



Kenya Union of Entertainment & Music Industry Employees v Bomas of Kenya Limited (Cause 1516 of 2018) [2025] KEELRC 1987 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 1987 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1516 OF 2018**

**CN BAARI, J
JULY 4, 2025**

BETWEEN

**KENYA UNION OF ENTERTAINMENT & MUSIC INDUSTRY
EMPLOYEES CLAIMANT**

AND

BOMAS OF KENYA LIMITED RESPONDENT

JUDGMENT

1. Before Court is the Claimant’s Amended Memorandum of Claim dated 17th October, 2023, wherein, the Claimant seeks the following reliefs as against the Respondent:
 - a. That the Honourable Court be pleased to find the action of the Respondent to terminate and refuse to pay terminal dues inclusive of the accrued rights an unfair labour practice.
 - b. That the Respondent be ordered to pay all accrued rights, terminal benefits and be compensated maximally as computed here under: -
 - i. 3 months’ pay in lieu of notice @ 38,120 X 3=108,360
 - ii. 32 years’ Service Gratuity @ 45 days per every year = 32 x45x36,120 =2,001,048/= 26
 - iii. Half pay arrears while on interdiction as per interdiction letter 12 months x 18,060 = 216,720/=
 - iv. 48 months house allowance arrears while on interdiction 12 months x 12,641.28 = 151,695.36/=
 - v. 48 months commuter allowance arrears while on interdiction 48 months x 1500 = 72,000/=
 - vi. Maximum 12 months - pay for unfair termination 12 months x 36,120 =433,440/=



vii. Full salary till when the termination letter was served

$75 \text{ months} \times (36,120 + 12,641.22) = 3,657,096/=$

Total claim = 6,640,359.36/=

- c. That the Respondent be ordered to continue paying the grievant as per Section 36 of the parties CBA, until the hearing and determination of the criminal suit against him (grievant);
- d. That the cost of this suit be met by the Respondent herein.
2. The Respondent filed a Statement of Defence dated 18th March, 2019 in response to the Claimant's claim.
3. The Claimant's case was heard on 30th June, 2023 and further on 28th October, 2024 when the grievant Mr. Evanson Ndegwa (CW1), testified in support of the Claimant's case. He adopted his amended witness statement dated 17th October, 2023 and produced his list and bundle of documents dated 14th November, 2018, and the further list of documents dated 17th October, 2023 as Claimant's Exhibits Nos. 1-12.
4. During the Defence hearing on 19th March, 2025, the Respondent's counsel Mr. Ouma told the Court that he was not able to avail his witness to testify in the matter, and proceeded to close the Respondent's case.
5. Submissions were received from both parties.

The Claimant's case

6. The Claimant avers that the parties have a signed a Recognition Agreement which was negotiated and registered. It is its further case that the grievant was employed by the Respondent on 15th September, 1991 as a General Labour.
7. It is the Claimant's case that the grievant was subsequently promoted to the position of supervisor in the department of caretaker and security, and that after 20 years of service, he was on 23rd December, 2011, issued with a certificate of recognition for outstanding performance.
8. The Claimant avers that on the 11th February, 2015, the grievant was issued with a show cause letter which he was required to respond to by 4th February, 2015.
9. It is claimed that on 5th February, 2015, the Respondent interdicted the grievant vide a letter of even date pursuant to Clause 36.0 of the parties CBA, and further placed the grievant on half basic salary, while the other allowances were not affected.
10. The Claimant avers that in Criminal case No. 651 of 2015. the grievant was discharged under Section 87 (a) of the CPC after the prosecutor was denied adjournment, and decided to withdraw the case due to failure to produce bonded witnesses. That subsequently, the grievant was re-arrested and charged with the same charges of stealing and taken back to Court on 8th June, 2016.
11. The Claimant states that the grievant was released on 5th February, 2015 and it is upon his release that he realized that his salary had not been deposited from March, 2016 as per the parties CBA, and the Respondent interdiction letter.
12. The Claimant states that the grievant basic salary was Kshs.36,120/=, house allowance Kshs.12,641 and commuter allowance was Kshs.1,600 before termination.



