



**Adan v Ole Naishu (2000) Limited (Employment and Labour Relations Cause E008 of 2024) [2024] KEELRC 13295 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13295 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E008 OF 2024  
ON MAKAU, J  
NOVEMBER 29, 2024**

**BETWEEN**

**SAMMY WACHIRA ADAN ..... CLAIMANT**

**AND**

**OLE NAISHU (2000) LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a statement of claim dated 12<sup>th</sup> February 2024, the claimant sued the respondent for unfair termination of his employment. He prayed for the following reliefs: -
  - a. A declaration that laying off the claimant without a valid reason amounts to unfair termination.
  - b. Compensation for unfair termination in the sum of Kenya Shillings One Million and Fifty-Six Thousand Only (Kshs.1,056,000/-).
  - c. Costs of the suit.
  - d. Any other relief the court deems fit to grant.
2. The Respondent filed a response to the claim admitting that it had employed the claimant from 28<sup>th</sup> October 2009 but issued him with a new contract on 1<sup>st</sup> January 2023 and terminated it on 26<sup>th</sup> September 2023 for gross misconduct. Consequently, it averred that the suit is not merited and prayed for it to be dismissed with costs.

**Evidence**

3. The claimant testified as CW1 and adopted his written statement dated 12<sup>th</sup> February 2024 as his evidence. He further produced 12 documents as exhibits. In brief, his evidence was that he was



- employed by the respondent on permanent and pensionable basis from 28<sup>th</sup> October 2009 earning a monthly salary of Kshs.88,000. He worked until 26<sup>th</sup> September 2023 when his contract was terminated by the respondent for alleged failure to obey a lawful command.
4. He stated that before the dismissal he was required to reside in a house provided by the employer at the Ranch but declined for the reasons that he was Asthmatic which would worsen if he exposed himself to the cold temperatures in the Ranch; and also, because his contract did not obligate him to work both day and night.
  5. He denied any wrong doing and blamed his employer for unlawfully and unilaterally trying to modify or alter the employment contract with respect to the working hours. Therefore, he maintained that the alleged insubordination was not true and the termination was not justified.
  6. On cross examination he admitted that he was informed of the reasons for the termination including refusal to move to the company house, refusal to do night trail/check up on herders in their cattle Boma; and refusal to move an orphaned calf from a foster mother to the Headquarters. He admitted that he received a letter dated 6<sup>th</sup> September 2023 highlighting attacks on livestock and instructing him to relocate to the company house in the Ranch.
  7. He admitted that he lived in the company premises within the Ranch for nine (9) years and moved out in 2019. He sought permission before moving out of the company house and he was allowed to do so long as he did not ask for payment of house allowance and transport allowance.
  8. He stated that ordering him to live in Ranch amounted to discrimination because his contract did not oblige him to do so. He admitted that he was given up to 20<sup>th</sup> September 2023 to relocate to the Ranch but declined due to the Asthmatic condition. He further admitted that he had no doctor's advice to live away from the Ranch. He also admitted that the employer had offered to facilitate his movement to the Ranch and that his duties included treatment of injured animals.
  9. He confirmed that he was invited to a disciplinary hearing and he attended with a colleague Mr.Christopher Muchiri. During the hearing he maintained that he would not relocate to the company house at the Ranch. Thereafter, he received a termination letter giving him a right of appeal but he never appealed.
  10. He admitted that he was paid his terminal benefits including one-month salary in lieu of notice, outstanding leave, airtime and transport allowance. Therefore, he clarified that by this suit he was claiming compensation for unfair termination.
  11. In re-examination, he clarified that the Ranch premises was not conducive to his Asthmatic condition. He contended that his Asthmatic attacks came at night due to extreme cold weather. He contended that animal attacks were not rampant and he was called in whenever there was an attack. However, he was not paid for working overtime. He clarified that his working hour were from 7.00am to 4.00pm and therefore not required to work during the night hours.
  12. The respondent called two witnesses. RW1, was Mr. Christopher Muchiri who also adopted his written statement dated 12<sup>th</sup> April 2024 as his testimony. In brief, he stated that he worked with claimant for 14 years before he was dismissed for refusing to live in a company house.
  13. The claimant had lived there but he moved out. His place was 45 minutes' drive from the Ranch. It was dangerous for the claimant to go to the Ranch at night due to Wildlife in case he was called to respond to an incidence.



