



**Andeyi v Street Children’s Assistance Network of Nakuru (Cause  
16 of 2016) [2023] KEELRC 2820 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2820 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 16 OF 2016  
DN NDERITU, J  
NOVEMBER 9, 2023**

**BETWEEN**

**PATRICK ANDEYI ..... CLAIMANT**

**AND**

**STREET CHILDREN’S ASSISTANCE NETWORK OF  
NAKURU ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. The claimant commenced this cause by way of a memorandum of claim dated 29<sup>th</sup> October, 2015 filed in court on 25<sup>th</sup> January, 2016 through Munene Chege & Co Advocates. As expected, the statement of claim is accompanied with a verifying affidavit, claimant’s written statement, a list of documents, and copies of the listed documents.
2. The claimant is seeking the following -
  - (a) Underpayment - Kshs. 190,056.40/=
  - (b) Salary in lieu of notice - Kshs. 15,000/=
  - (c) Annual leave - Kshs. 254,423.07/=
  - (d) Overtime - Ksh.1,266,246.78/=
  - (e) Public holidays - Kshs. 461,538.46/=
  - (f) Gratuity - Kshs. 173,076.92/=
  - (g) Compensation - Kshs. 180,000/=



Total - Kshs.2,540,341,63/=

3. The particulars of the above items are stated in paragraph 32 of the memorandum of claim and the claimant is also seeking interest thereon plus costs of the cause.
4. On 18<sup>th</sup> February, 2018 the respondent through Murimi, Ndumia, Mbago & Muchela Advocates filed a response to the claim praying that the claimant's cause be dismissed with costs for want of merits. The respondent on 1<sup>st</sup> August, 2022 appointed Mukite Musangi & Co Advocates to act for it in place of the above law-firm.
5. On 7<sup>th</sup> November, 2022 the respondent filed a witness statement by Anastacia Atieno Juma (RW1) and a list of documents accompanied with copies of the listed documents.
6. This cause came up for hearing in open court on 30<sup>th</sup> January, 2023 when the claimant (CW1) testified and closed his case. The defence was heard on the same date whereby RW1 testified and the respondent's case was closed.
7. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Chege, filed his submissions on 1<sup>st</sup> March, 2023 while Counsel for the respondent, Mr. Obiero, filed his on 22<sup>nd</sup> February, 2023.

## **II.The Claimant's Case**

8. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence by the Claimant (CW1), and the written submissions by his Counsel and the same is summed up as hereunder.
9. In his statement of claim the Claimant pleads that he was first engaged by the respondent (by then allegedly known as Kamoja Boys Rehabilitation Centre) on 27<sup>th</sup> December, 1991 as a volunteer general worker as per a letter of even date. On 1<sup>st</sup> January, 2000 the claimant was formally employed as a housekeeper at a monthly salary of Kshs.3,000/= and accordingly issued with a letter of employment by the respondent.
10. It is pleaded that on 11<sup>th</sup> July, 2013 the respondent unfairly and unlawfully terminated the claimant. As at of that date the claimant was earning a gross salary of Kshs.15,000/= as per the pay-slips availed as exhibits.
11. It is pleaded that while the claimant was issued with a show-cause letter dated 2<sup>nd</sup> July, 2013 he was not given an opportunity to respond to the same and was not invited for a hearing. He was subsequently issued with a letter of termination dated 11<sup>th</sup> July, 2013. It is the claimant's case that he was denied both substantive and procedural fairness.
12. It is pleaded that subsequent to the termination the respondent failed, refused, and or neglected to pay to the claimant his terminal dues and benefits, even upon demand, rendering this cause necessary. Further, it is pleaded that the claimant worked overtime and on public holidays without compensation.
13. In his testimony in court based on his filed statement, the claimant reiterated the foregoing contents of his memorandum of claim. He stated that he was dismissed on allegations that he failed to sleep in the dormitories with the children, which accusation he denies, as he allegedly slept in there at all times as directed by the respondent.
14. He stated that he spent all his time in the institution of the respondent with two hours break each day without any overtime pay. He emphasized that contrary to the promise in the letter of termination he



was not paid his final dues. He denied that he left the children unattended as alleged by the respondent. He stated that he reported the matter to his member of parliament and the labour office but the respondent refused to settle his dues. He produced his listed documents as exhibits.

