



**Mogotu v East Africa Cables Limited (Cause 247 of 2018)  
[2024] KEELRC 1123 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1123 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 247 OF 2018  
K OCHARO, J  
APRIL 26, 2024**

**BETWEEN**

**ELIZABETH MOGOTU ..... CLAIMANT**

**AND**

**EAST AFRICA CABLES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant instituted this suit vide a Memorandum of Claim dated 28<sup>th</sup> February 2018 seeking against the Respondent; a declaration that the termination of her employment was unlawful and wrongful; damages for the unlawful termination; issuance of a certificate of service; and various liquidated reliefs.
2. Alongside the Memorandum of Claim, the Claimant filed, a List of Documents dated 28<sup>th</sup> February 2018 and various documents thereunder, and her witness Statement of the same date.
3. The Respondent neither entered an appearance nor filed a statement of Response. As a result, this matter proceeds as an undefended cause. The matter proceeded for formal proof on the 7<sup>th</sup> of March 2013, when the Claimant testified. Counsel for the Respondent had an opportunity to cross-examine her.
4. After the formal proof hearing, I directed that parties file their respective written submissions. The Claimant filed submissions dated 22<sup>nd</sup> March 2023, and the Respondent filed submissions dated 5<sup>th</sup> May 2023.



## Claimant's case

5. The Claimant's case is that she first came into the employment of the Respondent on or about the 29<sup>th</sup> of June 2012 through a letter of appointment dated the same day as a store officer/Receptionist, at a starting salary of KShs. 28000. Her salary at the time of separation was KShs. 74,640.
6. The Claimant stated that on or about the 14<sup>th</sup> day of 2017, she requested to take 11 days of leave which request was granted by the Respondent. The 11 days were the remainder of her annual leave days. She commenced the leave on the 17<sup>th</sup> of July 2017 and was to report back on the 2<sup>nd</sup> of August 2017.
7. On the 28<sup>th</sup> of July 2017, she fell ill and had to be rushed to Hospital. She was admitted. On the 29<sup>th</sup> of July 2017, the Doctors decided that she needed to undergo surgery. Knowing that the surgery might require her to be off duty for some time, she called the Respondent and informed them of her situation.
8. The Claimant stated further that she underwent the surgery on 12<sup>th</sup> August 2017 and was discharged from the Hospital on the 28<sup>th</sup> August 2017. The Doctor recommended a three-week bed rest [29<sup>th</sup> August 2017 to 18<sup>th</sup> September 2017]. The Doctor gave her a sick-off sheet, which she handed over to the Respondent.
9. The Claimant testified that after three weeks, her Doctor was of the view that she was not fit to resume duty. He recommended for her a further two weeks of bed rest [18<sup>th</sup> September 2017 to 2<sup>nd</sup> October 2017]. She again gave out the sick sheet in respect of this period to the Respondent.
10. It is on this day when she handed in the sick sheet that the Respondent terminated her employment verbally, by informing her never to report back to work. She was further informed that another employee had been recruited to take up her position. The Respondent intimated to her that the termination was aimed at allowing her to attend to personal issues.
11. It was further stated that stated that at the time of termination, she had served the Respondent diligently and honestly without any disciplinary issues for 5 years and two months.
12. The termination was not preceded by any notice. The Respondent didn't give her any legitimate reason for the termination. Further, the termination was in contravention of the stipulations of the [Employment Act](#).
13. The Claimant further stated that during her tenure of service, she worked for 12 hours every day from 7.00 am to 7.00 pm which amounted to four hours of overtime every day, but she was never compensated for the overtime. Further, she never received house allowance during the entirety of her period of service, and never proceeded on annual leave or received payment for her earned but unutilized leave days.
14. The Claimant placed reliance on the contents of her witness statement as part of her evidence in chief. She further tendered the documents that she had filed herein as her documentary evidence.
15. Cross-examined on the letter of appointment, the Claimant testified that a signed copy thereof is in the possession of the Respondent. Paragraph 1[a] of the appointment letter provided for normal working hours, 8.00 am to 5 pm. Pressed further, she testified that she had not presented to the Court any document from whence it can be discerned that at any particular time, she was instructed to work overtime, however, the record in regard thereof is with the Respondent.
16. The Claimant further testified that she had a meeting with the Commercial Director, Ms. Julia who allowed her to proceed on leave. Annually, she was entitled to 21 days of paid leave. The contract of service was silent, however, on payment during sick-off days.



