



**Obungu & 3 others v Bandari Football Club (Cause E079, E080, E078 & E077 of 2023  
(Consolidated)) [2023] KEELRC 3454 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3454 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E079, E080, E078 & E077 OF 2023 (CONSOLIDATED)**

**M MBARÚ, J**

**DECEMBER 19, 2023**

**BETWEEN**

**WILSON ODUOR OBUNGU ..... 1<sup>ST</sup> CLAIMANT  
DANIEL MNYARO MSHAMBA ..... 2<sup>ND</sup> CLAIMANT  
KENNETH ONYACH OTHIENO ..... 3<sup>RD</sup> CLAIMANT  
DAVID KINGATUA NJUGUINI ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**BANDARI FOOTBALL CLUB ..... RESPONDENT**

**JUDGMENT**

1. The claims herein are consolidated for hearing and determination as they relate to the same series of events and facts and the respondent is the same. The lead file being ELRC Cause No. E079 of 2023.
2. The claimants were all employed by the respondent under written contracts.
3. Wilson Oduor Obungu had a contract dated 30 September 2021 for 3 years to serve as goalkeeper trainer at a salary of Kshs. 132,000 per month.
4. Daniel Mnyaro Mshamba had a contract dated 15 February 2023 to run for 2 years as assistant coach as a salary of Kshs. 96,427 per month.
5. Kenneth Onyach Othieno had a contract dated 1<sup>st</sup> January 2022 to run for 3 years as assistant kit attendant for a salary of Kshs. 75,000 per month.
6. David Kingatua Njuguini had a contract dated 15 February 2023 to run for 2 years as the performance analyst at a salary of Kshs. 70,000 per month.

7. The claim is that despite the claimants having fixed term contracts, through notices dated 6 July 2023 the respondent sent emails communication and attached notices terminating their employment. The claimants had taken a break of the season and were due to resume duty but asked to check their emails where they all found similar notices terminating their employment.
8. The claim is that this was unfair and without justification. The act of termination of employment was unilateral and for no good cause. Despite having fixed term contract, these were terminated without notice putting the claimants under distress, mental anguish and financial crisis. This has placed their careers in jeopardy and affected their mental well-being.  
The claimants are seeking for orders that;
  9.
    - a. A declaration that employment terminated unfairly;
    - b. Compensation for the full term contract period;
    - c. Exemplary damages for mental anguish and reputational damage;
    - d. Costs of the suit.
10. Wilson Obungo Oduor testified that after a successful season of football game he proceeded on his annual leave and was to resume duty on 10 July 2023 but he was issued with notice dated 6 July 2023 terminating his employment. This notice was issued through email. There was no prior notice, hearing or reasons given for such action. He only got back to work only to receive information that his contract had been terminated. The respondent acted in breach of contract for no good cause.
11. The claimant testified that his 3 years' contract was due to end on 30 September 2024. He was paid for days worked together with 2 months' notice.
12. David Kingatua Njuguini testified that he had a contract of 2 years with the respondent due to end on 14 February 2025. After the last season of football, he took leave and was due to resume duty but he was issued with notice terminating his contract without being given any reasons or hearing. The issue of his work performance was not brought to his attention before notice terminating employment issued.
13. The claimant also testified that he was employed under a performance contract but no performance issues was brought to his attention. The respondent has since paid him notice pay for 2 months but the termination was not mutual.
14. Daniel Mnyaro Mshamba testified that he had a contract for 2 years with the respondent due to end on 14 February 2025 but this was terminated prematurely on 10 July 2023 through notice dated 6 July 2023 which he received through email just after resuming duty after his annual leave. In total, 5 employees were affected and issued with similar notices. The response that the contract issued was performance based is not true since no case was presented with regard to any underperformance to allow him address. In the last season of football, in all the 7 games, the respondent performed very well. The main coach left his employment through mutual agreement. There was no justifiable reason to warrant his contract being terminated.
15. The claimant testified that the respondent got a new board and they wanted their own people. He had served well for over 9 years, his performance was good and due to the unfair termination of his employment, this has had reputational damage to his career and has not secured new employment since.

