



**Noor v Lake Oil Limited (Cause 2 of 2019)  
[2024] KEELRC 2732 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2732 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 2 OF 2019  
MA ONYANGO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**HOTHO HASSAN M NOOR ..... CLAIMANT**

**AND**

**LAKE OIL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Memorandum of Claim dated 24<sup>th</sup> January 2018 seeking compensation from the Respondent on allegation that the Respondent unfairly and unlawfully terminated her employment.
2. The Claimant averred that she was contractually employed by the Respondent on 9<sup>th</sup> March 2018 as a Depot Manager and was earning a monthly salary of Kshs. 80,000/= at the time her employment was unfairly terminated.
3. The Claimant states that she served the Respondent diligently and had no incident or history of misconduct or warning in her employment records until her employment was unfairly termination by the Respondent on 6<sup>th</sup> September, 2018 vide an email on allegations of theft of the corporation property.
4. According to the Claimant, the Respondent's action of terminating her employment was ill willed and forms the basis of unfair termination on the grounds that:
  - a. The Respondent terminated the Claimant's employment without following the laid down procedure in the *Employment Act*.
  - b. The Respondent did not give the Claimant termination notice as provided under Section 35 of the *Employment Act*.
  - c. The Respondent dismissed the Claimant without proving that the reason for the termination was valid.



- d. The Respondent failed to pay leave allowances to the Claimant contrary to the Section 28(1) of the Employment Act.
  - e. The Respondent failed to pay severance pay to the Claimant contrary to Section 40(1g) of the Employment Act.
  - f. The Respondent failed to pay the Claimant her 12 months' wages for loss of employment as provided under Section 15 (c) of the Labour Institution Act.
  - g. The Respondent never explained to the Claimant the reasons for termination as required under Section 41 (1) of the Employment Act.
  - h. The Respondent did not act in accordance with justice and equity in terminating employment contrary to Section 45 of the Employment Act.
    - i. No warning notices were ever issued to the Claimant for breach of duty.
5. The Claimant avers that owing to the unfair and unlawful termination of her employment, she is entitled to the compensation which she itemized as follows:
- i. One month pay in lieu of notice  
Basic salary + House Allowance  
80000+15%x80000.....Kshs. 92,000.00/=
  - ii. Compensation for unfair termination  
Gross pay x 12 months  
92,000 x 12 months.....Kshs. 1,104,000.00/=
  - iii. House Allowance
  - iv. 15/100x 80,000 x 6 Months.....Kshs.72,000/=
  - v. Unpaid Salary for the Months of June, July and August  
80,000 x 3 Months.....Kshs.240,000/=
  - vi. Service pay.  
15 days salary x years served (40,000x 1)..Kshs.40,000/=
  - vii. Leave pro-rate  
21/30 days x 80,000....Kshs.56,000/=
- Total.....Kshs. 1,604,000/=
6. She prayed for the following reliefs:
- a. A declaration that the claimant's termination from employment was unlawful, unprocedural and unfair;
  - b. The sum of Kshs. 1,604,000/=as set out above
  - c. Certificate of Service



7. In response, the Respondent filed a Statement of Response on 9<sup>th</sup> May 2019 dated 22<sup>nd</sup> March 2019 admitting that the Claimant was its employee as Petrol Station Manager from 9<sup>th</sup> March 2018 but maintained that she was earning a monthly salary of Kshs 68,000 as consolidated sum.
8. The Respondent alleged that in June 2018, the Claimant issued 1700 litres to a client without authority or corresponding payment as a result of which the Respondent suffered a huge loss.
9. The Respondent averred that the Claimant was summoned to its office wherein she admitted to committing an employment offence and that she was given sufficient opportunity to state her case and subsequently, her employment was terminated on 6<sup>th</sup> September 2018.
10. According to the Respondent, the termination of the Claimant's employment was justified and due procedure was followed.
11. Regarding the Claimant's claim for housing allowance, the Respondent stated that the Claimant was paid a consolidated salary and not basic pay.
12. The Respondent therefore prayed that the suit herein to be dismissed with costs.

