



**Ndalo v Riley Services Ltd (Cause 810 of 2017)
[2023] KEELRC 1738 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1738 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 810 OF 2017**

**AK NZEI, J
JULY 10, 2023**

BETWEEN

SAMUEL OTIENO NDALO CLAIMANT

AND

RILEY SERVICES LTD RESPONDENT

JUDGMENT

1. The claim herein was instituted by the Claimant vide a memorandum of claim dated October 5, 2017 and filed in Court on October 10, 2017. The Claimant pleaded that he was employed by the Respondent as a security guard from November 28, 2011 upto April 2017 when the Respondent unfairly and unlawfully terminated the services of the Claimant without giving him any hearing. That the Claimant was earning a net salary of ksh 12,177 at the time of termination.
2. The Claimant further pleaded that the nature of his employment was that he worked for 8 hours per day, was entitled to 21 fully paid leave days for each completed year of service, either party could terminate the contract of employment by giving 30 days' notice or payment in lieu thereof, and that the Claimant was entitled to a remuneration of ksh 12, 177 as net salary.
3. It was the Claimant's further pleading that in April 2017, the Respondent unfairly and unlawfully terminated the Claimant's employment without any justifiable excuse and failed to pay the Claimant's terminal dues and/or contractual benefits upon the unfair termination, including payment of one month salary being payment in lieu of notice.
4. The Claimant set out his claim against the Respondent as follows:-
 - a. notice payksh 12,177
 - b. leave pay earned and not taken for the years 2013, 2014, 2015 and 2016.....ksh 34,095



- c. 12 months' salary being compensation
 - d. for unlawfully and unfair terminationksh 161,053 Total ksh 207,325.
 - e. Costs of the suit and interest.
5. Other documents filed by the Claimant included the Claimant's affidavit sworn in verification of the claim, the Claimant's written witness statement, and a list of documents dated October 5, 2017. The listed documents included a demand letter dated April 18, 2017 and a bundle of the Claimant's payslips.
 6. The Respondent entered appearance on November 30, 2017 and subsequently filed Response to the claim on December 22, 2017. The Respondent admitted having employed the Claimant but denied having terminated his employment unfairly. The Respondent pleaded that the Claimant deserted employment without notice to the Respondent, and that it was the Respondent who ought to be paid one month salary in lieu of notice.
 7. The Respondent denied the Claimant's claim for unpaid leave and pleaded that it always granted annual leave to its employees and that where leave was not taken, payment was made. The Respondent further pleaded that the Claimant's suit was frivolous, and put the Claimant to strict proof of his allegations.
 8. Other documents filed by the Respondent included a witness statement of one William Wiga dated December 20, 2017 and an evenly dated list of documents listing one document, a letter dated April 12, 2017.
 9. On February 19, 2018, the Claimant filed a Reply to the Respondent's Response to the claim herein, and joined issues with the Respondent.
 10. On June 8, 2022, the Respondent filed a supplementary list of witnesses and a witness statement of Elijah Cheruiyot pursuant to the Court's leave in that regard.
 11. When trial opened on November 25, 2021, the Claimant adopted his written witness statement as his testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. The Claimant further testified that he was not issued with a termination letter, that he was never invited for any disciplinary hearing, and that he never received the letter filed by the Respondent herein and allegedly dated April 12, 2017. That he did not desert duty and was never served with any notice.
 12. Cross-examined, the Claimant testified that in or about March 2017, he was working at his assigned work place at Cooperative Bank Nyalı Centre when he was assigned to go and relieve another guard at Kenya Power Pay Point, also at Nyalı Centre, who was supposed to go on his off, but a lady guard at the Kenya Power Pay Point refused to work with the Claimant and instead asked the guard whom the Claimant was supposed to relieve to remain on duty, thus forcing the Claimant to go back to his place of duty at the co-operative bank whereat another guard had already reported, and wait for the supervisor. That the supervisor, one Evans Morara, came later that date and told the Claimant to go home and report at the Respondent's office the following day.
 13. That at the office, the supervisor told the Claimant to hand over his uniforms, which the Claimant did. That the Claimant never saw any letter by the Respondent accusing him of having deserted duty as no such letter was served on him, and that the Claimant only saw the same in his lawyers' office (after it was filed in Court). The Claimant denied the Respondent's suggestion that he send an abusive message to another guard, or that he insisted on working at a particular place.



