



**Filikisi v Euro Petroleum Limited (Cause 2125 of 2015)
[2023] KEELRC 1156 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1156 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2125 OF 2015**

K OCHARO, J

MAY 11, 2023

BETWEEN

COLLINS WANGILA FILIKISI CLAIMANT

AND

EURO PETROLEUM LIMITED RESPONDENT

JUDGMENT

1. Through a statement of claim dated the November 25, 2015 the Claimant instituted a claim against the Respondent seeking the following reliefs:
 - a. A declaration that the Claimant's dismissal from employment was unlawful and unfair.
 - b. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
 - c. An order for the Respondent to pay the Claimant his dues, terminal benefits and compensatory damages as in paragraph 13 (a-g) Ksh 713, 362.70.
 - d. Cost of the suit and interest therein.
2. The Memorandum of Claim was filed contemporaneously with the Claimant's witness statement and the list of documents he intended to place reliance on as documentary evidence in support of his case.
3. Upon being served with the summons to enter appearance, the Respondent entered appearance on February 3, 2016 and filed its Memorandum of response on February 10, 2016. In the Memorandum of response, the Respondent denied the Claimant's cause of action and his entitlement to the reliefs sought.
4. Subsequent to the close of the pleadings, the matter was heard inter-partes on merit. The Claimant's case was heard on November 11, 2021 while the Respondent's case was heard on April 20, 2022.



5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents admitted as their documentary evidence.

The Claimant's case

6. The Claimant averred that he was employed by the Respondent from August 18, 2011 until September 10, 2014 as a turn boy at the latter's vehicle Department. On September 6, 2014 the Claimant and his fellow colleagues were sent to Mombasa for official duties with two vehicles and while they were on the way back, one of the vehicles had a deflated tyre. His driver decided to relieve his colleagues in the other vehicle by giving them the spare tyre of his vehicle.
7. Unfortunately, on their way, the police flagged them down, accused the driver of driving a vehicle on a public road with worn out tyres. The police detained them and only released them after receiving Ksh 3000, which sum was sent from the Respondent's office.
8. He stated that on reaching their destination, Nairobi, the Respondent's driver instructed him to replace the worn-out tyre that had caused their arrest. The driver urged him not to, insisting that the worn-out tyre could only be replaced with the one that he had lent for use on the other vehicle. He decided to abide by the instructions of the supervisor, replaced the same with the one that the supervisor had given him.
9. Consequently, the driver decided to make allegations against him to the Respondent's in charge of operations. The allegations that he levelled against him were not divulged. Subsequently, the lady in charge of operations, summoned him to her office and issued him with a termination letter.
10. Subsequently, he escalated the matter to the Respondent's Director's office, with a claim that he had been terminated without any justifiable reason. He was told to go home and wait to be called back. He was never.
11. The Claimant contended that prior to the termination, he was not notified of any wrong doing on his part and/or accorded any opportunity to defend himself against any accusations. The termination was unfair.
12. Lastly the Claimant averred that he claimed his terminal dues as tabulated hereunder:
 - a. One month salary in lieu of notice.....Ksh 12,750
 - b. Untaken leave days for 4 years @26 days x 4 x12,750.....Ksh 51,000
 - c. Leave pay for 4 years@ 12,750 x 4 years.....Ksh 51,000
 - d. 12 months compensation for the unfair termination.....Ksh 153,000
 - e. Overtime per 3 hours per day for 4 years, 3 hours x 313 days x 4 for 3756 overtime claimed $12750/26/8 \times 8 \times 3756$Ksh 230,235.8
 - f. Untaken public holidays worked @ 11 day per year $12,750/26 \times 11 \text{ days} \times 4 \text{ years}$Ksh 21,576.90
 - g. House allowance @ $15/100 \times \text{Ksh } 12,750 \times 12 \text{ months} \times 4 \text{ years}$Ksh 91,800.