14. On cross-examination, he stated that the claimant was the Livestock Manager and he, together with security, were supposed to respond to any attacks to the Livestock by predators. He confirmed that the claimant had Asthmatic condition. RW1 admitted that he also experienced chest problems.
15. He confirmed that he accompanied the claimant to his disciplinary hearing where the claimant stated that he could not live in the Ranch due to his Asthmatic condition. He further confirmed that not all the employee's lived in the Ranch including himself. His work starts at 7.00am and ends at 4pm and as such he does not have to live there.
16. Finally, he confirmed that the claimant was using his personal car to attend work and he never required the employer to provide transport like the other staff. He stated that the company provided medicine to the claimant whenever he needed it.
17. RW2 was the Respondent's HR Manager Ms. Florence Gitahi. She also adopted her written statement dated 12<sup>th</sup> April 2024 as her testimony and produced 18 documents as exhibits. In brief, she stated that the respondent is a cattle rearing Ranch with 39000 acres of land in Nanyuki. There are also Wildlife living in the Ranch.
18. She stated that the claimant was employed as Livestock Manager and his duties included supervision of 40 employees in his department. He refused to obey a lawful command to live within the Ranch and he was dismissed. It was necessary for him to live within the Ranch because his role as a supervisor and a vet was critical in treating injured cattle.
19. She wrote a letter dated 6<sup>th</sup> September 2023 requiring him to relocate to the Ranch stating the reasons for the decision and he responded by his letter dated 7<sup>th</sup> September 2023 proposing to work during day shift and his assistant to work during the night shift. However, she wrote back on 18<sup>th</sup> September 2023, directing him to relocate by 20<sup>th</sup> September 2023 but he failed to comply.
20. As a result, she served him with show cause letter dated 21<sup>st</sup> September 2023. She contended that the claimant had lived in the Ranch with his Asthmatic condition before and maintained that it was not possible for the claimant to operate remotely due to the expansive nature of the Ranch.
21. She confirmed that the claimant's salary was Kshs.88,000.00 and his working hours per week were 46. He was also compensated for any extra hours worked by being given off days.
22. On cross examination, she confirmed that she had worked for the respondent for three (3) years. She contended that the claimant was issued with a new contract in 2023 after change of respondent's shareholding. However, she did not produce the claimant's contract before the said changes in the company's shareholding. She contended that the claimant was paid service pay for the years worked before the new contract.
23. She confirmed that the claimant was dismissed for refusing to live in the company premises. She also confirmed that the claimant was Asthmatic and he had informed her officer that the cold weather in the Ranch was affecting his health condition. She confirmed that employees were required to go for medical check ups every year. She further confirmed that Medical Examination Form dated 6<sup>th</sup> December 2018 indicated that the claimant had Asthma.
24. She admitted that an employee with personal reasons could live outside the Ranch. She confirmed that she does not live in the Ranch due to her personal reasons.
25. She contended that another reason for dismissing the claimant was failure to check herders at night. She confirmed that the nearest Boma from the company residence is 5 Kilometers. She admitted that the claimant's working hours were from 7.00am to 4.00pm and that any extra hours worked he was



compensated by off days. He was required to work with the security to ensure injured cattle were treated.

