



**John v Yalfa Cargo Handling Limited (Cause 147 of 2018)  
[2023] KEELRC 480 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 480 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 147 OF 2018  
AK NZEI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**SAMUEL MUCANGI JOHN ..... CLAIMANT**

**AND**

**YALFA CARGO HANDLING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent on March 19, 2018 vide a memorandum of claim dated March 14, 2018 and pleaded that he was employed by the Respondent as a cleaner on May 7, 2015, earning a salary of Kshs 9,000 at the time of termination. The Claimant further pleaded:-
  - a) that on August 1, 2017, the Claimant was instructed by his instructor to pack some pallets in a vehicle, but was unable to do so as the pallets were too heavy.
  - b) that the supervisor started insulting the Claimant, and chased him out of the Respondent’s premises after the Claimant asked him to stop insulting him.
  - c) that the Claimant was unfairly dismissed without any justifiable cause, without following the due process as by law provided, and without payment of his contractual and terminal dues.
  
2. The Claimant set out his claim against the Respondent as follows:-
  - a) One month salary in lieu of notice .....Kshs 12,926
  - b) Underpayment
    - (i) for year 2015 (Kshs 10,954-9,000)X8.....Kshs 15,632
    - (ii) for year 2016 (10,954-90,000)x12  
months .....Kshs 22,448



(iii) for year 2017 (Kshs 10,954-9,000)x4  
months.....Kshs 7,168

c) compensation for unfair termination (Kshs 12,926x12 months)  
.....Kshs 155,112

d) unpaid leave for 3 years .....Kshs 31,311

Total Kshs 244,597

e) a declaration that the Claimant's dismissal was unfair and unjust.

f) Costs and interest at Court rates.

3. The Claimant further pleaded that his dismissal from employment was contrary to section 35,41,43,45 and 49 of the *Employment Act*.

4. The Respondent filed Response to the Claimant's claim and counter-claim on May 3, 2018, whereby it denied the Claimant's claim and counter-claimed Kshs 9,000 from the Claimant being one month salary in lieu of termination notice. The Respondent pleaded:-

a) that the Respondent did not terminate the Claimant's employment, which employment was less than a year as the Claimant was employed in 2017.

b) that it was the Claimant who deserted his employment with the Respondent; even after being summoned by the Human Resource Manager to return to work and show cause why disciplinary action could not be taken against him.

5. The Claimant filed Reply to the Respondent's Response and counter-claim on June 4, 2018.

6. At the trial, the Claimant adopted his filed witness statement dated March 15, 2018 as his testimony. He also produced in evidence documents listed on his list of documents dated March 14, 2018. The claimant further testified that he did not take leave during the period of his employment, and was not paid anything upon termination of employment.

7. It was the Claimant's testimony (as stated in his said adopted witness statement) that on February 16, 2018, the Claimant was attacked and chased out of the Respondent's premises by his supervisor, one Mr Salim, after the Claimant told the said supervisor to stop insulting him. That the Claimant reported the incident to one Mr Zablun Mwakitele, who told the Claimant that there was nothing he could do as Mr Salim, who had send the Claimant away, was their boss' son. That Zablun Mwakitele was a clerk in the Claimant company. That the Claimant never received any communication from the Respondent after termination. The Claimant further denied having absented himself from duty.

8. Cross examined, the Claimant further testified that:-

a) he was dismissed by Mr Salim and was not given any dismissal letter.

b) that on being terminated/chased away, the Claimant telephoned Zablun Mwakitele who dealt with employees in the Respondent company, and told him what had happened. That he was never called to go for his dues.

c) that the Claimant's salary was being paid monthly.

d) that Salim was the Claimant's employer's son, and was the Claimant's supervisor, as he also worked in the company.