14. The Respondent called one witness Elijah Cheruiyot (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the document referred to in paragraph 8 of this judgment. RW-1 further testified: -
- a. that in April 2017, the Claimant was assigned duties and he assaulted a fellow employee at Nyali, and that when he was summoned to the office vide a letter dated April 12, 2017 he did not turn up and instead went to his lawyer and later filed the present case in Court.
 - b. that the Claimant did not honour summons by the Respondent, and was never terminated. That the Claimant did not give any termination notice to the Respondent.
 - c. that whereas the Claimant's claim for 2013 pay is statute-bared, the Claimant proceeded on leave during the years 2014, 2015 and 2016 as indicated on his payslips, and was paid. That the payslip for January 2016 shows that the Claimant was paid for leave.
 - d. that the Claimant is not entitled to payment of compensation for unfair termination as he was not terminated; and was not heard of after the letter dated April 12, 2017.
15. Cross-examined, RW-1 testified that he was not at the Respondent's Mombasa branch as at 2017, but had been adequately briefed on the suit herein. That the Claimant was summoned vide a letter dated April 12, 2017 which did not state the nature of the alleged abuse, the person allegedly abused and the nature of the charge against the Claimant. That the letter did not name the guard that the Claimant was working with, did not annex the text message allegedly send by the Claimant, and did not have an acknowledgement signature by the Claimant.
16. It was RW-1 evidence that the Respondent did not have/had not filed leave forms to show that the Claimant took leave. The witness (RW-1) further testified:-
- a. that the Claimant's payslip for January 2016 indicated that leave advance was paid, but payslips for 2013, 2014, 2015 and 2017 did not indicate any leave payment.
 - b. that the Claimant did not assault the other guard, but insulted her by sending text messages to her through another person's phone. That the Claimant was summoned to the office to explain but did not turn up.
 - c. that leave pay for 2016 was paid together with the salary, and the claim for 2013 leave pay was statute-bared.
 - d. that the letter dated April 12, 2017 contained reasons why the Claimant was being summed, and the Claimant was given an opportunity to respond to issues raised therein by recording a statement.
17. Upon considering the pleadings and evidence tendered by both parties, issues that present for determination, in my view, are:-
- a. whether the Claimant's employment was terminated by the Respondent.
 - b. whether termination of the Claimant's employment was unfair.
18. On the first issue, the Claimant testified that he was instructed by his supervisor to hand over his uniforms after a lady guard that he was supposed to work with at KPLC Pay Point Nyali Centre, refused to work with the Claimant after he was send there to relieve a guard who was supposed to take his off, and was not given a hearing before termination.



19. On its part, the Respondent alleged that the Claimant deserted duty without notice to the Respondent. The Respondent exhibited a letter dated April 12, 2017 addressed to the Claimant (Samuel Ndolo); but without any indication of the Claimant's address or the intended mode of delivery. The letter bears no indication on whether it was served on, and/or delivered to the Claimant. The letter stated in part:-

“It was reported to the office on diverse dates in the month of March that you left your place of work at CBA Nyali and went to KPLC Nyali paypoint where you left and abused a security guardette deployed there and even send an abusive text through another guard with whom they were working together. She reported the same to the office through our supervisor.

You were summoned to the office to explain what the problem was and why you left your assignment. You were given a chance to write a statement on the same issue, which you did not and thereafter disappeared and deserted duties.

You are therefore notified by this letter to return any company property within (sic) your custody to facilitate your clearance and payment of final dues if any.”