26. The 3<sup>rd</sup> reason for the dismissal was failure to move a calf from foster mother to the Headquarters.

### **Submission**

27. It was submitted for the claimant that the dismissal was unfair both substantively and procedurally. It was submitted that the reason for the termination was not valid and fair because he refused to relocate to the company house in the Ranch due to his Asthmatic condition. It was submitted that forcing him to live in the Ranch despite his ill-health was risking his well-being and amounted to inhuman treatment and undermined his dignity.
28. Further that, his contract of employment did not obligate him to live in company house but it gave him an option to leave outside if he had a personal reason. Clause 'N' of the contract did not force the employee to live in the company house. It was also submitted that the two defence witnesses confirmed that they also lived outside the Ranch due to their personal reasons.
29. It was further submitted that the attempt to force the claimant to live in the Ranch was tantamount to the employer unilaterally altering the terms of the contract without following the proper procedure set out under section 10 (5) of the *Employment Act*. For emphasis reliance was placed on Maxwell Miyawa & 7 Others v JSC (2017) eKLR where the court held that unilateral variation of an employment contract to the detriment of an employee is unfair labour practice.
30. As regards the 2<sup>nd</sup> ground for dismissal, that is failure to ensure that the herders were at their Bomas at night, it was submitted that his working hours did not include night shift. It was further submitted that working at night would expose him to cold weather which was not good for his asthmatic condition. It was also not reasonable and fair for him to perform random checks in all the Bomas scattered in 39000 acres of land at night. Besides he was not to receive any pay for that extra hours of work.
31. As regards the 3<sup>rd</sup> ground for the dismissal, that is, failure to transfer an orphaned calf to the Headquarters to be fed on porridge, it was submitted that the claimant, as a vet doctor assessed the situation and made an informed decision that separating the calf from its foster mother would result in the calf's death. It was submitted that DW2 confirmed that the calf is still alive and therefore it was unfair to dismiss him for performing his duties competently.
32. It was submitted that the dismissal of the claimant was for no valid and fair reason and therefore it was unfair. For emphasis, reliance was placed on Naima Khamis v Oxford University Press (EA) Ltd (2017) eKLR and George Musamali v G4S Security Services Kenya Ltd (2016) eKLR.
33. Finally, the court was urged to find that the claimant is entitled to the reliefs sought and proceed to award the same plus costs.
34. On the other hand, it was submitted for the respondent that the dismissal of the claimant was fair because there were valid reasons and a fair procedure was followed. It was submitted that the claimant was served with a show cause letter and he responded. Thereafter, he was invited to a hearing and he attended with a fellow employee of his choice and he defended himself. Subsequently, he was notified of the decision to terminate his employment by a letter dated 26<sup>th</sup> September 2023 which also gave him the right to appeal against the decision.
35. It was further submitted that the dismissal was justified because the claimant committed gross misconduct by refusing to obey lawful orders or instructions from the respondent's Board of Directors



and the General Manager to reside in Ranch, perform night checks on the herders, and to transfer an orphan calf to the Headquarters.

36. To fortify the above submission that the dismissal was fair, reliance was placed on *Pius Machafu Isindu v Lavington Security Guards Limited* (2017) eKLR and *Anthony Mkala Chitavi v Malindi Water & Sewerage Co.Limited* (2013) eKLR where it was held that an employer must prove the reason for termination of employment and also adduce evidence to prove that fair procedure was followed as required under section 41, 45 and 47 of the *Employment Act*, 2007.
37. In view of the submissions above the court was urged not to interfere with the internal disciplinary process since there are no plausible grounds. Further that, the claimant is not entitled to the reliefs sought and therefore the suit should be dismissed with costs.

### **Determination**

38. There is no dispute that the claimant was employed by the respondent until 26<sup>th</sup> September 2023 when his services were terminated on account of gross misconduct. The issues in contest are:
- (a) Whether the termination was unfair and unlawful.
  - (b) Whether the claimant is entitled to the reliefs sought.

### **Unfair termination**

39. The Claimant's case is that he was unfairly and unlawfully dismissed from employment by the respondent. Section 45 (1 & 2) of the *Employment Act* provides as follows:

- “(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.”

40. In *George Musamali versus G4S Security Services Kenya Ltd* [2016] eKLR the Court stated that:

“14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how



weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

41. Again, in the case of Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] eKLR where the Court of Appeal held thus:

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination / dismissal (Section 43); prove reasons are valid and fair (Section 45) ... among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”

42. It is clear from the foregoing provision and the judicial precedents, that unfair or unlawful termination of employment has two ingredients, namely, a valid reason and fair procedure. The said provision basically codifies the principles of fair administrative action as envisaged under Article 47 of *the Constitution* and magnified by the *Fair Administrative Action Act*.

43. In this case, the Claimant’s case is that he was summarily dismissed for no valid reasons. He never complained about the procedure followed and therefore the only issue to determine is whether the reason for dismissal was valid. The dismissal letter is cited the following three reasons for the termination:

“The reason for your dismissal is refusal to obey lawful instructions from the management of the company as itemized below.

1. Instruction to move and live within the company premises by close of business on Wednesday 20<sup>th</sup> September 2023 as per the letter dated 18<sup>th</sup> September 2023.
2. Failure to check that the herders were at the Bomas at night to ensure timely response in case on an attack by wildlife.
3. Refusal to move an orphaned calf to the headquarters”

44. I have considered the accusation in the show cause letter dated 21<sup>st</sup> September 2023, claimant’s response and typed proceedings of the disciplinary hearing. It is clear that they all dealt with the offence of disobeying the instruction to relocate to the company house within the Ranch as communicated through the letter dated 18<sup>th</sup> September 2023. It follows that the second and the third reasons for dismissal were not part of the disciplinary hearing and the claimant was punished for the same without hearing. An employer is not allowed to change the goal post after the disciplinary hearing in order to justify a dismissal. If the employer chooses a particular charge or charges upon which to discipline his employee, he must stick to the same throughout the process and if new offences are discovered, the employee must be accorded a fair hearing on the same.

