



**Matamano v Nirma Construction Company Limited (Cause
308 of 2018) [2022] KEELRC 1636 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1636 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 308 OF 2018**

J RIKA, J

MAY 27, 2022

BETWEEN

NELSON ELIPHAS MATAMANO CLAIMANT

AND

NIRMA CONSTRUCTION COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on March 14, 2018.
2. He states, he was employed by the Respondent as a Casual Labourer in May 2012. He subsequently worked as a Machine Operator, Storekeeper, Watchman and Supervisor. He earned a daily wage of Kshs. 1,000 by the time he left employment.
3. On February 18, 2018, construction machine bars were stolen from the Respondent's site by unknown persons. The Claimant was arrested and detained at Parklands Police Station. He was there for 10 days. He was released upon payment of cash bail of Kshs. 10,000.
4. He was summarily dismissed around February 24, 2018. He was not give the reason for the decision. He was only advised by his boss Khimji, that there was no more work.
5. He worked excess hours. He worked on Sundays and Public Holidays. He was not paid overtime. He was not issued Certificate of Service. He prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. Notice pay at Kshs. 33,000.
 - c. Unpaid overtime of 2,208 hours at Kshs. 607,000.
 - d. Annual leave for 2017 at Kshs. 33,000.



- e. 12 months' salary in compensation for unfair termination at Kshs. 396,000.
Total...Kshs. 1,069,200.
- f. Costs.
- g. Any other suitable remedy.
6. The respondent filed its Statement of response on March 14, 2019. Its position is that the claimant was engaged from January 2013, on a daily rate of Kshs. 700, and an additional sum of Kshs. 400, when he carried out extra duties. The claimant was present at the respondent's premises when goods were stolen. He was summarily dismissed for gross misconduct in relation to the theft. Termination was fair and lawful. The respondent prays that the claim is dismissed with costs.
7. The claimant testified and rested his case, on July 22, 2021. Administrator/ Secretary Patricia Nyokabi Chege and Foreman Peter Ndunda Musyoka testified for the respondent on the same day, July 22, 2021. 'Claimant's former colleague Bernard Wachira closed the evidence for the respondent, on October 7, 2021. The dispute last came up for mention on February 9, 2022, when Parties confirmed filing of their Final Arguments.
8. The Claimant adopted his Witness Statement and Documents on record. He restated that he was employed in May 2012. He worked as a Labourer. He operated a concrete mixer, became a Storekeeper and a Site Watchman. He worked until 2018.
9. Cross-examined, he told the Court that he was employed in May 2012. He was a Storekeeper in 2014. N.S.S.F and N.H.I.F account statements on record show he was employed by the Respondent
10. He was not at work when theft occurred. He was at Kibera. He left a colleague, Kelvin Sanya at work. He had permission to be relieved by Sanya. The claimant returned to work voluntarily on 19th February 2018. He found the gate locked by a different padlock. There was metal outside the gate. He did not communicate his absence to his supervisor, because he did not expect to be gone for long. He called Sanya. He was unreachable. The claimant's boss was unreachable too. The claimant waited at the scene until his colleagues, the foreman and his boss arrived. Musyoka and Wachira were his colleagues.
11. He informed the arrivals that there was an unusual occurrence at the site. He went to the Parklands Police Station. He was locked up and later released after a day. His boss advised him there was no need for criminal prosecution. He then advised the Claimant that there was no more work, and that he should consult Musyoka and Wachira about termination. The Claimant did not recall if there was a disciplinary hearing. He was not offered final dues. For most of the time, the Claimant worked from 5 a.m. to midnight. He was motivated by his desire to earn extra income. He was not paid overtime hours, although he made demand for the same.
12. Redirected, he explained that he went to Kibera because of a family emergency. He did not seek permission because he expected it would not take long. He found an unusual situation upon return. He waited for his colleagues. He was then advised to present himself at the Police Station. There was no disciplinary hearing.
13. Chege told the court that the claimant was employed in December 2012. He was a Storekeeper, earning Kshs. 700 basic pay and Kshs. 400 as night allowance, total Kshs. 1,100.
14. On February 18, 2018, Chege's boss called her, and told her there was a theft incident at the workplace. She was advised to make a report at Parklands Police Station. Steel bars were stolen. The claimant reported at the Station and was locked up. The boss, one Khimji, advised that the claimant is set free.