17. The Claimant reiterated that though she was supposed to return to work on the 2<sup>nd</sup> of August 2017, she didn't as she fell ill. However, she notified the Respondent of her health situation.
18. The Claimant testified that the 1<sup>st</sup> sick-sheet was delivered to the Respondent by her sister on her behalf, two days after she was discharged from the hospital. The Respondent didn't sign the same, it only advised the sister to leave it behind. The same was signed by the Respondent, and picked later by the Claimant when the Doctor insisted that he wanted a signed copy.
19. Under his contract of employment, she at all material times had medical cover which she could use whenever it was necessary. After the termination, she didn't use the Insurance card any more.
20. She further testified under cross-examination that after she successfully completed her probation period, her salary was for the 1<sup>st</sup> time increased to KShs. 35,000. Further, she was not advised that the salary was inclusive 15% house allowance.
21. The Respondent used to issue its employees with copies of their payslips only upon request. The ones she presented to this Court were obtained in this said manner.
22. The Claimant refuted the Respondent's Counsel's suggestion that she was issued with a termination letter dated 3<sup>rd</sup> November 2017. She insisted that her employment was terminated on the 28<sup>th</sup> of July 2017, verbally.
23. She further refuted the suggestion that she in the course of her employment took products from her employer, the Respondent on credit.
24. On the 13<sup>th</sup> of December 2017, a cheque of KShs. 214,610 was deposited into her account by her Sacco. The money was not her terminal dues but the savings that she had in the Sacco. The Respondent was the owner of the Sacco and managing the same.
25. The Claimant testified that at the time, her savings were approximately KSHS. 296,000. Further, she didn't place any document before the Court to demonstrate this as she didn't think that her savings could be an issue.
26. The Claimant admitted that she signed leave forms for the year 2017. Further, the contract of employment provided for termination of employment by either party issuing the other notice or salary in lieu of notice.

### **Claimant's Submissions**

27. It is submitted by the Claimant that the existence of an employer-employee relationship between the parties was never contested. Further, Section 47 (5) of the *Employment Act* 2007 imposes a burden upon the employee to prove that an unfair termination has occurred, and on the employer to justify the grounds for the termination.
28. The Claimant submitted that the termination of her employment offended the provisions of sections 43 and 45 of the *Employment Act*. As a result, it should be deemed unfair.
29. Further, the Respondent's argument that the Claimant absconded work, cannot hold sway. Where the employer alleges that the employee's employment was terminated on account of desertion of duty by the employee, the duty lies on the employer to demonstrate attempts made to reach out to the employee. To support this submission, reliance was placed on the cases of Boniface Francis Mwangi vs B.O.M, Iyego Secondary School [2019] eKLR; Simon Mbane vs Intersecurity Services Ltd [2018] eKLR;



- and Joseph Nzioka vs Smart Coatings Limited [2017] eklr. In the instant case, the Respondent failed to demonstrate that it did make attempts to trace the Claimant.
30. The Claimant submitted further that it is now trite law that in a dispute as is in the current case, the employer is charged with the burden of proving substantive justification for the termination of employment, and that the termination accorded the dictates of procedural fairness, as required by the provisions of Sections 41, 43 and 45 of the *Employment Act* 2007. Reliance was placed on the case of Walter Ogal Anuro vs Teachers Service Commission to buttress this submission.
  31. There cannot be a valid termination of employment in situations where the employer didn't give the employee proper notice under the contract of employment. To support this point, the Claimant sought fortification in the case of Ken Freight (EA) Limited vs Benson K. Nguti [2016] eklr.
  32. The Claimant concluded her submissions by urging the Court to hold that by reason of the premises, the termination of her employment was both procedurally and substantively unfair.
  33. On the reliefs sought, the Claimant submits that she is entitled to the maximum 12 month's compensation for unfair termination as she has proved that she was unfairly terminated, she did not contribute to her termination, and she has never received her terminal dues. In support of her submission, the Claimant cites the case of Kenya Broadcasting Corporation vs Geoffrey Wakio.
  34. Since the Respondent terminated her employment without notice, the Claimant states that she is entitled to one month's pay in lieu of notice per Section 36 of the Act. With regard to annual leave, the Claimant submitted that under Section 28 of the Act, she was entitled to 21 days of annual leave every year. However, in breach of the statutory provision, the Respondent never allowed her to go on leave or compensate her for the unutilized leave days. As such, her claim for compensation under this head should be allowed.
  35. Regarding house allowance, she submitted that Section 31 of the *Employment Act* places a duty on the employer to provide his employees with accommodation or house allowance in lieu. The Respondent provided the Claimant with neither. Her evidence on this is not rebutted. Her Claim for 15% of her basic salary should succeed. To buttress this submission she placed reliance on the case of Charloy Sikuku Madiangi vs Bunson Travel Service Limited [2018] eklr.
  36. The Claimant also submits that she is entitled to overtime pay as she worked from 7.00 am to 7.00 pm from Monday to Saturday for the 5 years she worked for the Respondent, including on public holidays. Further, Per Section 51 of the Act, the Respondent should be directed to issue her with a Certificate of Service.