13. During the hearing, the grievant testified that he did not steal the metal bars, but that he made a request to one Joseph Njoroge as shown in the Judgment in the Criminal Court. The Claimant avers that the grievant's testimony is that he was not invited to the disciplinary hearing nor was he paid any terminal dues.
14. On cross-examination, the grievant admitted that the property Manager, Mr. Njoroge was not authorized by the Respondent to release items including the metal bars that were found in his possession. The grievant further stated that he did not lay responsibility on Mr. Njoroge and that during the criminal hearing, Mr. Njoroge denied authorizing the metal bars to him.
15. The grievant further admitted on cross-examination, that when he was granted bail, he did not return back to work.
16. The Court further heard that the grievant was acquitted of the criminal charges in the criminal case No. 2504 of 2016 involving the material theft.
17. On re-examination, the grievant confirmed that he was not invited for a disciplinary hearing and only learnt of his termination while undergoing hearing in this instant case.

The Respondent's case

18. The Respondent's case is that on 31st January, 2015, the grievant was found carrying scrap metals from the Respondent's premises left behind by the China Wu-yi Company, and some parts of the billboard materials owned by Kenya Alliance Media Company that were rented out to the Respondent.
19. The Respondent avers that the grievant was stopped by security personnel whom upon questioning him, stated that Mr. Njoroge had authorized him to carry away the items. It avers further, that upon calling Mr. Njoroge, he denied having any such knowledge or authorizing the collection of the scrap metal.
20. The Respondent states that the grievant was then escorted to the police station. It is further avers that on 3rd February, 2015, the Respondent issued the Claimant with a show cause letter for having been found carrying scrap metal from the Respondent's compound without authorization or following due process which amounted to smuggling company property.
21. The Respondent states that the grievant responded to the letter stating that his material actions had been authorized by one Mr. Njoroge. It states further, that on 5th February, 2015, the grievant was interdicted awaiting the outcome of the staff committee directives or Court process whichever came first, and was to be paid half salary from then on until the completion of his case.
22. The Respondent avers that on 7th March, 2015 and again on 21st March, 2015, the grievant was invited to appear before the staff advisory committee which was to take place on the 15th March, 2015 and 24th March, 2015 respectively, but that he never appeared before the said committee on any of the respective dates.
23. It is further averred that on 29th April, 2016, the grievant was terminated for reasons that he was found in possession of company property without official authority, and for failure to comply with lawful orders issued by persons of higher authority which amounted to gross misconduct.
24. The Respondent prays that the Claimant's claim be dismissed with costs.



The Claimant's Submissions

25. On whether the grievant was unfairly and/or unlawfully terminated, the Claimant submits that for any termination to be valid and fair, it must comply with the statutory provisions of Sections 41 and 43 of the *Employment Act*, 2007.
26. The Claimant submits that the grievant was terminated without first establishing any valid proof as the investigations were pending in the criminal court and whose outcome acquitted him. It is the Claimant's submission that the grievant's termination violated Section 43 of the *Employment Act*.
27. The Claimant further submits that the Respondent violated the procedural fairness stipulated in Section 41 of the *Employment Act*, by not according the grievant an opportunity to be heard.
28. It is the Claimant's submission that the Respondent disregarded the mandatory provisions of Section 45(2) (a) & (b) regarding the validity of reasons and procedural fairness. To buttress this point, the Claimant relied on the holding of the Court Appeal in Pius Macahfu Isindu vs Lavington Security Guards Limited [2017] eKLR.
29. On the second issue, the Claimant submits that upon termination, the Respondent was required to pay the grievant his accrued terminal benefits in accordance with Section 18 (5) (a) of the *Employment Act*. It is the Claimant's further submission that the Respondent failed to observe the said provision, hence acted unjustly and contravened Section 45(4)(b) of the *Employment Act*.
30. It is also the Claimant's submission that Section 26 of the *Employment Act* provides that other favourable terms of employment contained in CBA in addition to the basic minimum conditions expressed in the *Employment Act*, are guaranteed. This being the case, the Claimant submits that the Court should fault the Respondent for failing to pay the grievant his terminal dues and accrued rights provided by the Collective Bargaining Agreement.
31. In summation, the Claimant urges the Court to grant the orders sought in the Memorandum of Claim.