20. It is worth noting that the aforesaid letter did not state and/or disclose the identity of the person who allegedly made reports on the Claimant leaving his place of deployment at CBA Nyali and going to abuse another guard at another station of deployment (KPLC Nyali paypoint), and that such person never testified in Court. the guard/guardette alleged to have been abused never testified, an extract of the alleged abusive message allegedly send by the Claimant was never exhibited in Court. the guard through whom the alleged abusive message was allegedly send by the Claimant did not testify.
21. The alleged letter dated April 12, 2017 was not shown to have been served on and/or delivered to the Claimant. The Claimant denied having received the said letter; and there is nothing on it to show that it was received by the Claimant.
22. The Respondent did not rebut the Claimant's evidence that his employment was terminated by the Respondent in April 2017 without notice, without giving the Claimant an opportunity to be heard and without any reason.
23. It is my finding that the Claimant's employment was terminated by the Respondent. Termination of employment that does not accord with the requirements of Section 41 of the Employment is unfair. Termination of the Claimant's employment did no accord with the said law, and was unfair. Section 41 of the [Employment Act](#) provides as follows:-

“(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.”



24. It was held as follows in *Walter Ogal Anuro -vs- Teachers Service Commission* [2013] eKLR:-
- “...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
25. As already stated in paragraph 23 of this Judgment, termination of the Claimant’s employment was procedurally unfair.
26. Turning to the issue of substantive fairness, Section 43(1) of the *Employment Act* states:-
- “(1) (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.”
- (2) the Reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
27. Section 45(4) on the other hand 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.”
28. As already stated in this judgment, the Respondent did not demonstrate the validity and/or truth of its allegation that the Claimant deserted his duties. Termination of the Claimant’s employment was, therefore, substantively unfair.
29. On the second issue, the Claimant pleaded, testified and demonstrated that his monthly salary was ksh 12,177 at the time of termination. On the prayer for notice pay, the Claimant testified that his employment was terminated without notice. The claimant is entitled to one month salary under Section 35 (1) (c) of the *Employment Act*. I award him ksh 12,177 being notice pay.
30. On the prayer for leave pay, the Claimant pleaded and testified that he worked from January 2011 upto April 2017, and that he did not take annual leave during the years 2013, 2014, 2015 and 2016. He claimed ksh 34,095 under the leave heading. The Respondent denied the claim and pleaded that the Claimant and other employees of the Respondent were always granted annual leave, and proceeded on the same. The Respondent testified that whereas the claim for 2013 leave pay was statute-barred, the Claimant had been paid leave pay for 2014, 2015 and 2016. The Respondent referred the Court to the Claimant’s payslip for January 2016 which itemized ksh 3,967 as leave advance. The duration/year in respect of which this payment was made is not indicated on the said payslip.
31. By dint of Section 28(1) (a) of the *Employment Act*, the Claimant was entitled to not less than twenty one days’ leave with full pay after every twelve consecutive months of service. Section 74(f) of the



Employment Act obligates an employer to keep records of an employee's annual leave entitlement, days taken and days due. In the present case, the Respondent did not produce such documents.

32. The Respondent's allegation that the Claimant's claim for 2013 leave pay is statute-barred is, in my view, untenable as an employer's continuous failure to pay an employee in lieu of untaken leave amounts, in my view, to a continuing injury under Section 90 of the Employment Act, regarding which limitation period starts running upon cessation of the continuing injury.
33. I find and hold that the Claimant is entitled to twenty-one days' pay for each of the pleaded years, 2013, 2014, 2015 and 2016, less the amount of leave advance shown to have been paid with the Claimant's January 2016 salary. I award the Claimant ksh 30,128.1 being leave pay earned.
34. On the claim for compensation for unfair termination of employment, I award the Claimant the equivalent of nine months' salary, which is ksh 12,177X9 = ksh 109,593. I have taken into account the circumstances in which the Claimant's employment was terminated.
35. In sum, and having considered written submissions filed by Counsel for the parties herein, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. Notice pay.....ksh 12,177
 - b. Leave pay earned.....ksh 30,128.1
 - c. Compensation for unfair termination of employmentksh 109,593
 - d. Total ksh 151,898.1
36. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH JULY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Okanga for Claimant

N/A for Respondent