16. Kenneth Onyach Othieno testified that he had a 3 years contract with the respondent running up to 1<sup>st</sup> January 2025. He took his annual leave and was due to resume duty on 10 July 2023 but when he checked his email, he found notice dated 6 July 2023 terminating his employment without being given any reasons. He had performed well in his duties and had no cause known to him to justify termination of employment.
17. In response, the respondent's case is that each claimant had a written contract of employment with terms and conditions thereof. Each contract was terminable prior to its expiry on terms provided therein and which include service of 2 months' notice or payment in lieu thereof. If the employee was guilty of gross misconduct, in breach of the employment agreement, the contract allowed for termination. Where the respondent club was dissolved, automatically, this would result in termination of employment.
18. The claimants did not exhibit exemplary performance of duty with a legitimate expectation or entitlement to serve for the entire term contract. There was no unfair termination of employment on 6 July 2023 as alleged as the respondent applied the term and conditions of the written contract and paid in lieu of notice. The respondent had no obligation to assign any reasons for termination of contract.
19. The respondent as the only premier league club in Coast region must conform with requirements of having officials that meet the requirements of FKF, CAF and PIFA statutes and the club's Unions in separating with the claimants. The claims made are not due, the fixed term contracts allowed for termination conditions and the claims should be dismissed with costs.
20. In evidence, the respondent called Twaha Mbarak the vice chairperson who testified that each claimant had a fixed term contract which also provided for termination upon 2 months' notice or payment in lieu thereof. Each claimant has since been paid in lieu of notice in terms of the contract of employment. Notices issued on 6 July 2023 to each claimant.
21. The contracts were terminated legally and in accordance with clause 7 of each contract. Either party had the liberty to terminate contract or make a payment for 2 months which the respondent did.
22. Mr Mbarak testified that the respondent had a new board which found that the previous board established that the claimant had underperformed and should be sacked and hence the new board implemented these resolutions. The claimants were found to have underperformed in their duties. The entire technical team had to go and on 6 July 2023, termination notices issued. It was not necessary to give reasons since the contracts allowed for termination upon notice or payment in lieu thereof.
23. The claimants were aware that they were underperforming. The former board told them as much and there are minutes in this regard.  
  
At the close of the hearing, both parties filed written submissions.
24. The claimants submitted that under their fixed term contracts, they were not allowed to serve to completion due to unfair termination of their employment by the respondent. clause 7 of each contract allowed for termination of employment upon notice which did not issue and further, if there was gross misconduct or underperformance which was not the case. No matters were brought to the attention of the claimants before the notices dated 6 July issued leading to summary dismissal. The payment in lieu of notice does not absolve the respondent from giving reasons leading to termination of employment.
25. The claimants submitted that under Section 41 of the *Employment Act*, 2007 (the Act), where the employer relies on performance to terminate employment, the employee must be given notice and allowed to attend a hearing to defend himself what was not done in this case. In the case of Naomi Ruwa v Peter Odote [2018] eKLR, the court held that Section 45(2) of the Act requires that termination of

employment should be based on valid and fair reasons. Before notices dated 6 July 2023 issued, there was no matter brought to the attention of the claimants to allow them to address. This resulted in unfair termination of employment and contrary to the provisions of Section 47(5) and 43 of the Act. The orders sought should be issued with costs of the suit.

26. The respondent submitted that each claimant had a term contract and clause 7 thereof allowed for termination upon notice or payment in lieu thereof and also required that if the performance of the claimants were in issue such matter can result in termination of employment. Through notices dated 6 July 2023 the respondent terminated the term contracts and paid in lieu of notice. This was lawful in terms of Section 35 of the Act as held in the case of *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR. A contract of employment allows parties to terminate the employment relationship and not subject the employee to slavery. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR the court held that a court cannot rewrite a contract. Parties are bound by the terms of the contract and in this case, the respondent complied with the agreed terms and each claimant confirmed that he has since been paid in lieu of two months' notice.

### **Determination**

27. The issues which emerge for determination are whether there was unfair termination of the claimant's employment and whether the remedies sought should issue. Also, who should pay costs.
28. The employment of the claimants by the respondent is not contested. Indeed, the claimants were under fixed term contract which is allowed in law pursuant to Section 10(3) of the Act. An employer is allowed to issue a fixed term contract with a start and end date. Such is lawful and legitimate as held in the case of *Transparency International – Kenya v Teresa Carlo Omondi Civil Appeal No.81 of 2018* (Nairobi).
29. Clause 7 of each contract had termination provisions. It allowed for notice or payment in lieu of such notice. The respondent has applied these provisions of clause 7 to assert its position that the parties were bound by their contract which allowed termination at the option of each party.
30. However, even where parties are bound in a written contract, the Act has changed termination of employment at the will of the employer. It is now a statutory requirement in Kenya that an employer should not terminate contract of employment except for valid and fair reasons and in accordance with section 45(2) of the Act.
31. Under section 43 of the Act, the employer has the burden of proving the reason for the termination of employment in any legal proceedings brought to challenge the legality of the termination as held in *Kenya Plantation & Agricultural Workers Union (KPAWU) v Finlays Tea (K) Limited* [2022] eKLR. Section 43(2) of the Act defines reasons for termination of employment to be matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate employment. such matters must be outlined in the notice terminating employment to allow the employee a fair chance to address in terms of Section 47(5) of the Act.
32. Mr Mbarak for the respondent testified that when the new board of the respondent took over, they found minutes of the previous board where it had passed a resolution that the claimants had underperformed and should be sacked. However, such finding, before execution required that notice be issued in terms of Section 41 of the Act and that the claimants be called to respond to any matters with regard to their challenged performance.