The Respondent's Submissions

32. On whether the Claimant's termination was conducted in a valid, procedural and lawful manner and thereby ultimately fair, the Respondent relied on the case of Aviation & Allied Workers Union vs Kenya Airways Limited [2017] to submit that the criminal case and the internal disciplinary process are two distinct matters and are in no way connected to each other.
33. It is further submitted that the reason for the Claimant's dismissal was sound, sufficient and lawful. The Respondent claims that it discharged its burden of proof on the reason for termination. The Respondent had reliance in the case of Dungani Vs *West Kenya Sugar Company Limited (ELRC Appeal 12 of 2023)* [2024], to submit that its decision was reasonable.
34. On due process, it is the Respondent's submission that it accorded the Claimant an opportunity to be heard and ultimately followed due process in the termination in line with Section 41 (1) and (2) of the *Employment Act*. The Respondent in addition reiterated the steps it took from the occurrence of the incident up to termination as expressed in the Defence.
35. On whether the grievant is entitled to the reliefs sought, the Respondent is of the position that the Claimant is not entitled to the relief sought as it has failed to discharge the burden of proof for unlawful termination.



36. It is the Respondent's final submission that the Claimant's suit is not merited and urges the Court to dismiss the Claimant's claim with costs.

Analysis and Determination

37. Upon careful consideration of the pleadings herein, the grievant's testimony and the parties' submissions, the following issues crystallize for determination:
- i. Whether the termination of the grievant's employment was fair, procedural and lawful; and
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the grievant's employment was fair, procedural and lawful.

38. The grievant's date of termination is in contestation. The Claimant contends that the grievant was terminated on 30th June, 2023, while the Respondent asserts that it served the grievant with a termination letter dated 29th April, 2016, when he declined to appear before the Staff Advisory Committee for disciplinary hearing. The Court notes that it is only upon its intervention that the Respondent issued the grievant with a termination letter dated 30th June, 2023.
39. The Respondent having subsequently issued the grievant with a termination letter dated 30th June, 2023, the Court adopts that as the date when the grievant was terminated from the service of the Respondent.
40. On whether the termination of the grievant's contract was fair, it is trite law that the Court in determining this issue must interrogate the processes followed in the termination and must also satisfy itself on the validity of the reasons for the termination; otherwise referred to as the substantive justification.
41. Section 41 of the *Employment Act*, 2007 provides thus:
- “(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.”
42. The Claimant's position is that the grievant who was employed as a general labourer, was falsely accused of intending to steal the Respondent's Property on 31st January, 2015, when he was arrested and arraigned in a criminal Court where he was subsequently acquitted of the theft charges on 8th April, 2020.
43. It is the Claimant's assertion that following the incident, the grievant was issued with a show cause letter dated 3rd February, 2015 requiring him to respond to the incident that had occurred on 31st January, 2015, where he was found carrying scrap metal left by China WU-YI company and parts of billboard materials owned by the Kenya Alliance Media Company, which action amounted to gross misconduct.
44. The Court further heard that the grievant was subsequently interdicted on 5th February, 2015 on account of the stealing charges and consequently put on half pay, pending the conclusion of the criminal case No. 2504 of 2016 or directives of the Staff Advisory Committee. It is also not disputed



- that the grievant was subsequently acquitted of the Charges vide a Judgment delivered on 8th April, 2020.
45. The grievant maintains that he did not receive an invitation to attend a disciplinary hearing over the allegations contained in the notice to show cause letter and only learnt of his termination during the hearing of the instant case.
 46. In light of the foregoing, the Claimant contends that the Respondent did not follow due process in terminating the grievant's services, and therefore, seeks that the termination be declared unlawful and unfair.
 47. The Respondent on its part, insists that it followed due process in terminating the grievant's contract upon being found in unlawful possession of metal bars belonging to the Respondent without lawful authorization. It asserts that the grievant was consequently, charged with stealing contrary to Section 268(1) as read with Section 275 of the *Penal Code* and criminal proceedings ensued as a result.
 48. The Respondent further contends that it served the grievant with a show cause letter dated 3rd February, 2015, outlining the offences committed by the grievant, and requiring him to respond to the charges. It is also the Respondent's assertion, that the grievant responded to the allegations vide a letter dated 4th February, 2015, but that it was not satisfied with the response, and it served the grievant with an Interdiction letter dated 5th February, 2015 placing him on half pay pending the conclusion of the Criminal case or the directives of the staff advisory committee.
 49. The Respondent further submitted that it invited the grievant to attend a disciplinary hearing on two separate occasions, vide letters dated 7th March, 2015, and again on 21st March, 2015, but that the grievant failed to attend resulting in his termination from the service of the Respondent on 29th April, 2016.
 50. It is not disputed that the grievant was issued with a show cause notice and which he admitted responding to on 4th February, 2015. It is also not in dispute that the grievant was interdicted pending the hearing and determination of the criminal charges levelled against him, which parties agree that he was acquitted of.
 51. The grievant has not at all indicated or admitted service by the Respondent with invitations to appear for a disciplinary hearing, and the Respondent not having presented any witness to produce its documents, the grievant's position that he was not accorded a hearing prior to termination of his employment stands.
 52. This Court thus on this basis, reaches the conclusion that the Respondent failed the procedural fairness test espoused in Section 41 of the *Employment Act*, in not granting the grievant opportunity to be heard.
 53. The termination of the grievant's employment is therefore no doubt unprocedural and unfair and so I hold.
 54. On whether the Respondent had valid, fair and justified grounds to terminate the grievant's services, the Respondent not having led any evidence to prove validity of its reasons for terminating the grievant, coupled with the judgment produced in evidence by the Claimant acquitting the grievant, I hold that the Respondent has not proved fair grounds upon which it terminated the grievant's contract.