### **Respondent's Submissions**

37. The Respondent heavily submits on the procedural history of this matter. The Court has noted the same, however, it will not reproduce that part of the submissions, as the burden at hand for this Court at this juncture is to interrogate whether or not there was the termination of the Claimant's employment; if there was, whether the same was fair; and whether the reliefs sought can be availed her.
38. The Respondent submitted that on cross-examination, the Claimant admitted that she had been paid her terminal dues of Kshs. 204,610/- comprising of service pay calculated at 15 days pay for every year worked (based on her gross salary of Kshs. 74,846/-) less certain deductions. Further, the payment was effected through her Barclays Bank of Kenya account by cheque.
39. It was further submitted that the Claimant's claim for overtime compensation worked for five years should be declined for two reasons, first, is not plausible that the Claimant worked 4 hours overtime,



6 days a week, 4 weeks a month for the entire duration of her employment, being 5 years. No doubt, the computation by the Claimant of the alleged unsettled overtime pay does not exclude the days on which she was on leave. Second, the claim suffers from a lack of specificity.

40. On house allowance, the Respondent submits that the Claimant earned a consolidated salary which is evidenced by Clause 3(a) of the Letter of Appointment. Further, the Respondent submits that the Claimant does not fall within the categories of employees covered under the Regulation of Wages (General) Order, on which she bases her claim of house allowance.
41. The Respondent submits further that the Claimant's claim for notice pay is unfounded and it should be rejected pay. Her employment was terminated through the letter dated 3<sup>rd</sup> November 2022, in which letter it is indicated that she was paid one month's salary in lieu of notice.
42. The Respondent submitted that the Claimant didn't place before this Court any sufficient evidence in the form of medical records/ reports from which it can be conclusively deduced that indeed she was admitted to the hospital for all the alleged time. Further, her contract of employment, Clause 6 thereof, stipulated that the Claimant was only entitled to 30 days' sick leave per year. Contrary to this contractual term, she was away for away from duty for seventy (70) days beginning on 17<sup>th</sup> July 2027 and ending on 28<sup>th</sup> September 2017. The Respondent was justified to summarily terminate her employment.

### **Analysis and Determination**

43. I have reviewed the Claimant's pleadings, her evidence, and respective submissions filed by the parties, and the following issues emerge for determination;
  - a. Whether the Respondent unfairly terminated the Claimant's employment;
  - b. Whether the Claimant is entitled to the reliefs sought.
    - a. Whether the Respondent unfairly terminated the Claimant's employment
44. It is imperative to state from the onset that the fact that the Respondent failed to file its response to the Claimant's Statement of Claim and present evidence against her claim doesn't in any manner suggest that she shall automatically have a judgment in her favour in this matter. This Court must carefully consider her evidence and render itself on the point whether she has or hasn't proved that which the law requires her to to succeed, in the context of an employment dispute. The decision in *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR, supports this point.
45. From the material placed before this Court, there cannot be any doubt that at all material times, the Claimant was an employee of the Respondent and that the latter terminated the same. In his submissions Counsel for the Respondent first acknowledged the termination but argued that the same was justified as the Claimant absconded duty. This Court takes cognizance of the duty placed upon the employee under Section 47 (5) of the *Employment Act* 2007 which provides that:-
  - “(5) 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.”
46. The Claimant challenged the termination of her employment on two counts, first that the same was substantively unfair, and second that the same was procedurally unfair. Looking at the Claimant's



version as regards how her employment was terminated, one will have an unmistakable impression that prima facie the same reveals that the same was without, adherence to the canons of procedural fairness, and substantive justification. As a result, I conclude that she discharged her legal burden under the above-stated section of the law.