15. In cross-examination, the claimant admitted that he attended a meeting on 1<sup>st</sup> July, 2013 before he was issued with the show-cause letter. He stated that he did not respond to the show-cause letter in writing but did so verbally. He stated that no sexual assault took place as alleged by the respondent. He admitted that he was issued with the letter of termination and that he was issued with a notice of one month, but he testified that he was ordered to leave the institution before the notice expired. He admitted that he received a sum of Kshs.17,185/= in final dues and signed for the same. However, he stated that he was informed that the said pay was for salary arrears for August, 2013.
16. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

### **III.The Respondent's Case**

17. The respondent's case is contained in the reply to the memorandum of claim, the oral and documentary evidence adduced through RW1, the officer-in-charge, and the written submissions by its Counsel, as summarized hereunder.
18. In the response to the claim the respondent to a large extent does not dispute the basic facts as pleaded and presented by the claimant as summarized above. However, the respondent is categorical that the claimant was fairly and lawfully terminated for gross misconduct. It is stated that the claimant, contrary to express and lawful instructions, left the children unattended as a result of which the younger boys were sexually assaulted by the older ones.
19. It is pleaded that the claimant was duly served with a show-cause letter to which he failed and or refused to respond and subsequently he was terminated as per the letter dated 11<sup>th</sup> July, 2013. It is pleaded that the respondent opted to give to the claimant a soft landing by terminating him instead of handing down to him a summary dismissal. It is stated that the claimant was given a two months' notice in termination. It is denied in toto that the claimant is entitled to any of the reliefs sought.
20. In her oral testimony in court RW1 stated that she is the officer-in-charge of the respondent's project. The project takes in street boys for rehabilitation and care. She clarified that the project is not part or in partnership with Kamoja Boys Rehabilitation Centre but rather took over the project from this outfit. She produced the documents filed by the respondent as exhibits 1 to 13. She stated that in April, 2013 the respondent received reports that the big boys were sexually molesting the small boys and it commenced investigations wherein it was established that the claimant was not spending the nights in the dormitories as directed and expected hence the occurrence of the sexual molestation. It is then that the respondent took disciplinary action as alluded to in the foregoing paragraphs.
21. In cross-examination RW1 admitted that other than the Kshs.17,185/= paid to the claimant there is no evidence of any other payments. She stated that this money took care of leave days as per the payment voucher. She stated that she is not aware if a disciplinary hearing was held following the show-cause letter. She stated that the claimant only worked at night from 6pm to 7am as his duty was to ensure the safety and security of the boys at night as a dorm-master or housekeeper. She stated that it was reported by other housekeepers that the claimant was not spending the nights in the dormitories as expected.
22. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs and the counter-claim be allowed with costs. The submissions by counsel for the Respondent



shall be considered in the succeeding parts of this judgment alongside those by counsel for the Claimant.

#### **IV. Issues for Determination**

23. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. From the above the court identifies the following issues for determination –
- a. Was the termination of the claimant by the respondent unfair and unlawful?
  - b. If(a) above is in the affirmative is the Claimant entitled to the reliefs prayed for?
  - c. What orders are appropriate on costs?