Whether the Claimant is entitled to the reliefs sought Pay in lieu of Notice

55. The Respondent did not lead any evidence to show that the grievant was issued notice or paid in lieu thereof, and having found the termination procedurally unfair, entitles him to 1 month pay in lieu of notice. It is hereby awarded.

Compensation for unlawful termination

56. The Claimant sought that the grievant be awarded the equivalent of 12 months' salary as compensation for the unfair dismissal. Having found that the grievant's termination was unlawful and unfair, no doubt entitles him to an award of compensation.
57. Compensation for unfair termination/dismissal, is by law capped at a maximum of 12 months' salary. Section 49(4) of the *Employment Act*, further provides 13 factors that guide the Court in arriving at the appropriate award.
58. The grievant admitted on cross-examination that he was found in possession of the Respondent's property without lawful authorization. For this reason, it is evident that the grievant largely contributed to his own termination, and on this account, I find an award of three (3) months' salary sufficient compensation for the unfair termination.

32 years' Service Gratuity in the sum of Kshs. 2,001,048/=

59. It is now settled that an employee is not entitled to gratuity as a matter of course. Instead, one has to prove that gratuity was either a term of contract or provided for under a CBA.
60. The Claimant did not lead any evidence to show that the grievant was entitled to gratuity. In *John Karanja Mbogo v Leah Wangui t/a Gilgil Distributors Limited* [2020] eKLR the Court in dismissing a prayer for gratuity stated that:

“The claim for gratuity is not due. The Claimant had no written contract giving him such a benefit. The Respondent was paying statutory dues and even where a service pay was claimed, with such payment of PAYE, NSSF not service pay is due.”

I therefore, decline the prayer for an award of service gratuity.

Half pay arrears while on interdiction as per interdiction letter in the sum of Kshs.216,720/
=

61. The grievant was entitled to the half salary withheld during the interdiction period after his acquittal from the criminal charges on 8th April, 2020. An employee who is interdicted on half pay is entitled to payment of the half pay withheld during the interdiction period.
62. In the case of *Grace Gacheru Muriithi –Versus- Kenya Literature Bureau* (2012) eKLR, the Court stated:

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process, the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period



of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.”

63. In view of the foregoing, I find and hold that the grievant is entitled to unpaid half pay for a period of 12 months which was withheld during the interdiction period. The same applies to house allowance arrears withheld and commuter allowance withheld.

Full salary till when the termination letter was served

64. From the record, there is no proof of any service rendered after the grievant was interdicted. It is also clear from the evidence that the Grievant did not return to work after he was arrested even after being granted bail by the Criminal court. In view of the forgoing and having granted compensation for unfair termination, I decline the claim for salary in the period the grievant did not provide service.

65. In whole, the Claimant’s claim succeeds and orders granted as herein below: -

- a. A declaration that the grievant’s services were unfairly terminated.
- b. An award of one (1) month salary in lieu of notice at Ksh. 36,120/-
- c. An award of three (3) months salary as compensation for the unfair termination at Kshs.108,360/-
- d. Half pay arrears while on interdiction as per interdiction letter for 12 months at Kshs.216,720/
=
- e. 48 months house allowance arrears while on interdiction 12 months at Kshs.151,695.36/=
- f. 48 months commuter allowance arrears while on interdiction 48 months at Kshs.72,000/=
- g. Parties shall bear their own costs of the suit.

66. Judgment of the Court.

SIGNED, DELIVERED AND DATED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 4TH DAY OF JULY, 2025.

C. N. BAARI

JUDGE

Appearance :

Mr. Mucuha present for the Claimant

N/A present for the Respondent

Ms. Wali – C/A

