



**Sichenje v Computer Revolution Africa Limited (Cause 2068 of 2016)  
[2023] KEELRC 2243 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2243 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2068 OF 2016  
L NDOLO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PATRICK NGALA SICHENJE ..... CLAIMANT**

**AND**

**COMPUTER REVOLUTION AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The issue in dispute as stated by the Claimant in his Memorandum of Claim dated 5<sup>th</sup> October 2016 is ‘wrongful dismissal and refusal to pay terminal dues’. The Respondent’s defence is contained in a Statement of Response dated 19<sup>th</sup> December 2016.
2. The matter went to full trial where the Claimant testified on his own behalf with the Respondent calling its Managing Director, Frasih Githua.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent on 15<sup>th</sup> September 2008, in the position of rider at a monthly salary of Kshs. 11,000 which was later increased to Kshs. 27,378.
4. The Claimant claims that on 9<sup>th</sup> August 2016, he was issued with a letter of termination, without valid reason and without prior notice. He adds that he was not paid his terminal dues nor was he issued with a Certificate of Service.
5. The Claimant’s case is that the termination of his employment was unlawful and unfair. He therefore claims the following:
  - a. One month’s salary in lieu of notice.....Kshs. 27,378
  - b. Salary for 9 days worked in August 2016.....10,125



- c. Leave pay for 8 years.....216,000
- d. Prorata leave for 2016.....7,525
- e. 12 months' salary in compensation.....328,536
- f. House allowance.....388,800
- g. Overtime.....156,000
- h. Certificate of Service
- i. Costs

### **The Respondent's Case**

- 6. In its Statement of Response dated 19<sup>th</sup> December 2016 and filed in court on 21<sup>st</sup> December 2016, the Respondent admits having employed the Claimant in September 2008, as pleaded in the Statement of Claim.
- 7. The Respondent states that the Claimant was paid a consolidated salary, inclusive of allowances.
- 8. The Respondent accuses the Claimant of absenting himself from work, on several occasions, without justification or explanation, for which he was issued with warning letters. In addition, the Respondent states that the Claimant had been warned about intoxication and insubordination for which he apologised but he did not transform.
- 9. The Respondent's case is that the Claimant was dismissed for gross misconduct, in accordance with the Employment Act and the provisions of his employment contract. The Respondent states that the Claimant was allowed leave every year and was duly issued with a Certificate of Service.
- 10. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it.

### **Findings and Determination**

- 11. There are two (2) issues for determination in this case:
  - a. Whether the termination of the Claimant's employment was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

### **The Termination**

- 12. On 9<sup>th</sup> August 2016, the Respondent wrote to the Claimant as follows:

“Dear Patrick,

REF: NOTICE OF TERMINATION OF EMPLOYMENT

You are hereby given notice that your employment with the company has been terminated effective immediately.

This action is necessary due to the following reasons:

- 1. Absence from the office for more than three days without permission from your supervisor or HR; and
- 2. Continued disregard of company policies with regard to asset management.



Previous warnings on these matters have been given but no reform has been observed, instead your actions have taken a turn for the worst.

It is the policy of this company to protect its trade secrets, customer lists and other confidential or proprietary information as vigorously as possible. We remind you that we consider its procedures our clients, our business procedures and our business plans to be proprietary. You are required to keep this information strictly confidential.

Please note that you are to return any and all property that was generated or obtained during your employment with this company, including any documents, handbooks, keys, identification cards, etc immediately.

We wish you success in your future endeavors.

Yours faithfully,

(signed)

Fresiah Githua

GM-Corporate Affairs”

13. According to this letter, the Claimant’s employment was terminated for two reasons; first, unauthorised absence from the office and two, persistent disregard of company policies.
14. Section 43 of the *Employment Act* obligates an employer to establish a valid reason for terminating the employment of its employee. In assessing the validity of the reason for termination of employment, the Court is expected to apply the ‘reasonable responses test’ and not to replace the employer’s decision with its own.
15. The reasonable responses test is as captured in the following excerpt from the *Halsbury’s Laws of England*, 4<sup>th</sup> Edition, Vol. 16(1B) para 642:  

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”
16. The Respondent produced a handwritten letter dated 15<sup>th</sup> August 2016, by which the Claimant apologised for absenting himself from work for a period of one week.
17. The Claimant confirmed this in his testimony before the Court where he admitted having extended his leave without authorisation. In my estimation, this constituted a valid reason for termination of employment, within the dictates of Section 43 of the *Employment Act*.
18. The next question is whether in effecting the termination, the Respondent observed due procedure. This procedure is codified in Section 41 of the *Employment Act*, which provides as follows:



41. Notification and hearing before termination on grounds of misconduct
  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.
  1. 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.
19. As affirmed by the Court of Appeal in its decision in *Mary Kitsao Ngowa & 36 others v Krystalline Limited* [2015] eKLR for a termination of employment to pass the fairness test, both substantive justification and procedural fairness must be established.
20. In this case, the Respondent did not adduce any evidence to confirm compliance with the fairness requirements of Section 41 of the *Employment Act*. For this reason, I find and hold that the termination of the Claimant's employment was procedurally unfair.

### Remedies

21. I therefore award the Claimant five (5) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service moderated by his contribution to the termination. I have also taken into account the Respondent's conduct in the termination process, which I have adjudged as unfair.
22. I further award the Claimant one (1) month's salary in lieu of notice as provided in Clause 14 of his employment contract. I also allow the claim for salary for nine (9) days worked in August 2016.
23. The Respondent availed records to show that the Claimant took his annual leave. This was corroborated by the Claimant's own testimony. The claim for leave pay is therefore without basis and is disallowed.
24. According to Clause 4 of his employment contract, the Claimant was paid a gross salary which would ordinarily be inclusive of house allowance. The claim for house allowance is therefore also without basis and is dismissed.
25. The claim for overtime was not proved and consequently fails.
26. In the end, I enter judgment in favour of the Claimant in the following terms:
  - a. 5 months' salary in compensation.....Kshs. 136,890
  - b. 1 month's salary in lieu of notice.....27,378
  - c. Salary for 9 days in August 2016 (27,378/30\*9).....8,213
  - Total.....172,481
27. This amount will attract interest at court rates from the date of judgment until payment in full.
28. The Claimant will have the costs of the case.



29. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Khalwale for the Claimant

Mr. Thuita for the Respondent