h. Off -duty @ 52 days per year 12,750/26 x 52 x
4.....Ksh 102,000

13. In his oral evidence in court, evidence in addition to the witness statement, the Claimant testified that his salary was normally paid through his bank account.
14. He told the court that at the period he worked for the Respondent he never proceeded for leave or public holiday. He never applied for leave. He would report at 7.50 am due to the nature of his work and leave at 7.50 pm.
15. When cross-examined, it was his testimony that he was employed in the year 2011 August, however, he had no document to demonstrate it. He was being paid Ksh 425 per day, therefore, Ksh 11,050, per a month.
16. He was not issued with any warning nor explained to any mistake[s] that he had done. Instead he was told off, by the Director's secretary. He was not allowed to see the Director at all. The Secretary's action was informed by the Director's instructions. He further testified that he subsequently tried to call the Director to plead his case, but the Director declined to give him audience.
17. The witness stated that the Respondent issued a cheque for his terminal dues, but he declined to pick the same.
18. On re-exam, he told the Court that in 2011 he started as a casual and being paid Ksh 425. He was later made a permanent employee where the Respondent paid the NSSF and the NHIF. The cheque was returned because it was quite insufficient.

The Respondent's case

19. The Respondent presented its Legal Manager, Mr. Gibson Kabur to testify on its behalf. He told the court that the Claimant was in the employment of the Respondent up to the September 9, 2014, when his employment was terminated vide a letter of the even date.
20. The reason for the termination was that he absented himself from the appointed place for the performance of his work, this despite the several warnings that he had been given earlier on. Further, he had on several occasions absented himself from duties without authority.
21. He alleged that the Claimant was called to explain himself on the misconduct but he only gave a casual answer to the effect that he left the station because at the material time there wasn't any work to be done by him. This was untrue.
22. The facts laid out in the Claimant's Memorandum of Claim and brought out in his evidence are untrue. The Respondent is unaware of the tyre incident and the events that allegedly followed. The termination of his employment had nothing to do with the alleged incident.
23. The witness stated that the Claimant's salary was Ksh 10,200 and not Ksh 12,750 as he alleged. The Claimant utilized all his leave days, and whenever he worked during public holidays he was compensated for that. His salary was a consolidated salary, therefore inclusive of House allowance.
24. Upon demand for his terminal dues, the Respondent computed the same and issued him with a cheque, which cheque he declined to deposit and instead had it sent back to the Respondent.
25. The Claimant was summarily dismissed within the terms of his employment contract and stipulations of the *Employment Act*.



26. When cross-examined, it was his testimony that the Claimant had been given verbal warnings regarding his absenteeism and due to the nature of the work he was doing he would not be given written warnings.
27. RW1 told the court that as regards to the incident that led to his termination, he believes that the Claimant was invited to appear before his supervisor for him to make a representation before any action was taken against him.
28. It was his testimony that there were no leave forms as his work did not require him to fill leave forms. He further told the court that he had not produced any document to demonstrate that for any overtime worked he was paid.
29. He told the court that due to the nature of his work, public holidays would get him on the road. There was no record to show that he was compensated.
30. Lastly it was his testimony under cross-examination that without minutes he was not able to tell whether hearing ever occurred.
31. On Re-exam, he told the court that the Claimant had conveniently avoided to place before court documents to prove his case.

The Claimant's submissions

32. The Claimant filed his submissions on 2nd June 2022. The Claimant submitted that the Respondent had failed to produce evidence of an employment contract to show that the Claimant received a consolidated salary. Reliance was placed on the case of *Ayanna Yonemura v Liwa Kenya Trust* [2014] eKLR where it was held:

“

“ 12. If it was the intention of the Respondent to include provision for housing in that remuneration, it would have stated so expressly in the contract. It is therefore the Court's conclusion that the Respondent did not provide housing or pay rent or housing allowance for its Managing Director and the Court awards the Claimant the amount claimed calculated at 15% as provided in the General Wages order which requires that housing component comprise at least 15% of the basic wage.”

