



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maunda v Acme Containers Limited (Cause 1436 of 2017)  
[2023] KEELRC 3175 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3175 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1436 OF 2017  
K OCHARO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**STEPHEN NDUNDA MAUNDA ..... CLAIMANT**

**AND**

**ACME CONTAINERS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant approached this Court vide a Statement of Claim dated 21<sup>st</sup> July 2017 seeking: -
  - a) Damages for unlawful termination of employment Kshs. 483,795.00 as per paragraph 10 of the Statement of Claim.
  - b) General Damages for unlawful dismissal, unfair discrimination, mental torture, and anguish.
  - c) Costs and interest.
2. The Claimant filed the following documents alongside his Statement of Claim: A Verifying Affidavit sworn on 21<sup>st</sup> July 2017; Statement of Stephen Ndunda Maunda dated 21<sup>st</sup> July 2017; Claimant's List of Documents dated 21<sup>st</sup> July 2017; Further Statement by Stephen Ndunda Maunda dated 14<sup>th</sup> April 2022.
3. On its part, the Respondent filed a Memorandum of Defence and Counter Claim dated 23<sup>rd</sup> August 2017; the Respondent's List of Documents dated 23<sup>rd</sup> August 2017; and the Respondent's Witness's Statement dated 23<sup>rd</sup> August 2017.
4. In Response to the Memorandum of Defence and Counter Claim, the Claimant filed a Reply dated 1<sup>st</sup> September 2017.



5. Imperative to state that when the matter came up for hearing on the 14<sup>th</sup> of March 2023, the Respondent and or its counsel were not in court. Satisfied that the court process was duly effected on the Respondent's Counsel, this Court directed that the matter proceeds their absence notwithstanding.
6. The Claimant urged the Court to adopt his witness statement filed herein dated 14<sup>th</sup> April 2022, and the supplementary affidavit that he subsequently filed as his evidence in chief. Further, he moved the Court to admit and it did, the documents that were filed under the list of documents dated 21<sup>st</sup> July 2017 as his documentary evidence.

### **Claimant's case**

7. The Claimant stated that he was employed by the Respondent as a Data Clerk on 1<sup>st</sup> March 2008 vide a Letter of Appointment dated 1<sup>st</sup> March 2008. The Claimant worked faithfully and diligently up to 31<sup>st</sup> December 2016 when the Respondent unlawfully and unfairly terminated his employment verbally without notice or justifiable cause.
8. The termination of his employment was unlawful, unprocedural, and unfair. Prior to the termination, the Respondent didn't inform him of the grounds that stirred its intention to discharge him from its employment. He was not given a fair hearing, and it was not based on valid or lawful reasons.
9. He further asserted that the Respondent did not conduct any disciplinary proceedings against him before terminating his employment.
10. In addition to the foregoing, the Claimant contends that he was not paid his terminal dues, inclusive of three months' salary in lieu of notice, all amounting to Kshs. 483,975.00.
11. At the time of dismissal from employment, he was earning Kshs. 23,205.00 as basic pay; Kshs. 3,480.00 house allowance; and Kshs. 5,588.00 as Overtime pay, all amounting to Kshs. 32,273.00. After statutory deductions his Net Pay was Kshs. 27,278.00. He tendered a copy of his pay slip for December 2016.
12. The Claimant denied the allegations contained in the Respondent's Memorandum of Response and Counterclaim. He asserted that the Respondent's position that he absconded is untrue.
13. Further, the allegations by the Respondent that he was involved in an act of theft of spare parts, the property of the Respondent were unfounded. Contrary to the assertion by Respondent he didn't at any time forge and/or inflate vouchers while working in the kitchen. In fact, at the alleged time of the forgery, he was not stationed in the kitchen. On 31<sup>st</sup> December 2016, he and four other colleagues were arrested by the police following allegations of theft by the Respondent. Though they were detained at Kantaria Police Post for about three days, pending investigations, they were released without any charge being preferred against them.
14. After being released from police custody, he went back to the Respondent's premises with the intent to resume his duties but was denied entry by the Respondent's guard. Upon receiving information from the guard as regards the Claimant's intention, the Respondent's Director, Anil Shah, walked to the gate and gave the Claimant and his colleagues a stern warning, never to approach the Respondent's premises again at any time, as thieves.