#### **V.Termination**

24. The issues in contest between the parties are rather straight forward. Without the necessity of repeating or recounting the contents of the pleadings and the oral and documentary evidence by the parties, the Claimant was engaged by the respondent as a dorm-master also referred to as housekeeper on 1<sup>st</sup> January, 2000 starting at a monthly salary of Kshs.3,000/=. The letter of appointment states that the claimant was to be provided with accommodation for self and his family and as such no house allowance was payable.
25. The jurisprudence on what constitutes substantive and procedural fairness in employment and labour matters has fairly crystallized. An employer has to have a lawful reason on which to found disciplinary action and the procedure adopted has to be fair, just, and lawful – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
26. The foregoing position is fortified by the provisions in Sections 35, 36, 41, 43, 44, 45, 46, 47, & 48 of the *Employment Act* (the Act).
27. In terms of the reason for dismissal the court has gone through the evidence, both oral and documentary, and noted that in the show-cause letter dated 2<sup>nd</sup> July 2013, it is alleged that the claimant failed to spend the nights in the dormitory during the nights from 29<sup>th</sup> April to 27<sup>th</sup> June, 2013 which omission allegedly exposed the boys to danger and led to sexual abuse of the younger boys by the older boys. This show-cause letter was subsequent to a meeting held on 1<sup>st</sup> July, 2013 wherein the conduct of the claimant was discussed. The claimant admitted that he attended the said meeting.
28. The minutes of the said meeting of 1<sup>st</sup> July, 2013 were produced by the respondent as an exhibit. In minute 6 the meeting resolved that the claimant be issued with the show-cause letter as alluded to above. However, there is no evidence whatsoever that a disciplinary meeting was called and or held after the show-cause letter was issued. This issue shall be revisited in a while in regard to the procedure adopted by the respondent in arriving at the termination of the claimant.
29. The minutes of the meeting of 1<sup>st</sup> July, 2013 and the show-cause letter clearly indicate that the claimant was accused of failing to spend nights in the dormitories, as directed and as per his duties, as a result of which sexual abuse of younger boys was allegedly committed by the older boys. From the reading of the minutes of the meeting of 1<sup>st</sup> July, 2013 it appears that the information on the sexual assault or molestation of the boys had been delivered to the respondent in a letter by a head boy in one of the affected dormitories. In legal terms the alleged failure by the claimant to spend the nights in the dormitories to protect the boys, which resulted in the alleged sexual assault, amounts to neglect of duty,



carelessness, or improper performance or execution of duty under Section 44(4)(c) of the Act which is a ground for lawful dismissal.

30. However, in the letter of termination dated 11<sup>th</sup> July, 2013 the ground of the said termination is stated to be insubordination. This contradiction between the show-cause letter and the minutes of the meeting of 1<sup>st</sup> July, 2013 on the one hand, and the letter of termination on the other begs for an answer to the question – on what ground(s) was the claimant terminated? The issue of the reason for termination is further complicated and lost by the fact that no disciplinary hearing was held (no evidence of the same was availed in court) wherein the allegations and accusations or charges against the claimant should have come out clearly.
31. Going by the letter of termination, what insubordination did the claimant commit and against whose lawful orders so as to bring the same under the provisions of Section 44(4)(d) or (e) of the Act?
32. It is the finding and conclusion of this court that while the respondent may have had some suspicion that the claimant was guilty of some misconduct, the respondent failed to bring the said suspicion to reasonable and genuine levels of realities so as to found ground(s) for termination based on the said suspicion. The failure by the respondent to hold a disciplinary hearing, which should have created an opportunity to confirm the suspicion, rendered the grounds of the alleged misconduct uncertain, shaky, and untenable. It is in such a hearing that the specific charges should have been levelled against the claimant, evidence tendered against him, and he be given an opportunity to question the witnesses and tender his defence against the specific charges.
33. At the end of the day, the following questions remain unanswered – On what basis (charges/ misconduct) was the claimant terminated? What were the specific charges/allegations against him? What evidence was adduced? Was he notified of the specific charges and informed of his rights? Was a disciplinary hearing held wherein the evidence against the claimant was tendered and the claimant given an opportunity to defend himself? The court finds and holds that the answers to all the foregoing questions are in the negative.
34. While counsel for the respondent has submitted at length on the issue of substantive fairness and even cited the applicable law and relevant authorities, to which the court is familiar and in agreement, it is the finding and holding of this court that in view of the circumstances and analysis provided above, the respondent has failed to persuade the court that it had genuine and reasonable grounds upon which to found the termination. Suspicion alone, no matter how strong, is not a fair ground for termination.
35. For all the foregoing reasons, the court finds and holds that the termination was without substance.
36. However, even if the respondent genuinely believed that it had good reasons for terminating the claimant, but the court has found to the contrary, the respondent completely ruined the process by not following the applicable procedure and failing to give to the claimant an opportunity to be heard.
37. After the claimant was issued and served with the show-cause letter, he was not invited for a disciplinary hearing and apparently no hearing was ever held. The claimant was not informed of his rights before, during, and after the disciplinary hearing. He was not informed of his right to call witnesses; right to attend the hearing with a witness or a union representative of his choice, if he was a member of a union; he was not supplied with the specific charges or allegations and the evidence against him; he was not informed of the date and venue of the hearing; and he was not informed of his right of appeal or review once a decision was made, among other gaps and lapses. As noted in an earlier part of this judgment, the allegations in the show-cause letter and those in the letter of termination are different and therein, again, lies the failure by the respondent to conduct the process in a professional manner