33. It was submitted that the termination of the claimant from employment was both procedurally and substantively unfair. Reliance was placed on the case of *Njeru Evanson Mwaniki v Euro Petroleum Limited* [2020] eKLR.
34. The Claimant submitted that he was entitled to the reliefs sought in the statement of the claim as his termination from employment was unfair and un-lawful.

The Respondent's submissions

35. The Respondent filed its submissions on October 3, 2022. The Respondent submitted that the Claimant did not make any objections against the consolidated salary prior to the filing of the suit and due to this fact, he was fully aware and conceded to the consolidated salary. It was its submission that it was not in the province of the court to renegotiate for the parties the implied terms herein.
36. It is submitted that the allegation of the unfair termination is baseless as the claimant failed to demonstrate how his termination was unlawful and unfair. That the Claimant was invited to a disciplinary meeting and given an opportunity to make his presentation and thus the respondent



discharged its obligation under section 41 of the [Employment Act](#). Reliance was placed on the case of [George Okello Munyolo v Uniliver Kenya Limited](#) [2019] eKLR as quoted with approval in the case of [Antony Mkala Chitavi v Malindi Water & Sewerage Company Ltd](#) [2013] eKLR where it was held:

“Again, it can be argued that the claimant has failed to adduce evidence in support of a case of unlawful termination of employment. He has failed to satiate his burden of proof as required of section 47 (5) of the [Employment Act, 2007](#) which comes out as follows;

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”

37. On the relief for overtime pay, it was submitted that the claimant was not entitled to the same as there was no evidence presented in support thereof. Reliance was placed on the case of [Wilfred Mutwota v Managing Director, Bakery Solutions Limited & Another](#) [2021] eKLR and the case of [Njeru Evanson Mwaniki v Euro Petroleum Limited](#) [2020] eKLR.
38. Lastly it was submitted that the claimant was not entitled to any of the other reliefs sought. His claim is an abuse of court process meant to extort the Respondent Company. It should be dismissed be dismissed with costs.

Analysis and determination

39. From the pleadings by the parties herein, their evidence on record as well as the revival submissions by the counsel, the following issues present themselves for determination thus:
- a. What was the status of the Claimant’s employment at the time of his termination?
 - b. Whether the termination was fair and procedural
 - c. Whether the Claimant is entitled to the reliefs sought.
 - d. Who should bear the cost?

What was the status of the Claimant’s employment at the time of his termination?

40. It is not disputed that the Claimant’s initial engagement was on a casual basis. The contest now is whether moving forward, his engagement graduated from casual employment to regular term employment by operation of law.
41. Section 2 of the [Employment Act](#) 2007 defines a casual employee to mean: -
- “.. An individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”.
42. A casual employee is therefore an employee who is engaged for 24 hours at a time. As per the provisions of section 35(1) (a) of the [Employment Act](#), such engagement is terminable by either party at the end of the day, without notice.
43. Section 37 of the [Employment Act](#) empowers the court to convert the contract of service of an employee engaged on a casual basis, to a regular term contract. This conversion is significant in that, such an employee becomes entitled to the safeguards available to an employee on a regular contract of



employment. Such safeguards include, termination with notice or payment in lieu thereof, protection from unfair termination, benefits such as leave, rest days and issuance of certificate of service.

44. On its part, the Respondent maintained that the Claimant was a casual employee, there is no evidence presented by the Respondent herein in form of a casual payroll to support its assertion that the Claimant was not engaged in its employment regularly from the period between August 18, 2011 until September 10, 2014. The Respondent has taken an evasive position or path in its statement of response on the specific year the Claimant was engaged initially as its casual employee. In the premise of the foregoing, I have undoubtable impression that the Claimant was employed in the stated year as per his statement of claim.
45. Section 10 (7) of *Employment Act* provides that 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. A construction of this provision is that the Respondent being the employer, was under an obligation to disprove the fact that the Claimant was not a casual employee.
46. In this premise, and being the party responsible for maintenance of employment records, it was under an obligation to prove by way of evidence that the Claimant was engaged intermittently and not for a continuous period exceeding three months. Clearly, the Respondent did not discharge its burden.
47. In absence of proof to the contrary, I am led to conclude that the contract of service of the Claimant assumed permanency and was deemed to be one where wages are paid monthly. In essence, section 35 (1) (c) of the *Employment Act* became applicable to the Claimant's contract of service in terms of section 37(1).

