



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ukungi v Big Square Limited/Interstrat Limited (Cause 45 of 2017)  
[2023] KEELRC 3098 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3098 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 45 OF 2017  
B ONGAYA, J  
NOVEMBER 27, 2023**

**BETWEEN**

**LUCIA UKUNGI ..... CLAIMANT**

**AND**

**THE BIG SQUARE LIMITED/INTERSTRAT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the Statement of claim on 12.01.2017 through Ngeresa & Okallo Associates Advocates. The claimant prayed for judgment against the respondent for:
  - a. A declaration that the claimant's employment contract with the respondent was unfairly, unlawfully or illegally terminated.
  - b. Issuance of a certificate of service.
  - c. Special damages as pleaded in paragraph 10 above with interest thereon at commercial rates from 25.04.2016 until payment in full. At the paragraph 10 the claimant claimed for:
    - i. On-month notice payment Kshs.16,000.00.
    - ii. Pay for 25 days worked in April 2016 Kshs.13,333.00.
    - iii. 32-days annual leave not taken Kshs.17,066.67.
    - iv. 16-days accumulated public holidays Kshs.25,000.00.
    - v. 12-months' compensation  $16,000 \times 12 =$  Kshs.192,000.00
    - vi. Total claim Kshs.251,733.33.
  - d. The costs of this suit.



- e. Interest d) above at court rates until payment in full.
2. The memorandum of response was filed on 07.03.2017 through Macharia – Mwangi & Njeru Advocates. The respondent prayed that the suit be dismissed with costs.
  3. The claimant's case was that she was employed by the respondent in the month of March, 2014 as an assistant manager earning a basic salary of Kshs.16,000, until 25.04.2016 when she was dismissed from employment on allegations of service voids worth Kshs.11,000.
  4. The claimant states that she was wrongfully dismissed from employment having not been informed in writing the reasons for dismissal and was not given opportunity to respond to the allegations of service voids.
  5. On the part of the respondent it is stated that the claimant was its employee with effect from 21.10.2013 working as a Customer Service Attendant earning a consolidated salary of Kshs.16,500.
  6. The respondent maintains that the claimant's services were terminated in accordance with the provisions of the *Employment Act* and it was on account of service voids amounting to Kshs.33,810.
  7. The respondent states that sometimes in the month of April 2016, the respondent discovered that the claimant had used a manager's code to conduct out of sale voids on the POS system yet she was not a manager and was not authorized to use the manager's code.
  8. That this discovery led the respondent to issue the claimant with a notice of a letter to show cause dated 18.04.2016 wherein the respondent informed the claimant that as per the rules and regulations pertaining to point of sale she had knowingly and intentionally shared and used the manager's codes with unauthorised persons leading to loss of Kshs.33,810/-.
  9. The claimant was thereafter invited for a disciplinary hearing scheduled for 24.04.2016 and was informed of her right to have a representative during the disciplinary hearing.
  10. The disciplinary hearing was scheduled for 25.04.2016 with the consent of the claimant. That prior to the disciplinary hearing, the claimant gave a written account of the events leading to the summons for the disciplinary hearing.
  11. The claimant attended the disciplinary hearing and gave explanations regarding the events, which the respondent found unsatisfactory, culminating in the issuance of the termination letter, which letter the claimant refused to acknowledge.
  12. The respondent pleaded that upon terminating the claimant's contract of employment, it paid the claimant all her terminal dues.
  13. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
  14. To answer the 1<sup>st</sup> issue, the Court returns that the respondent employed the claimant as a Customer Service Attendant. The letter dated 11.02.2014 confirmed the claimant in appointment effective 21.10.2013. She was put on annual contracts from 02.10.2013 to 21.10.2014; 22.10.2014 to 21.10.2015; and, 21.10.2015 to 20.10.2016. The last monthly gross salary was Kshs.16,500.00.
  15. To answer the 2<sup>nd</sup> issue, the Court returns that the contract of employment was terminated on 25.04.2016 and the termination was unfair. The letter to show cause was dated 19.04.2016. The allegation was that the claimant had used a manager's code to conduct out of sale voids on the POS System while she was not a manager or a person authorised to use the manager's code in issue. The



amount she was liable to explain was Kshs.33,810.00. In her written response thus, “I don’t have any manager’s code and we are not supposed to use Managers codes at any given time.” The claimant attended the disciplinary hearing which took place on 25.04.2016. The claimant in her testimony denied receiving the letter to show cause but admitted she had written her unsigned response. On a balance of probability, the Court finds that she received the letter to show cause and denied using the manager’s code. She also testified thus, “It was my writing about voids. The issue was there were several voids which had occurred during my service. Void means when you cancel and order that is void. The void value was not given to me.” The claimant testified that as a cashier she had her allocated secret code and the manager had his own allocated secret code. The secret security code ensured that no one accessed the system using her code. The claimant denied that she had attended the disciplinary hearing. The respondent’s witness (RW) was Sandra Odhiambo, the Human Resource Officer. She testified that the claimant received the letter to show cause, she signed, and she attended the disciplinary hearing she had no evidence that the claimant had been paid her terminal dues as claimed in the memorandum of claim.

16. The Court has considered the testimonies and all documents filed for parties. Parties are in dispute that the claimant attended disciplinary hearing. Whatever may have proceeded in that regard, the Court finds that the respondent has failed to show that the reason for termination existed as valid per section 43 of the Employment Act and that it related to the claimant’s conduct or compatibility or the respondent’s operational requirements per section 45 of the Act. In particular, the respondent has not shown that the alleged Manager’s secret system’s security code was accessed by the claimant. The termination was unfair both in procedure and substance. While making that finding, the Court has considered the alleged record of the alleged disciplinary hearing and being scanty as to whatever may have transpired, the claimant’s testimony that the disciplinary hearing did not take place is sustained on a balance of probability.
17. On the remedies the Court answers the 3<sup>rd</sup> issue as follows:
  - a. As submitted for the respondent the claimant did not provide evidence and justification for the 16-days public holidays and 32-leave days. The claims and prayers will collapse as unjustified.
  - b. The termination was unfair and the claimant is awarded the contractual one-month notice payment Kshs.16,000.00.
  - c. There was no evidence that salary for days worked in April 2016 had been paid and Kshs.13,333.00.
  - d. The Court has considered the factors in section 49 of the Employment Act for award of compensation. The claimant did not have a clean record of service and she received several warnings. The Court considers she significantly contributed to her termination. In that consideration she is awarded 2-months’ salaries in compensation Kshs.32,000.00.
  - e. The respondent to issue certificate of service per section 51 of the Act.
  - f. The claimant has succeeded and the respondent to pay costs of the suit.
18. In conclusion judgment is hereby entered for the claimant against the respondent for:
  1. The declaration the termination of the contract of employment was unfair.
  2. The respondent to pay the claimant Kshs.61,333.00 (less PAYE) by 31.12.2023 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
  3. The respondent to deliver the certificate of service by 31.12.2023.



4. The respondent to pay costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
MONDAY 27<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