based on the Rules of natural justice, Article 47 of *the Constitution*, and the relevant provisions in the *Fair Administrative Action Act*.

38. Counsel for the claimant has cited several authorities on procedural fairness including Mary Chemweno Kiptui (Supra) and Gilbert Mariera Makori V Equity Bank Limited (2016) eKLR. The court agrees and holds that the respondent failed to follow and abide by the law and denied the claimant procedural fairness before, during, and even after the dismissal.
39. Counsel for the respondent is wrong in submitting that the claimant was heard in the meeting of 1<sup>st</sup> July, 2013 yet by that date the show-cause letter had not been issued and served upon the claimant. If that be the case, then the respondent laid the cart before the horse and the alleged hearing was in further abuse and violation of the rights of the claimant to procedural fairness and fair hearing.
40. Flowing from the foregoing, and the court has read and considered the written submissions by counsel for both parties, the court concludes that the termination of the claimant was unfair and unlawful both in substance and procedure, and it is so declared.

## VI. Reliefs

41. Having found and held as above the court shall now consider each of the reliefs sought by the Claimant as hereunder. The reliefs sought were set out in the introductory part of this judgment.
42. At the onset, it is important to state that based on Section 90 of the Act, the court can only award reliefs falling within three years of the cause of action. The claimant was terminated vide a letter dated 11<sup>th</sup> July, 2013 and any relief that may be awarded must fall within the period from that date counting backwards to July, 2010. Any prayer outside that period shall fall by the wayside for being out of the limitation period.
43. Prayer (a) is for underpayments stretching from 1991 to 2002 in the sum of Kshs.190,056.40. This claim shall fail and fall for two main reasons. One, it is outside the limitation period and two, even if it was within the period of limitation it does not state and prove why the claimant was allegedly underpaid. What was the minimum regulated wage for his category during the period alluded to? This claim is denied in toto.
44. Prayer (b) is for one month's salary in lieu of notice in the sum of Kshs.15,000/=. The letter of termination dated 11<sup>th</sup> July, 2013 indicates that the claimant was issued with a two months' notice but in his testimony in court the claimant stated that he was ordered to leave the employment upon issuance of the notice of termination. The respondent did not avail evidence on the date that the claimant left its employment and whether the notice was served or paid in lieu thereof. The claimant was on a month to month contract and he was thus entitled to at least one month's notice or payment in lieu thereof. In the circumstances, the claimant is awarded the claimed sum of Kshs.15,000/=.
45. Prayer (c) is for annual leave in the sum of Kshs.254,423.07. Again, this item is not particularized and no details are given at all on what it entails. It is not stated which period it relates to except that the court is left to discern that it allegedly covers a period of 21 years and based on the last monthly pay of Kshs.15,000/=. In his testimony in court the claimant admitted that he was paid a sum of Kshs.17,185/= on 25<sup>th</sup> July, 2013 which he understood to be for leave earned. The court has no reason to disturb that settlement for which both the parties executed a petty-cash voucher. In any event, the claim as pleaded goes way beyond the period of statutory limitation. This prayer is denied.
46. Prayer (d) is for overtime in the sum of Kshs.1,266,246.78. It is pleaded that the period covered runs from 1991 to 2012. As stated in the foregoing paragraphs of this judgment the court can only bend backwards to July, 2010 in view of the statutory limitation of three years. The evidence on record is



