported to his workstation on 4th January 2014, a day after he alleges to have been terminated. (Refer to Attendance Form marked as RE-2) This contradiction undermines the credibility of the Claimant's testimony. It is a well established practice where an employee is summarily dismissed, such dismissal would result in the immediate termination of the employment relationship. An employee who has been summarily dismissed or suspended would not, under ordinary circumstances, be expected, or even permitted, to return to the workplace the following day. In this regard, the Respondent submits that the Claimant's presence at the workplace on 4th January 2014 is inconsistent with the conduct of an employee who had been summarily dismissed or allegedly suspended.
19. On the other hand, the Respondent's witness, RW1, testified that the Claimant was found to have taken company property without authorization following a routine audit and subsequent internal investigations. RW1 further testified that upon being confronted, the Claimant admitted to taking the company property, expressed remorse, and offered an explanation that was not convincing, hence he was instructed to return the property, but he failed to comply and instead opted for the easy way out, absconding without taking accountability. It further came out in RW-1's testimony that the Claimant ceased reporting to work altogether on 6th January 2014. The Claimant failed to show up to work and has never shown up since then. All attempts to reach out to him hit a brick wall as the Claimant refused and/or ignored all calls to report back from the Respondent. Despite the Respondent's efforts to contact the Claimant, we submit that there was a clear lack of communication from the Claimant's side, absence that can be construed as absconding from duties and desertion, which are legitimate grounds for dismissal under Section 44 of the *Employment Act*.



Decisio

20. What emerges from the above analysis of the evidence by the parties is that the claimant was accused of some crime and sometimes between 3rd and 4th April 2014 left work (the suspension on 3rd April was disputed). On his part the claimant said he was suspended on 3rd April 2014 being accused of theft and on the part of the respondent that the claimant did not report back after being shown footage of theft on CCTV. It was not in dispute that there was no show cause on the alleged theft or the absconding by the employer. There was no evidence of the employer having looked for the claimant on the alleged absconding. All what the employer did was to proceed with replacement of the claimant. Absconding is a valid reason for termination if proved by the employer. The prove is by invocation of section 41 of the *Employment Act* as held in *Simon Mbithi Mbane Vs Inter Security Services Limited (2018) Eklr* where the Court stated, an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. The employer is thus obliged to prove communication effort to the employee that it intends to terminate the employment on basis of absconding. In the instant case the employer raised issue of theft crime but no show cause or any evidence of the claimant having admitted to the crime. Further the actual reason for separation advanced by the employer was absconding. The respondent through its witness confirmed that they had no evidence of any efforts made to reach the claimant upon the alleged absconding. In the circumstances the court finds that there was no prove of valid reasons for the termination of the claimant's employment.

Procedural fairness

21. The court found the respondent just proceeded to replace the claimant as an employee on basis of unproved claim of absconding. RW1 told the court there was no procedural hearing as the claimant absconded. The court found there was not procedural fairness according to section 41 of the *Employment Act* to wit:- 41. Notification and hearing before termination on grounds of misconduct
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
22. In the upshot, the termination of the claimant's employment is held as unlawful and unfair.

Whether the claimant is entitled to reliefs sought

23. Compensation for unfair termination-The court found there was no prove of the alleged theft and the reason for absconding was not proved hence the claimant did not contribute to his employment contract's termination (section 49(4)(b) of the *Employment Act*). The court on finding unfair termination is to consider and apply remedies under section 49 of the *Employment Act*. The Supreme



Court in Kenfreight (E.A.) vs. Benson K. Nguti Civil Appeal No 31 of 2015 2016 KECA 688 (KLR) [2019] eKLR explained the applicability of the provisions of Section 49 as hereunder:-