33. In the case of *Jane Nyandiko v Kenya Commercial Bank Ltd* [2017] eKLR the court in addressing the issue of alleged poor work performance held that;

... Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer.

34. The Court of Appeal in addressing a similar question in the case of *National Bank of Kenya Ltd v Samuel Nguru Mutonya* [2019] eKLR held that the provisions of Section 41 of the Act are mandatory and before termination of employment, even where the human resource manual of the employer allow for issuance of notice or payment in lieu thereof, the employee must be issued with notice and allowed to attend to defend himself. Where poor performance is cited, the employer must demonstrate what measures were taken to support the employee before addressing such matter as subject to termination of employment. See also *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR, the court held;

The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable."

35. Therefore, it is no longer acceptable under the Act that the employer has the power to terminate employment at will. The threshold to be met is under Section 35 read together with Section 41, 43 and 45 of the Act. The employee must be issued with notice, the reasons leading to such notice and a fair chance to defend himself before termination of employment can be found justified.
36. In this case, the claimants were on their annual leave and expected to resume duty on 10 July 2023. Upon return, they were faced with notices dated 6 July 2023 terminating their employment. despite the offer to pay in lieu of notice, the law required that they be given reasons for such action and allowed to attend and address any matter with regard to their conduct, performance or other matters that the respondent found to justify termination of employment which was not the case here. Under the mistaken belief that the respondent had clause 7 of the contract of employment to act at will, they proceeded without regard to the due process and issued notice. The notices issued are unlawful contrary to Section 41 of the Act and this resulted in unfair termination of employment contrary to Section 45 of the Act.
37. In terms of Section 49 of the Act, the claimants are entitled to compensation for unfair termination of employment.
38. The claimants are young in their careers, had performed well in the club only to proceed and annual leave and before return with freshness of mind and body, their careers were cut short. The new board, upon finding that the former board had passed resolutions that had far-reaching impact on the claimants ought to have called and invited the claimants to make their representations before taking a resolution they had not engaged in and cut short promising careers with far-reaching effect on livelihoods.
39. The claimants confirmed that they have since been paid in lieu of notice. This was paid immediately.

- 40. Wilson Oduor Obungu had his contract of 3 years ending on 30 September 2024. He had served under his contract without any record. A compensation of 4 months' gross salary is hereby found appropriate in his case. He was last earning Kshs.  $132,000 \times 4 = 528,000$ .
- 41. Daniel Mnyaro Mshamba had a contract of 2 years ending on 14 February 2025. He had just started on his contract and had high hopes to complete and earn a just living. The premature termination of his employment and hardship visited on him is not justified and compensation at 5 months is hereby found justified. He was last earning Kshs.  $96,427 \times 5 = 482,135$ .
- 42. Kenneth Onyach Othieno had a contract of 3 years ending on 1<sup>st</sup> January 2025. He had served well in his contract and had hoped to complete it after serving the respondent for many years. a compensation of 4 months is hereby found justified. The claimant was last earning Kshs.  $75,000 \times 4 = 300,000$ .
- 43. David Kingatua Njuguini like Mr Mshamba had just started on his contract of 2 years ending on 14 February 2025. No matter of his performance was addressed before notice terminating his employment issued. Compensation at 5 months' gross salary is hereby found justified. He was last earning Kshs.  $70,800 \times 5 = 352,500$ .
- 44. The claimants are also seeking punitive damages for mental anguish and damage to their reputation due to the manner their employment terminated. Indeed, upon termination of employment unfairly, the employee is distressed, disoriented and without immediate course of action as to the next steps. It is particularly distressful where the employee is allowed to proceed on annual leave to take a break and rest and upon return, he is faced with a notice terminating employment. These are matters compounded and result in the assessment of compensation for unfair termination of employment. Account is also taken that the respondent paid in lieu of notice immediately. However, for want of due process and substantive reasons leading to termination of employment, the claimant is entitled to costs.
- 45. Accordingly, judgment is hereby entered for the claimants against the respondents in the following terms;
  - a. A declaration that the respondent terminated the claimants' employment unfairly;
    - i. Wilson Oduor Obungu is awarded compensation at Kshs. 528,000;
    - ii. Daniel Mnyaro Mshamba is awarded compensation at Kshs. 482,135;
    - iii. Kenneth Onyach Othieno is awarded compensation at Kshs. 300,000;
    - iv. David Kingatua Njuguini is awarded compensation at Kshs. 352,500;
  - b. The claimants are awarded costs;
  - c. Dues (a)(i) to (iv) above shall be paid within 60 days after which date the same shall be due with interests.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 19<sup>TH</sup> DAY OF DECEMBER 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

**Court Assistant: Japhet Muthaine**

..... **and** .....