### **Claimant's Submissions**

15. In his submissions dated 31<sup>st</sup> March 2023, the Claimant identified three (3) issues for determination, namely: -



- a. Whether the reasons for termination were valid;
  - b. Whether the procedure for termination was fair; and
  - c. Whether the Claimant is entitled to the prayers sought.
16. On the first issue, the Claimant submits that the Respondent was obliged, pursuant to section 41 (1) of the *Employment Act* 2007, to explain to the Claimant the reason for which it was considering to terminate his employment. Further, the Claimant states that section 43 of the *Employment Act* 2007 requires the employer to prove the reason or reasons for the termination. If the employer fails to do so, the termination shall be deemed to have been unfair, within the meaning of section 45 of the *Employment Act* 2007.
17. The Claimant submits that the Respondent didn't place any evidence before this Court to establish the reasons for the termination of his employment. Consequently, his evidence on the manner in which the employment was terminated remained uncontroverted. His claim should therefore be allowed. The Claimant cites the case of *Grace Nzula Mutunga v Joyce Wanza Musila* [2017] eKLR to buttress his submission that upon strength of his uncontroverted evidence his claim should be allowed.
18. He further submitted that in the absence of evidence by the Respondent, it cannot be argued that the Respondent did discharge its legal burden under the provisions of section 43 of the *Employment Act*, proving the reason[s] for the dismissal.
19. On the second issue, the Claimant submits that section 45 (2) (c) provides that a termination shall be deemed to be unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure. Under section 41 (1) of the *Act*, before terminating the employment of an employee on grounds of misconduct, poor performance or physical capacity, the employer shall explain to the employee in a language he understands the reason for which the employer is considering the termination and the employee shall be given an opportunity to make a representation on the ground[s]. The employee is entitled to have another employee of his choice or shop floor union representative [where he or she is a member of a union] present during the hearing.
20. In the circumstances of his dismissal from employment as explained by him, there cannot be any doubt that the Respondent didn't at all adhere to the statutory procedure set out in section 41. The dismissal was procedurally unfair.
21. As the termination was unfair, and the Respondent unjustifiably failed to pay him his terminal dues, the Claimant is entitled to the reliefs sought. He urges the Court to avail him the same.
22. The Claimant urges this Court to award him the compensatory relief contemplated under section 49[1][c] to its maximum extent considering the length of time [8 years] he was in the employment of the Respondent, and that during this period he was not at any time involved in any disciplinary issue or issued with a warning letter[s]. Further, as a result of the unjustified dismissal, he suffered mental anguish and torture which he should be compensated for. He seeks for KShs. 3,000,000, for the anguish and torture. To support his claim under this head, he places reliance on *JMV v Bank of African Kenya Limited* [2013] eKLR.

### **Respondent's Submissions**

23. In its submissions dated 18<sup>th</sup> April 2023, the Respondent identifies two issues for determination: -
- a) Whether the Claimant was terminated or absconded duty;
  - b) Whether the Claimant is entitled to the prayers sought.



24. On the first issue, it is submitted by the Respondent that the Claimant absconded duty as stated in the Respondent's pleadings. In its view, this evidence is neither disputed nor controverted, as, though the Claimant asserted that he reported back to the workplace only to be verbally dismissed, he didn't come out clearly on the exact date when this happened.
25. Further, the Respondent states that the Claimant admitted that he and his colleagues were arrested by the police for the reported incident of theft. The Claimant has conveniently failed to state the specific date when he and his colleagues reported back to work. The claimant absconded duty, consequently, no meaningful process and/or disciplinary hearing could be conducted. As such, the provisions of section 41 could not apply as there was no termination.
26. The Respondent submits that the Claimant has not discharged the burden of proving that a termination occurred as required by section 47 (5) of the Employment Act 2007. Consequently, the Court should uphold the Respondent's version of events, that the Claimant absconded duty.
27. The Respondent submits that the Contract of Employment dated 1<sup>st</sup> March 2008 provided for one month's notice termination notice. In breach of this term of the contract, the Claimant terminated the contract by deserting without giving the requisite notice, making him liable to pay the Respondent one month's salary in lieu of notice. The Claimant's claim for three months' salary in lieu of notice, is not aligned with the terms of the contract.
28. The Claimant's claim for general damages is unproven. It should be rejected. On the compensatory relief of twelve months' gross salary, the Respondent submits that it is unmerited as the Claimant failed to demonstrate that the termination was unfair.

### **Issues for Determination**

29. I have reviewed the pleadings, the evidence by the Claimant, and submissions filed by both parties. The issues for determination are as follows: -
  - a) Whether the Claimant was unfairly dismissed from employment;
  - b) Whether the Court should grant the prayers sought by the Claimant.
  - c) Whether the Claimant was unfairly dismissed from employment;
30. It is not in dispute that the parties herein were in an employer-employee relationship at all material times, under the terms and conditions that were set out in the Letter of Appointment dated 1<sup>st</sup> March 2008.
31. Imperative to state from the onset, that the Respondent did not present a witness to testify in this matter when the same came up for hearing. The failure on the part of the Respondent to present evidence in support of its defence against the Claimant's claim left the latter's evidence uncontroverted. The Respondent's Counsel submitted on Claimant its pleadings and concluded that the Claimant did not challenge "the evidence". With great respect, Counsel's submissions are not well anchored. Pleadings are not evidence. They will never be a substitute for evidence.
32. However, time and again this Court has stated that the fact that the Claimant's evidence is not challenged doesn't in any manner lessen the Court's obligation to examine the Claimant's evidence to assess whether it aids him or not to establish his case to the requisite standards.
33. It is not in dispute that the parties separated on or about 31<sup>st</sup> December 2016. The circumstances of the separation are the main bone of contention between the parties. While the Claimant contends that he



was dismissed verbally by the Respondent's director, Anil Shah, the Respondent on its part contends that the Claimant absconded his duties, he caused the termination of his employment.