Whether the termination of the Claimant was fair and procedural

48. The *Employment Act* 2007 puts forth two aspects that must be considered by the Court whenever called upon to interrogate fairness of an employee's dismissal or his/her termination from employment. The aspects being procedural fairness and the substantive justification.
49. Section 41 of the *Employment Act* provides the structure for the procedural fairness. It provides;

“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)”
50. The provision is couched in a mandatory manner; any form of non-adherence to it, legally renders the termination or the summary dismissal unfair pursuant to the provisions of section 45 of the Act.
51. It is trite that procedural fairness entails the duty on the employer to explain to the employee clearly the accusations for which it is contemplated that his employment be terminated, an opportunity for the employee to make representations on the grounds and the consideration by the employer of the representations before taking a decision.



52. By dint of the provision of section 45 (2), the duty to prove that there was procedural fairness in the termination or summary dismissal lies on the employer. Looking at the material placed before this court, one cannot find any difficulty in being persuaded by the evidence of the Claimant that the Respondent did not follow the basic prescript of the *Employment Act*. The Claimant was not notified of the accusations that were levelled against him. He not given a chance to defend himself. The Respondent failed to discharge the burden of proving that the summary dismissal was procedurally fair.
53. By reason of the foregoing premises, I find that the Claimant's summary dismissal from employment was procedurally unfair in total disregard of section 41 of the *Employment Act* 2007.
54. On substantive justification of the dismissal, section 43 of the *Employment Act* commands that whenever there is a dispute regarding termination of an employee's employment, the employer bears the duty to prove the reasons for the termination. Sections 45 places further burden on the employer of proving that the reasons for the termination was valid and fair. Where the employer fails to discharge the first burden, no doubt, it isn't possible for him or her to discharge the second one under section 45.
55. It was the Respondent's case that the Claimant was dismissed on the ground of abdicating duties and absenteeism from work and had several verbal warnings over this uncalled-for conduct. The Court notes that the Respondent mentions not when this occurred, leaving the allegation in my view, a bare assertion, one not supported sufficiently or at all.
56. A legal burden is ordinarily discharged by adduction of evidence. The Claimant testified that there was an attendance register to be signed by the Respondent's employees. This evidence was not challenged at all. The court is left to wonder why the register was not put forth in evidence to disabuse his evidence.
57. By reason of the premises foregoing, I am convinced that the dismissal of the Claimant from employment was substantively unfair. The Respondent failed to discharge the burden of proving that there was a valid and fair reason for the dismissal.

Whether the Claimant is entitled to the reliefs sought.

a. On month's salary in lieu of notice.

58. The parties herein were not in agreement as to how much the Claimant was drawing as salary monthly. None of them placed before the Court clear evidence on this. The Court is impelled to place reliance on the Regulation of wages Order 2013, consequently. The Regulation provided a turn boy's wages as Ksh 10, 563.60 per month. The Claimant's employment was one terminable by notice, a twenty-eight days' notice as contemplated under section 35 [1] [c] of the *Employment Act*. No doubt his employment was terminated without the notice. hereby award him Ksh 10, 563.60 as salary in lieu of notice.

b. Untaken leave

59. The Claimant urged the court to award him Ksh 51,000 for the untaken leave for four years. Section 28 of the *Employment Act* enjoins an employer to allow an employee to proceed for leave with full pay and leave not taken should be paid in lieu of having not been taken. Section 74 of the Act mandates the employer to keep records concerning an employee including the leave taken and the pending leave days. RW1 did not produce before the Court any evidence to demonstrate that indeed the Claimant proceeded for leave. In the premise, I hereby award the Claimant leave pay as tabulated hereunder;
 $(10,563.60 \times 21/30 \times 3 \text{ years}) = \text{Ksh } 22,183.56$



c. Unfair termination.