“.....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....” The exercise of the discretion of the court is not capricious or whimsical and the court should justify the award (*Olpejeta Ranching Limited v David Wanjau Muhoro* (2017)e KLR. The claimant told the court he was employment on 1st September 2008 and the employment terminated on 3rd January 2014. The respondent took the position that he was last in employment on 4th January 2014 as per the produced attendance register. The court finds the claimant worked for 5 years 4 months and 3 days for the respondent. Only one warning during employment was issued of having taken too long on a task at Portland. Taking into account the period of work and the court guided by similar cases awards 5 months gross salary as compensation for the unfairness. See *Wilson Kibande Abai v Kenya Tents Limited* [2019] eKLR and *Obonyo v Kibos Sugar & Allied Industries* [2024] KEELRC 1392 (KLR)) The compensation is awarded equivalent of 5 months’ salary for the sum of Kshs. 132,000(Kshs. 26,400x5).

24. Notice of one month to issue under section 35 of the *Employment Act*. The same is awarded for Kshs. 26,400.
25. On claim for housing- RW1 stated the salary of Kshs 26,400(R-exh4) was stated as basic pay and not consolidated. The claimant was not housed. The claimant relied on the decision of the Court of appeal in *Grain Pro Kenya Inc Ltd V Andrew Waithaka Kiragu* 2019 e KLR where the court held- ‘For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause “other benefits as required by law” in the contract to award house allowance. We would have applied Section 31 (2) (a) of the *Employment Act* to exclude it.
 - (14) The above being our finding, the only issue is the computation of the said house allowance. It would seem the learned Judge did not explain the formula used to arrive at the sum of Ksh 571,531 awarded as house allowance. This was the sum claimed by the respondent in the statement of claim which the Judge adopted as it was, hook line and sinker. Counsel cited many authorities where house allowance was calculated at the rate of 15% of the monthly salary and in accordance with the General Wages Guild. The case of *Ananna Yonemura v Liwa Kenya Trust* [2014] eKLR and *Kedhihia Workers v B.O.G Maseno School for the deaf* [2013] eKLR were cited. To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent. In this regard the respondent was employed on 1st June, 2010 and he was terminated on 14th September, 2012 giving a period of about 25 months. Thus $600 \times 25 \times 103 = 1,545,000$ out of which 15% should be the house allowance and that is Ksh. 231,750.”In the instant case the Respondent produced pay slip of the claimant indicating basic pay as Kshs. 26400. Neither party produced the employment contract. Without any other basis to find the salary was consolidated, the court is then guided by the Court of Appeal decision *Grain Pro Kenya Inc*



Ltd V Andrew Waithaka Kiragu 2019 . The claimant’s employment was terminated in January 2014. This claim was filed on the 25th October 2016. The claim for housing is categorised as continuing injury and ought to have been claimed within 12 months of termination under section 89 of the Employment Act to wit-‘89. Limitations Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

26. The Court of Appeal in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- “There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. In the case the court observed “It is no doubt true that if the appellant’s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant’s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified.” I find the claim was housing was a continuing injury, was justified but was statute time-barred the claimant having sacked in January 2014 and filed his claim on 25th October 2016 outside the 12 month’s time limit under section 89 of the Employment Act.
27. Leave pay -The claimant sought for leave pay for 21 days(accrued). The respondent produced a leave form indicating the claimant went on leave for 21 days in 2013. The claimant told the court he applied for the same but was told he would take the leave in 2014 but was sacked before he could take it. During cross-examination, RW1 confirmed the claimant went on leave for 21 days and stated the period. The court had no basis to doubt the evidence of respondent. The claim for accrued leave fails.

Conclusion

28. The claim is allowed. The court enters judgment for the claimant against the respondent as follows:-
- a. The termination is held as unlawful and unfair
 - b. Notice pay for Kshs. 26,400
 - c. Compensation the equivalent of 5 months salary Kshs. 132,000
 - d. The total sum of Kshs. 158400 (above) is payable with interest at court rates from date of judgment until payment in full.
 - e. Cost of the suit.
 - f. Certificate of service to issue under section 51 of the Employment Act.
29. Stay of 30 days granted.
30. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025

J.W. KELI
JUDGE



IN the presence of:

Court Assistant: Otieno

Claimant –

Respondent: Munene