### **The Evidence**

13. The Claimant testified on 19<sup>th</sup> October 2023 as CW1 and adopted her written statement dated 29<sup>th</sup> January 2019 as her evidence in chief. She also relied on her list of documents dated 24<sup>th</sup> January 2019, 24<sup>th</sup> April 2019 and 30<sup>th</sup> October 2021 as her evidence.
14. In brief, the Claimant stated that she was employed by the Respondent on 9<sup>th</sup> March 2018 at a monthly salary of Kshs 80,000. She also stated that she was not take annual leave. NSSF and NHIF dues were deducted from her salary.
15. The Claimant stated that on 6<sup>th</sup> September 2018 while in the course of her employment, she was called by her immediate supervisor, Mr. Evans Obaga and told to check her email. That on checking her email, she found a termination letter. It was her evidence that the termination letter did not disclose the reason for the termination.
16. The Claimant maintained that she was not issued with a warning letter or a show cause letter prior to the termination of her employment and further, that she was not subjected to a disciplinary hearing.
17. The Claimant explained that she supplied a regular customer with fuel on the understanding that the customer would pay at a later date. She stated that the station supervisor told her to seek authorization from head office for the said customer to be supplied with fuel and that she called a Mr. Piyush, the Respondent's Retail Manager, who authorized that the customer be supplied with fuel on the understanding that should the customer fail to pay, the amount due would be deducted from the Claimant's salary. The Claimant stated that by the time she was leaving the company, the said customer had not made good the fuel debt.
18. The Claimant contended that although her employment was terminated in September 2018, she had not been paid her salary for the months of June, July and August 2018. She prayed for compensation for what she alleged was the unfair and unlawful termination of her employment by the Respondent.
19. On cross examination, the Claimant contended that she was never given a reason before the termination of her employment. She however admitted to advancing fuel on credit to one of the customers.



20. On 14<sup>th</sup> November 2023, the court after granting the Respondent several adjournments, closed the Respondent's case in their absence and parties were directed to file written submissions. On 24<sup>th</sup> January 2024, counsels for both parties were present in court when they were directed to file written submissions.
21. The Claimant's submissions were filed on 14<sup>th</sup> December 2023 while the Respondent's submissions were filed on 23<sup>rd</sup> February 2024.

### **The Claimant's submissions**

22. In her submissions, the Claimant identified the issues for determination to be:
  - a. Whether the Claimant was an employee of the Respondent
  - b. Whether the Claimant was unlawfully, unprocedurally and unfairly suspended and/or dismissed from employment by the Respondent;
  - c. Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment;
  - d. Who should pay costs and interest of the suit
23. As to whether the Claimant was an employee of Respondent, it was submitted that the Claimant was employed on permanent basis on 9<sup>th</sup> April 2018.
24. On the second issue it was the Claimant's submission that while in the course of performing her duties on 6<sup>th</sup> September 2019, she received a call from one Evans Obuya, a sales manager, who asked her to check her email which she did and found that her services had been terminated. The Claimant submitted that the email did not indicate the reasons for the termination.
25. The Claimant submitted that the Respondent in terminating her employment failed to explain to her the reason for termination, did not give her any notice for the intended termination and never accorded her a chance to be heard.
26. In support of the Claimant's averment that she was constructively dismissed, the Claimant submitted that she was never paid her salary for the months of June to August. It is the Claimant's submission that the termination was wrongful, unlawful and without any lawful justification.
27. On the third issue the Claimant submitted that having been terminated unfairly and unlawfully from employment, she is entitled to compensation for the same and to payment of her terminal benefits.
28. In concluding, the Claimant submitted that she had proved her case on a balance of probability and given that the Respondent never testified to controvert her claim, the court was urged to grant the Claimant the prayers sought in the Memorandum of Claim with costs.