- that owing to the nature of his duties the claimant slept in the dormitories with the boys but was also allocated a house with his family within the institution. However, under Sections 10 and 74 of the Act the respondent/employer is obligated to keep records of employment and as such it ought to have availed records on the check-in and check-out times for the claimant for the periods claimed if it was to dislodge this claim. The respondent did not avail such records notwithstanding that it was aware of this prayer by the claimant. In the circumstances, the claimant shall be awarded half the amount claimed for 2010, to make it from July to December for that year, making it Kshs.96,473.35/2 = Kshs.48,236.70. He is also awarded Kshs.122,757.34 \* 2 = Kshs.245,514.68 for 2011 and 2012. This makes the total awardable under this head to Kshs.293,751.38.
47. Prayer (e) is pay for public holidays worked for 20 years. Again, only the period from July, 2010 to July, 2013 may be considered for obvious reasons based on the three years limitation. The respondent again failed to disprove this claim as it did not produce records of employment as obligated in law. The evidence by the claimant is that he worked for 15 hours a day as opposed to eight hours and for the 20 years he thus did 3000 hours for the average of 10 holidays per year making the total of Kshs.461,538.46/= claimed. For simplicity, therefore, the amount awardable for the three years that may be considered is Kshs.461,538.46/20 \*3= Kshs.69,230.80. This is the total awarded under this head.
48. Prayer (f) is for gratuity in the sum of Kshs.173,076.92. This court has said countless times, and I repeat it for the umpteenth time, that gratuity is not a right to an employee. As the word implies, it is a gratuitous payment by the employer in appreciation for the services rendered and delivered by a departing employee. Essentially, therefore, gratuity is paid at the discretion of the employer. However, if the contract of employment provides for payment of the same on certain conditions, the same shall be paid upon satisfaction of those conditions. In this cause, the contract of employment does not provide for payment of gratuity and the respondent is not willing and did not offer to pay any.
49. Counsel for the respondent has ably submitted on this item and cited several authorities on when gratuity may be paid, including *Bamburi Cement Ltd V William Kilonzi* (2016) eKLR. The court agrees with counsel's submission and this prayer by the claimant is denied in its totality.
50. Prayer (g) is for compensation for the unlawful termination. The claimant is seeking the maximum compensation under Section 49(1)(c). It is noted that although the respondent denied the claimant a fair hearing, the relationship between the employer and the employee irretrievably broke down on suspicion by the employer that the claimant was not performing his duties as directed and or expected. It is also noted that upon termination the respondent paid to the claimant some dues at Kshs.17,185/= which the claimant signed for but during the hearing alleged was for overtime pay. It is also noted that the work the claimant was performing is not specialized work that needed special or any kind of training.
51. The court has read the submissions by counsel for both parties and the authorities cited on this item. Compensation in employment is intended to take care of the salary or earnings that an employee would have earned bar an unlawful termination. It is instructive to note that employment is not a birth right. It may terminate in as many ways as the law provides for. Either party may issue notice of termination in accordance with the law; an employee could die; the employer could close shop, etc. Compensation should not be so low as to make the court appear to reward an employer for unlawful termination. Likewise, compensation should not be so inordinately high as to be unnecessarily and unreasonably punitive to an employer. The point the court is making is that the award should be fair and reasonable based on the circumstances and merits of each case. The court has to strike a balance based on the factors provided for under Section 49(4) of the Act.



52. Considering all the factors discussed above, this court forms the opinion and holds that an award of six months gross pay for the claimant shall be fair and reasonable compensation to the claimant calculated as Kshs.15,000/= \* 6 = Kshs.90,000/=. This award is subject to statutory deductions.

#### **VII. Costs**

53. Costs ordinarily should follow the event and the claimant is thus awarded costs of this cause.

#### **VIII. Disposal**

54. In disposal of this cause, this court issues the following orders: -

a. A declaration be and is hereby issued that the termination of the claimant was unfair and unlawful.

b. Consequently, the claimant is awarded a sum of Kshs.467,982.18 made up as follows –

- i. Notice pay .....Kshs. 15,000.00
- ii. Overtime pay ..... Kshs.293,751.38
- iii. Public holidays .....Kshs. 69,230.80
- iv. Compensation .....Kshs. 90,000.00
- Total .....Kshs.467,982.18

c. Costs of the cause to the claimant.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 09<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**DAVID NDERITU**

**JUDGE**