60. The Claimant urged this court to award him Ksh 153, 000 as compensation for the unfair termination. The authority to make this award flows from the provision of section 49 of the Act and the circumstances of each case influence the grant. Having noted that the claimant's termination was procedurally and substantively unfair and the fact that being a turn boy the claimant could secure another engagement quickly, I conclude that he is entitled to 6 months' gross salary compensation, thus Ksh 63,681.30

d. Overtime

61. The Claimant urged the court to award him Ksh 230,000 as overtime. In the case of Rogoli Manadiengi v General Cargo Limited 2015 eKLR it was held;

“The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee.”

62. Similarly, in the case of Wilfred Mutwota v Managing Director, Bakery Solutions Limited & Another [2021] eKLR the court held:

“His claims for overtime similarly fail as no evidence was led on this. I restate the following: employees have an obligation to notify the employer of adverse working conditions and not merely acquiesce to the conditions at work without a murmur and then come to Court to lament how poorly they were treated yet they did not document any grievance with their employer. He never issued a note to the employer seeking payment for overtime, there is no evidence he raised this issue at all during the period he was employed and as such it is not possible to ascertain whether he was paid or not paid for overtime worked. As such this aspect of the claim fails.”

63. The Claim for overtime is hereby declined as the same is not supported by any evidence to warrant its award by this Court.

e. Untaken public holidays

64. The Claimant further urged the court to award him Ksh 21,576.90 for having worked during public holidays without any compensation thereof. RW1 told the court that public holidays would often get the claimant on road and that there was no record to demonstrate that the Claimant was compensated for the same. In view of the foregoing premise, I consequently award the Claimant the compensation sought under this head. Thus; $(10,563.60/26 \times 3 \times 11) = \text{Ksh } 13,407.65$

f. House allowance

65. House allowance is based on a minimum of 15% of the basic salary and employers are bound by Section 31(1) of the Employment Act, 2007, to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary.
66. The Respondent has not demonstrated before this court that the Claimant was paid house allowance or that his salary was inclusive of house allowance. In the premise, the Claimant is awarded house allowance as tabulated below;



(10,563.60 X 15/100 X 12 X 3.1 years) = Ksh 58, 944.88

g. Off-duty

67. The Claim for Ksh 102, 000 as off duty has no evidential sub- strum. The Claimant never issued a note to the employer, the Respondent herein seeking the payment of the same during the period of engagement. There is no evidence that he raised this issue either verbally or in written form at the period he was employed by the Respondent and as such it is not possible to ascertain whether he was paid or not paid the off-duty. In the premise, I consequently decline to make any award in favour of the Claimant under this head.

Who should bear the Cost of the suit?

- 68. The cost of this suit to be borne by the Respondent.
- 69. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms;
 - a. A declaration that the Claimant’s termination was both procedurally and substantively unfair.
 - b. One month’s salary in lieu of notice.....Ksh 10, 563.60.
 - c. Untaken leave.....Ksh 22, 183.56
 - d. Compensation for unfair termination....Ksh 63,681.30.
 - e. Compensation for work during public holidaysKsh 13,407.63.
 - f. House allowance.....Ksh 58,944.88
 - g. Cost of the suit.
 - h. Interest at the Court rates from the date of judgment till payment in full.

READ, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF MAY, 2023.

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OCHARO KEBIRA

JUDGE

In the presence of

Mr Wangila for the Claimant.

Mr. Nurah for the 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 15th March 2020 and subsequent directions of 21st 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.

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Ocharo Kebira

Judge