47. Upon discharging the burden hereinabove mentioned, the evidential burden shifted to the Respondent to prove, the reason[s] for the termination [Section 43 of the Act], and that the reason[s] was valid and fair [section 45]. Legal burdens are discharged by the presentation of sufficient evidence. Where a party who bears a legal burden to discharge fails and or neglects to present evidence on those matters or facts that he is supposed to establish, seldom can he be found to have discharged the burden.
48. The Respondent didn't place forth any evidence to prove the reason for the termination. The legal burden under section 43 was not discharged, therefore. This failure called into operation the deeming stipulation under Section 45, that the termination was unfair.
49. Counsel for the Respondent couched his submissions as if they were some sort of evidence. Maybe he needs to take heed that submissions have never and cannot be a substitute for evidence. Also, see, Hon. Daniel Toroitich Arap Moi vs Mwangi Stephen and Anor. [2014] eKLR.
50. The failure on the part of the Respondent to discharge the legal burden coupled with the fact that I am persuaded that the Claimant's employment was terminated in the manner she explained to this Court, leads to the conclusion that she was summarily dismissed from employment without cause and or fair and valid reason.
51. Imperative to state that under Section 44 (4) (a) of the *Employment Act*, the employer can summarily dismiss an employee where the employee without leave or other lawful cause absents himself from the place appointed for the performance of his work. The Claimant explained that she first had the authority to proceed with her 11 days' leave. In the course, she fell ill, and recovery took a long time. She had sick-off sheets to demonstrate this. In my view, the Claimant was off duty for the alleged 70 days with the authority of the Respondent and as a result of a lawful cause. The Respondent could not therefore have a justification to summarily terminate her employment as argued by its Counsel.
52. The Respondent's Counsel argued that Clause 6 of the Claimant's contract of employment entitled her to 30 (thirty) calendar days' sick leave per year, and that if an employee's absence due to illness was to continue beyond these stated days, under Clause 6 (c) (ii) the Respondent was entitled to terminate the contract of service without notice. The Court notes that indeed the Clauses so stipulated. However, I should at this juncture point out that, time and again this Court has held that the statutory aspects of substantive justification and procedural fairness cannot be outcontracted. To allow clauses as is Clause 6 of the subject contract herein to operate against an employee's recognized statutory rights, could amount to diminishing the protection of employees as contemplated in the *Employment Act*. This, this Court cannot bless.
53. Further, to allow the Respondent to terminate the Claimant's employment without notice as the clause suggested, could amount to sanction a summary dismissal on a ground that is not among those contemplated under section 44[4] of the *Employment Act*. Ground that reasonably cannot amount to a gross misconduct.
54. The Respondent did not put forth any evidence to demonstrate that it adhered to the mandatory procedure provided for under Section 41 of the *Employment Act*. The Claimant's evidence that the Respondent didn't notify her of the reasons for the termination, and didn't allow her to make a representation on any accusations against her, remained unchallenged. In the upshot, I conclude that procedural fairness was absent in the dismissal.