9. The Respondent called one witness, Zablon Mwakitele Mwangumba (RW1), who told the Court that he worked as the Respondent company's Insurance and Personnel Manager between 2016 and October 2018, and knew the Claimant as having been the Respondent's employee upto February 2018; whereby he worked as a cleaner and workshop helper. The witness adopted his filed witness statement dated April 23, 2018 as his testimony.
10. The witness (RW1) testified that the Claimant telephoned him on February 7, 2018 and informed him that he had been chased out of the yard by his supervisor when he failed to lift some heavy pallets which he had been told to lift. The witness further testified that he called the Claimant one week later after he had discussed the matter with the Respondent's Managing Director, but the Claimant said that he did not want to go back, that he only wanted to be paid.
11. The Respondent's witness (RW1) further testified that on enquiry, he learnt that the Claimant's supervisor, Salim, had asked the Claimant to leave after he found him idling while others were working and an altercation ensued after the Claimant was asked why he was idling. That the supervisor had no authority to dismiss the Claimant, and that such authority was only vested in the witness (RW1) in consultation with the Respondent's Managing Director.
12. Cross examined, RW1 testified:-
  - a) that before 2017, the Claimant worked for the Respondent as a casual, and was employed permanently in the year 2017, though the Respondent had not furnished any records in that regard.
  - b) that the Claimant's supervisor, Salim, had not filed any statement.
  - c) that the Claimant was not called in writing, to show cause why he could not go back to work.
  - d) that the Claimant was not paid any dues and that the Respondent had not exhibited any leave documents on the Claimant.
13. Having considered the pleadings filed and evidence presented by both parties, issues that present for determination in my view are:-
  - a) whether termination of the Claimant's employment by the Respondent was unfair.
  - b) whether the Claimant is entitled to the reliefs sought.
  - c) whether the Respondent is entitled to the relief sought in the counter-claim.
14. On the first issue, it was a common ground that the Claimant was an employee of the Respondent and that on February 6, 2018, the Respondent was send away/chased out of his place of work by his supervisor. That on being chased out, the Claimant telephoned the Respondent's Personnel Manager and informed him of what had happened. That the Respondent's personnel Manager, one Zablon Mwakitele (RW1), did not issue any show cause letter to the Claimant and that the Claimant was not paid his dues.
15. The Claimant pleaded and testified that he was employed by the Respondent as a permanent employee on May 7, 2015, while the Respondent's witness (RW1) testified that the Claimant was employed permanently in 2017 after working for the Respondent as a casual prior to that date. None of the parties, however, produced a contract of employment between the Claimant and the Respondent.



16. Section 10(6) of the *Employment Act* provides that an employer shall keep written particulars (of an employment contract) as prescribed in sub-section (i) for a period of five years after the termination of employment. Section 10(7) of the *Act* on the other hand provides:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

17. The Claimant stated May 7, 2015 as the date of his employment. The Respondent pleaded and testified that the Claimant was employed permanently in 2017 after working as a casual, and worked for less than a year. The Respondent failed to produce a written contract to prove its allegations and to disprove the Claimant’s allegations; and therefore failed to discharge the burden of proof placed on it by the statute. I will, therefore, proceed to determine the first issue based on the date of employment as pleaded by the Claimant.

18. It was stated as follows in the case of *Gilbert Isandula Shikalo v Bernard Njoroge t/a Creative Metro Services [2020] eKLR*

“...Section 10(6) and (7) of the *Employment Act*, 2007 is in mandatory terms. Upon the filing of the claim, the employer has the statutory duty to file all work records with regard to the employee to enable the Court to assess the claims made. Without any work records, the Respondent as the employer whether casual or full time worker is left without any evidence. The Court must believe the Claimant was in the continuous service of the Respondent from the June 30, 2008 to February 12, 2018 when his employment was verbally terminated.”

19. In their evidence, both parties appeared to agree that the Claimant’s employment was verbally terminated by the Respondent on February 6, 2018 when the Claimant is said to have been insulted and chased out of his place of work by his supervisor. The Respondent’s Personnel Manager, who admitted to having been notified of the incident by the Claimant on February 6, 2018, did not do anything to rectify the situation by either restoring the Claimant back to his employment or issuing him with a notice to show cause why he could not be dismissed, if at all he had done anything wrong.

20. It is, therefore, clear from the foregoing that the Claimant had worked for the Respondent for over two years and eight months as at February 6, 2018 when his employment was verbally terminated. Under Section 45(3) of the *Employment Act*, the Claimant is entitled to complain that he was unfairly terminated. Section 45(3) of the *Act* provides:-

“an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”

21. The Respondent did not demonstrate that it either complied with the mandatory procedure set out in Section 41 of the *Employment Act* or that it acted in accordance with justice and equity in terminating the Claimant’s employment as set out in Section 45(4) (b) of the Act.