### **The Respondent's submissions**

29. The Respondent on its part framed the issues for determination as:
  - a. Whether the Claimant was an employee of the Respondent
  - b. Whether the termination of the Claimant was fair and lawful
  - c. Whether the Claimant is entitled to the reliefs sought in the statement of claim
  - d. Who should bear costs of this suit



30. On the first issue, the Respondent admitted that the Claimant was its employee from 9<sup>th</sup> March 2018 till 6<sup>th</sup> of September 2018 when her contract was terminated. The Respondent submitted that at the time of termination of the Claimant's employment she was still on probation.
31. On the issue whether the termination of the Claimant's employment was fair and lawful, it is the Respondent's submission that it had a fair and valid reason to terminate the Claimant's employment on account of the Claimant violating her duties through engaging in activities that were against the company policies. The Respondent also submitted that the Claimant was accorded an opportunity to defend herself before she the termination of her employment.
32. According to the Respondent, the Claimant admitted that in June 2018, she did issue 1700 litres of oil to a client only known to her, without authority from the retail manager which resulted in the Respondent suffering huge losses.
33. The Respondent contended that there was adherence to the procedure provided for under section 41 of the Employment Act as the Claimant was issued with a Disciplinary Notification with details of the accusation levelled against her and was invited to state her case regarding occasioning loss to the Respondent but she did not show up.
34. The Respondent therefore submitted that the Claimant is not entitled to a declaration that the termination of her employment was unfair and unlawful as the correct procedure was followed before and after the termination.
35. With regard to the issue whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim, it was the Respondent's submission that the Claimant was terminated fairly and lawfully and is therefore not entitled to the reliefs sought.
36. Lastly, it is submitted that since the Claimant has failed to demonstrate before this Court that she deserves the prayers specified in the claim, the claim should be dismissed with costs to the Respondent.

### **Determination**

37. From the pleadings, the evidence before court, the submissions of the parties and the authorities cited therein, the issues for determination are;
  - a. Whether the reason for the termination of the Claimant from employment was valid and fair.
  - b. Whether the procedure followed was fair.
  - c. Whether the Claimant is entitled to the reliefs sought.
38. It is not in dispute that there was an employment relationship between the Claimant and the Respondent. It is further not in dispute that the relationship commenced in March 2018 and ended on 6<sup>th</sup> September 2018 when the Respondent terminated the employment of the Claimant.

### **Whether the reason for the termination of the Claimant from employment was valid and fair.**

39. Section 43 (1) of the Employment Act, 2007 Provides that: -
  - “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.”



40. In the present case, the Respondent in its Statement of Response and submissions before court stated that the reason for termination of the Claimant's employment was that in June 2018, she issued 1700 litres of fuel to a client without authority or corresponding payment and the client had not made payment by the time of the dismissal of the Claimant.
41. On her part, the Claimant in her testimony told the court that her employment was terminated via email which did not state the grounds for termination. The Claimant attached a copy of the email of 6<sup>th</sup> September 2018 at 9.11am from Evans Obuya addressed to her in the list and bundle of documents dated 24<sup>th</sup> January 2019. The email reads:
- Hodho,
- Good day to you. We spoke on phone at length regarding your position. The purpose of this note is to inform you that effective immediately your services with Lake Oil have been terminated. As such kindly hand over any material in your possession that belongs to the company.
- As regards what is owed to you, kindly get in touch with Piyush so that you can close on any pending issues especially on debts at the station. All the best in your future endeavors.”
42. From the email it is clear that no reason was given for the termination of the Claimant's employment. Although the Respondent has attributed the termination to the Claimant issuing a customer fuel on credit without authorization, this accusation is not substantiated in the excerpts of WhatsApp communication between the Retail Manager, Mr. Piyush and the Claimant filed with the Claimant's Further List of Documents dated 30<sup>th</sup> April 2019. From the WhatsApp communication, the incident appears to have occurred in June 2018. The Retail Manager was aware about the said transaction and had withheld the Claimant's salary for June, July and August 2018 to cover for the value of the fuel not paid for by the Client as is evident from the WhatsApp trail between the Claimant and Peyush.
43. it is further evident from the trail of communication that Mr. Peyush had agreed to the customer being issued with the fuel on credit albeit reluctantly after being persuaded to do so by the Claimant who offered to have the credit recovered from her salary should the client fail to pay as is evident from the WhatsApp conversation between Peyush and the Claimant on of 18<sup>th</sup> June 2018.
44. In view of the foregoing, I find and hold that the reason advanced for the termination of the Claimant's employment was not invalid.