- b. Whether the Claimant is entitled to the reliefs sought.
55. Having held that the Claimant's employment was indeed unfairly terminated, turn to consider what reliefs she is entitled to.
56. The Claimant seeks; Compensation for unutilized leave days for 5 years (Kshs. 200,000/-); Pay in lieu of notice (Kshs. 40,000/-); overtime compensation for the five years (Kshs.2,995,200/-); unpaid House Allowance for 60 months (Kshs. 800,000/-); and 12 months' salary as compensation for wrongful dismissal (Kshs. 480,000/-).
57. The Claimant's claim for compensation for the alleged earned but unutilized leave days is a claim this Court must decline. Must decline because it is anchored on very shaky evidence. The claim is watered down duly by her witness statement [turned evidence in chief] and oral testimony in court. The Claimant stated that she took 11 days of leave beginning on 17<sup>th</sup> July 2017, which was the remainder of her annual leave days. The impression that I get here is that for all the annual leave days she was entitled to before the date stated, she had utilized all save the 11 days. I am therefore not convinced that she has been candid in her quest for the remedy under this head.
58. Under Section 35[c] of the Employment Act, the Claimant's employment was terminable by at least 28 days' notice under Section 35 (1) (c) of the Employment Act 2007. Having found that the termination was unfair and without notice, I have no hesitation to conclude that she is entitled to notice pay under Section 36 of the Act.
59. Like her claim for compensation for alleged untaken leave days, her claim under the head, overtime compensation must fail, as her evidence on the same is unworth believing. The Claimant's pleadings and witness statement suggest that she worked overtime 4 hours every day for 6 days a week, 4 weeks a month, for the 5 years that she was employed by the Claimant. During cross-examination, the Claimant was unable to explain how this is possible when she no doubt took leave during the 5 years that she was employed.
60. Further, her evidence on the claim was too general. I have held again and again that a Claimant wishing for this court to award him overtime pay has to be specific about the days and hours worked. In James Orwaru Nyaundi vs Kilgoris Klassic Sacco Limited [2022] eklr it was held as follows:-
78. The Claim for overtime and public holidays worked compensation has just been thrown to Court. This Court has incessantly urged that this practice must come to a stop. It is not enough for a Claimant to just give figures to court, asserting that he or she is entitled to them, cross her or his fingers hoping that the Respondent does not place before Court documents, and as a consequence of the failure say "behold the claim is proved, the employer has not tendered in evidence any documents." The Claimant must if she or he has to succeed in the Claim, be specific on the days when he worked overtime, the specific public holidays, when he worked and wasn't paid for...
81. The Claimant did not tender any evidence specific in the nature mentioned herein above, the Claim for overtime, and public holidays worked compensation is declined."
61. With regard to the claim for house allowance, I note that Clause 3 (a) of the Claimant's contract of employment dated 29<sup>th</sup> June 2012 reads that:
- "The Company will pay you a consolidated monthly salary of Kshs. 28,000/- (Kenya Shillings Twenty Eight Thousand only) after all statutory deductions."



62. It is clear therefore that the remuneration under the contract of employment was at all material times inclusive of house allowance. The relief sought cannot therefore be availed to the Claimant.
63. I now turn to the prayer for compensation for unfair termination. Under Section 49 (1) (c) of the Employment Act 2007, this Court has the discretion to award compensation up to a maximum of 12 months' gross salary, taking into account relevant factors contained under Section 49 (4) of the Act, and the circumstances of the case.
64. The Claimant prayed for 12 months' gross salary as compensation, while the Respondent argued that she is not entitled to such compensation as it was justified in summarily dismissing her.
65. Taking into account how the Claimant was terminated from employment, the casual disregard for the law by the Respondent to the extent that it without reason failed and or neglected to follow the statutory requirements herein above set out, the length of period the Claimant was in the employment of the Respondent, being roughly 6 years and 3 months, I award the Claimant 10 months gross salary as compensation. Per the pay slips she tendered in evidence, her gross salary at the time of termination was Kshs. 74,846/-. This evidence remains uncontroverted by the Respondent.
66. It is trite law that per Section 51 of the Employment Act 2007, the Claimant should be issued with a Certificate of Service.
67. In the upshot, Judgment is hereby entered for the Claimant in the following terms:-
- a. A declaration that the Claimant's employment was terminated unfairly.
  - b. The Claimant be paid the following;
    - i. Payment in lieu of notice, tabulated at Kshs. 74,846/-.
    - ii. Compensation for unfair termination, tabulated at Kshs. 748,460/- (Kshs. 74,846/- x 10 months)Total - Kshs. 823, 306/-
  - c. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
  - d. Interest on (b) above at Court rates from the date of judgment until payment in full.
  - e. The Respondent shall bear the costs of this suit.

**READ, DELIVERED AND SIGNED THIS 26<sup>TH</sup> DAY OF APRIL, 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Ms Muthoni holding brief for Mr. Omwansa for Claimant

Ms Wangare holding brief Mr. Kihara for Respondent

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