22. Section 41 of the *Employment Act* 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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

23. Section 45(4) (b) of the [Employment Act](#) provides:-

- “(4) A termination of employment shall be unfair for the purpose of this part where
- (a) .....
- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”

24. The Claimant referred the Court to the case of [Florence Atieno Ominde v Techno Service Limited \[2021\] eKLR](#) where the Court held:-

“The termination of employment is unfair if the employer fails to prove that the reason for termination is valid and for a fair reason. This was aptly stated by my brother Radido J in the case of [Kenya Union Of Domestic, Hotels, Educational Institutions & Hospital Workers v Mombasa Sports Club \[2014\] eKLR](#) Cause No 440 Of 2013.

An employee facing the allegations the Claimant faced is entitled to the full range of rights under Section 41 of the [Employment Act](#). In her case, it was alleged she was 2 hours late. She was immediately dismissed by being notified that she was not to come to work except to handover.

As was held in [Donald Odeke v Fidelity Security Ltd \[2012\] eKLR](#) Cause No 1998 of 2011, an employee facing a disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. It was held in that case that it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair. The termination herein is therefore unfair within the meaning of the law and under Section 45 of the [Employment Act](#), an employer ought to justify the reasons for dismissal. The Claimant did not have on record any warning and therefore the lateness shown to have occurred on September 9, 2013 should have led to a warning being issued and appropriate sanctions being given.”

25. In the present case, it is my finding that termination of the Claimant’s employment was unfair, and I so declare.

26. The Court of Appeal held as follows in the case of [Kenfreight \[ea\] Limited v Benson K Nguti \[2016\] eKLR](#):-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the



decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding..."

27. Before addressing the 2<sup>nd</sup> issue, the issue of the Claimant's monthly earnings at the time of termination must be addressed. The Claimant pleaded that he earned Kshs 9,000 per month at the time of termination. The Respondent seemed to admit this pleading by the Claimant by Counter-claiming from the Claimant a sum of Kshs 9,000 being one month salary in lieu of notice.
28. Although the Claimant pleaded salary underpayment and stated the sum of Kshs 12,926 as the rightful monthly salary that he ought to have been earning, the Claimant did not adduce any form of evidence in proof or attempted proof of that pleading; and the same remains just a mere statement of unproved fact in the Claimant's statement of claim.
29. Turning to the second issue, and having found that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of ten months' salary being compensation for unfair termination of employment. That is Kshs 9,000 x10 = 90,000.
30. The Claimant's contract of employment being one to which Section 35(1) (c) of the *Employment Act* applied, the Claimant was entitled to a one month termination notice or one month salary in lieu of notice. No notice was given. I award the Claimant Kshs 9,000 being one month salary in lieu of notice.
31. As stated in paragraph 28 of this judgment, the claim for salary underpayment was not proved, and is declined.
32. On the claim for unpaid leave, the Respondent did not demonstrate that the Claimant took any leave during the period of employment. Section 74(f) of the *Employment Act* obligates an employer to keep written records of his employees containing particulars of an employee's annual leave entitlement, days taken and days due. In the present case, the Claimant was in the Respondent's employment for over 2 years and 8 months. He was entitled to a minimum of 21 days leave for each year served, and 1.75 days per month in any uncompleted leave earning year pursuant to Section 28(1) of the *Employment Act*. The Claimant was entitled to 21 says leave for each of the 2 completed years of service and 14 days for the 8 months served during the uncompleted third year of service. I award the Claimant Kshs 16,800 being payment for unpaid leave days.
33. On the third issue, the Respondent did not prove its allegation that the Claimant absconded or deserted duty. In the contrary, the Claimant demonstrated, on a balance of probability, that his employment was terminated by the Respondent. The Respondent's Counter-claim against the Claimant being one for one month salary in lieu of notice must, therefore, fail, and is declined. The Respondent's counter-claim is hereby dismissed with costs.
34. Consequently, and having considered written submissions filed on behalf of both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-
  - a) compensation for unfair termination of employment .....Kshs 90,000
  - b) one month salary in lieu of notice .....Kshs 9,000
  - c) unpaid leave .....Kshs 16,800TotalKshs 115,800



- 35. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
- 36. The Claimant is awarded costs of both the suit and the counter-claim herein.
- 37. The Claimant is also awarded interest at Court rates, to be calculated from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup>**

**FEBRUARY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

**In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.**

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

.....for Claimant

..... for Respondent