45. Turning to the offence of refusal to move to the Ranch, the respondent contended that the claimant’s presence in the Ranch at night was necessary for ensuring that the herders were in their bomas through random checks, and secondly for providing treatment to animals in case of attacks by predators. The claimant was indeed, by a letter dated 18<sup>th</sup> September 2023, instructed to relocate to the Ranch by 20<sup>th</sup> September 2023.



46. The claimant failed to comply with instruction citing his asthmatic condition which he contended that it was likely to worsen if he moved to the Ranch house or if he was exposed to the cold weather in the Ranch at night. He further cited his working time under his contract of employment being 7.00 Am to 4.00 PM and not during the night. Further that, the contract gave him the option of living outside the Ranch at his own cost. Consequently, he contended that the employer was purporting to alter the terms of contract by forcing him to live in the Ranch and to do extra work in the cold nights.
47. I have considered the evidence by the two sides and it is clear that the contract of employment for the claimant did not bind him to live within the Ranch. Clause 2n of the contract provided as follows:
- “We will provide reasonable housing and water at our cost for you at your place of work. The housed employee is responsible for the care and cleanliness of the house provided. Employees who are not housed in the reasonable accommodation or who wish to live in their own housing will be paid a House Allowance calculated at the rate of 15% of the basic salary of the employee. This does not apply to those who are provided with reasonable housing accommodation and refuse to take such accommodation for personal reasons.”
48. I agree with the claimant that the above clause did not bind him to live in the Ranch even when provided with a house. He had the liberty of living in his own house provided he did not burden the employer with payment of house allowance and travelling cost. The respondent’s witnesses confirmed that they were also not living within the Ranch for their own reasons. The claimant contended that his asthmatic condition was a personal reason that entitled him to live in his own house away from the ranch.
49. I have also verified from clause 3b of the contract that the claimant was required to work from 7.00am to 4.00pm, Monday to Friday, then from 7.00am to 1.00 pm on Saturdays. There was no obligation to work at night even on emergency cases. It follows that if the claimant’s services were required outside his working time, special arrangement had to be made, whether he was resident in the Ranch or not. Rw2 confirmed the said working time for the claimant and clarified that if he worked extra hours he was compensated by days off duty.
50. It follows that the employer acted contrary to the terms of the contract of employment by purporting to force the claimant to live in the company house contrary to Clause 2n of the contract. The terms of the contract of service are clear that the parties did not intend that the claimant would work 24 hours in the Ranch. The claimant was only supposed to work between 7.00 am and 4.00pm during week days and then 7.00 am to 1.00pm on Saturdays. He also had the liberty to live in the company house or elsewhere at his cost.
51. If the employer saw the need to amend the contract, it was supposed to consult with the claimant as required by section 10(5) of the *Employment Act* and not to act unilaterally. The unilateral alteration of the contract was also discriminatory and inhuman because it amounted to treating the claimant differently, and it was also a mockery to his human dignity as it ignored his health condition. Section 5 (3) of the *Employment Act* prohibits an employer from discriminating his employees at the workplace while Article 28 of *the Constitution* guarantees every person the right to be treated with dignity.
52. In view of the foregoing matters, I am satisfied that the claimant has proved on a balance of probability that the reasons for his dismissal were not valid and fair. Section 43 of the *Employment Act* provides that:

“ 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.”

53. It follows that without any valid and fair reason to justify the impugned dismissal, I must hold that the termination of the claimant’s employment contract herein was unfair and unlawful within the meaning of section 45 of the Act.

### **Reliefs sought**

54. In view of the foregoing conclusion, I find that the claimant is entitled to declaration that the termination of employment was unfair. For the same reason I find that he is entitled to compensation for the unfair termination under section 49 (1) (c) of the Act. The claimant had worked for the respondent from October 2009 to September 2023 equaling to 14 years and he did not cause his dismissal through misconduct. Consequently, I award him ten months gross salary as compensation for the unfair termination of his contract of service being Kshs.88,000 x 10 = Kshs. 880,000.00.

### **Disposition**

55. On the basis of the foregoing reasons, I enter judgment for the claimant in the following terms:
- a. Compensation for unfair termination.....Kshs.880,000.00
  - b. Costs and interest at court rates.
  - c. The award is subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