34. In a dispute regarding the termination of an employee's employment the employer is under a legal burden by dint of the provisions of section 43 of the Employment Act, 2007 to prove the reasons for the termination. A party charged with a legal burden to discharge cannot manage to do it without presenting evidence unless there is an admission by the adversary on the matter[s] on which he [the party charged with the onus] has to tender evidence on to discharge the burden, or the Court makes judicial notice on the matter[s], or there is some form of compromise by the parties.
35. Section 45[2] of the Act places a further burden on the employer to prove that the reason[s] was fair and valid. Therefore, even where the employer contends that he terminated an employee's employment for this or that reason, the termination shall be deemed unfair if the employer fails to demonstrate that the reason[s] was fair and valid.
36. As stated hereinabove, the Respondent didn't tender evidence before this Court. It is therefore not difficult to conclude that it didn't discharge the twin legal burden. Consequently, I hold that the separation in employment occurred in the manner explained by the Claimant and that by operation of the provisions of section 45 of the Act, the dismissal was unfair.
37. Section 45(2) provides:

- “(2) A termination of employment by an employer is unfair if the employer fails to prove —
- (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - (i) related to the employee's conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.

38. Section 41 of the Employment Act, provides for a procedure, that any employer contemplating terminating an employee's employment must adhere to. The procedure is mandatory and any failure to follow the same renders the termination procedurally unfair by dint of the provisions of section 45[2] of the Act. The Section provides:

“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 her choice present during this explanation.
- (2) 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.”

39. Again, the burden of proving that in the termination of an employee’s employment, there was adherence with the statutory procedure is on the employer. The Respondent as said hereinabove did not render any evidence, and with this, it cannot be said that it discharged the burden under section 41. Further, having stated as I have hereinabove above that I am persuaded by the Claimant’s explanations as regards the manner the separation occurred, I have no doubt in my mind that the procedure was not adhered to.
40. In the upshot, I conclude that the dismissal both was procedurally and substantively unfair.

**Whether the Court should grant the prayers sought by the Claimant.**

41. The Claimant has sought *inter alia* a compensatory relief for unfair termination. Having found that the dismissal was unfair, I should now turn to consider whether he is entitled to the relief. The relief is contemplated under section 49[1][c] of the Act. An award of the remedy is discretionary. Whether the employee is to be awarded to the full extent [twelve months’ gross salary] provided for under the provision or part thereof or nothing at all, depends on the circumstances of each case. I have carefully considered the fact that in dismissing the Claimant, the Respondent did not adhere to the canons of the law regarding procedural and substantive fairness, and the length of time [eight years] the Claimant was in the employment of the Respondent and hold that he is entitled to the relief. He is hereby awarded eight.
42. I decline the claim for general damages for mental torture and anguish, as in my view, the Claimant just threw the claim to the Court. No evidence was laid by the Claimant to establish the torture and mental anguish, and the justification for the award of general damages.
43. As already noted, Clause 7 of the Letter of Appointment dated 1<sup>st</sup> March 2008 provides that the contract of employment shall be terminated by either party giving the other one month’s notice or payment of one month’s salary in lieu of notice. Therefore, the Claimant’s claim for 3 months’ salary in lieu of notice flows not from a contractual term, or the provisions of the law, both of which provide for one month’s salary in lieu of notice. The Court hereby declines to grant him 3 months’ salary in lieu of notice but grants him one month’s salary under this head pursuant to section 35 of the Act as read together with Section 36.
44. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
45. In the upshot judgment is hereby entered in favour of the Claimant in the following terms: -
- a) The Claimant be paid terminal dues as follows: -
    - i) One month’s salary in lieu of notice - Kshs. 32,273.00
    - ii) Compensation for Unlawful termination  
(Kshs. 32,273.00 x 8 months) - Kshs. 258,184.00  
Total - Kshs. 290,457.00
  - b) Interest on (a) above at court rates from the date of this judgment till full payment.
  - c) That the Respondent does hereby issue the Claimant with a Certificate of Service.
  - d) Costs of this suit shall be in favour of the Claimant against the Respondent.



46. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Ngure for Claimant

No appear for 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**OCHARO KEBIRA**

**JUDGE**