#### **Whether the procedure followed was fair**

45. The Claimant contended that she was never issued with any warning letter, show cause letter and was not taken through a disciplinary hearing before her employment was terminated. The Respondent on its part contended in its Statement of Response and in its submissions that it invited the Claimant for disciplinary hearing but the Claimant never showed up.
46. Section 41 of the *Employment Act*, 2007 provides: -

“(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.”

47. The Respondent did not adduce any evidence to support its averment that the Claimant was invited for a disciplinary hearing and failed to turn up. There is no evidence of an invitation for the hearing. Apart from the listing of a letter of employment in the List of Documents filed by the Respondent dated 22<sup>nd</sup> March 2019, the Respondent did not file any documents. In the absence of any evidence showing that the Claimant was subjected to a disciplinary hearing, it is my finding that the Claimant was never taken through the due procedure as required by law.
48. Flowing from the above, I find that the Claimant has proved that the termination of her employment was without valid or any reason and that there was no compliance with fair procedure. The termination was therefore unlawful and unfair both substantively and procedurally and I declare accordingly.

### **Whether the Claimant is entitled to the reliefs sought**

49. The Claimant in her Memorandum of Claim prayed for payment of Kshs. 1,604,000 as terminal dues comprising 1 month’s salary in lieu of notice, 12 months’ compensation for unfair termination, house allowance, unpaid salary for the months of June, July and August 2018, service pay and pro rata leave. I will address these prayers in separate heads.
- a. One-month pay in lieu notice
- Having found that the termination of the Claimant’s employment was unfair, she is entitled to pay in lieu of notice. I therefore award her the same at Kshs 80,000.
- b. 12 months’ compensation for unfair termination
- The Claimant prayed for maximum compensation for the unlawful termination. Considering that the Claimant had only served the Respondent for 6 months as at the time of termination of her employment, it is my view that 3 months’ compensation salary would be reasonable taking into account all the relevant factors under section 49(4) of the *Employment Act*. I award the Claimant 3 months’ compensation being Kshs. 240,000.
- c. House allowance
- Section 31(1) of the *Employment Act*, 2007, provides that an employer should either provides an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. Section 31(2) provides that the contract of the employee may provide for a consolidated salary.
- The Claimant did not provide the court with a copy of her contract of employment to enable the court ascertain whether or not her salary was consolidated as averred by the Respondent in the Response to the Claim. I find that the Claimant has not proved that she was not paid a consolidated salary inclusive of house allowance. The prayer thus fails and is dismissed.
- d. Unpaid salary for the months of June, July and August 2018
- The Claimant in her testimony stated that she was not paid salaries for the months of June, July and August. The evidence on record proves that the same was not paid. The Respondent did



not tender any evidence to rebut this evidence. I therefore award the Claimant Kshs 240,000 being the unpaid salaries.

e. Service Pay

Service Pay is payable under sections 35(5) of the Employment Act only to employees who are not covered under the any social security scheme. The Claimant in her evidence stated that she was a member of both NSSF and NHIF. The Claimant is thus not entitled to service pay.

f. Pro rata Leave

From the evidence on record, the Claimant worked for the Respondent for 6 months. She is therefore entitled to pay in lieu of 6 months leave being leave earned but not taken. The Claimant having not adduced evidence on the number of days leave she was entitled to, I award her 1.75 days per month worked as provided in section 28 of the Employment Act being 10.5 days. I thus award her (10.5 x80,000/30) Kshs 28,000.

50. Consequently, Judgment is entered in favor of the Claimant against the Respondent as follows: -

i. A declaration be and is hereby made that the termination of the Claimant's employment by the Respondent was unlawful and unfair.

ii. The Claimant is awarded payment of her dues as follows:

a. One month notice in lieu.....Kshs. 80,000

b. 3 months' compensation  
for unfair termination.....Kshs. 240,000

c. Unpaid salary.....Kshs. 240,000

d. Leave pro-rata.....Kshs. 28,000

Total.....Kshs. 588,000

51. The Claimant is awarded costs and interest which shall accrue at Court rates from the date of Judgment until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