The claimant was told to avail himself at the office, to collect his terminal benefits. He did so, but did not agree on the amount of terminal benefits.

15. Cross-examined, Chege told the Court that she joined the Respondent in 2008. She worked with the Claimant. She did not have proof that the date of employment was December 2012. She did not have a document to show that the Claimant earned Kshs. 1,100 daily. She did not know if he was present at the site when theft occurred. She met the Claimant at the Police Station. 57 steel bars were stolen. Chege did not know if anyone was prosecuted. A lorry was being used to ferry the metal bars. The owner of the lorry ran away. The Claimant told Chege that he had left a colleague at the site. The Respondent called the Claimant to negotiate terminal dues, after his dismissal. Chege was categorical that the Respondent did not grant the Claimant a disciplinary hearing. Redirected Chege told the Court that the Claimant was released in good faith.
16. Foreman Musyoka told the Court he had worked for 10 years for the Respondent, at the time of the incident in 2018. According to him, the Claimant was employed in 2013. He too was called by his boss and alerted that there was theft at the workplace. He proceeded to the site at 6.00 a.m. found the gate was locked and there were steel bars outside the gate. The Claimant was advised to present himself at the Parklands Police Station. He did so, and was locked up. He was the prime suspect. The following day, the boss advised that the Claimant should be released, as the steel bars had been recovered. The Claimant came to the office to ask for his terminal benefits, a day after his release.
17. Cross-examined, Musyoka told the Court he had worked for 10 years. He was the foreman when theft took place. He was not at the site on the material night. It was his duty to ensure things were in order. He was called at night on February 18, 2018. There were arrests but no prosecutions. The steel bars were recovered. The Claimant was a Storekeeper, but agreed with his boss, to assist in keeping watch at night. He would spend the night at the site. He was paid Kshs. 400 for the extra hours. Normal hours were compensated at Kshs. 700 daily. The Claimant declined terminal dues, which included service for 5 years. The Claimant was not issued notice because he was involved in theft. Musyoka did not participate in any disciplinary proceedings. There was none. The boss Khimji asked the Claimant to leave the workplace. Redirected, Musyoka told the Court he worked during the day, not at night. The Claimant was in charge of security. He was meant to be at the site, when thieves struck.
18. Wachira corroborated the evidence of his colleagues above. Cross-examined, he told the Court that it is stated in his Witness Statement, paragraphs 3 and 4, that he worked for 11 years. He found the claimant in employment. Wachira did not have any document to show that he was employed by the Respondent. He was like, his colleagues called by his boss and told about the theft. He proceeded to the site and found it pretty much the same, as described by the claimant and Musyoka. The claimant was locked up and set free a day later. He asked to be paid his terminal dues. He disputed what was offered and rejected it. He was not heard. There was no notice of termination. Wachira did not have authority to negotiate claimant's terminal dues.
19. The issues are: whether the claimant's contract was terminated fairly by the respondent in accordance with sections 41, 43 and 45 of the [Employment Act](#); and whether he merits the remedies sought.

The Court Finds: -

20. The date of employment is contested. The claimant states that he was employed in May 2012. The respondent pleads that it employed the claimant in January 2013. Chege gave the employment date as December 2012, while her colleague Musyoka stated the date of employment was February 2013.
21. The date of commencement of employment is an employment particular, which must be stated by the Employer as required under section 10 of the [Employment Act](#). Where it is disputed in



- legal proceedings, the burden of proving or disproving the alleged date of employment, falls on the Employer in accordance with section 10[7] of the Act.
22. The respondent has given contradictory dates, and did not reduce the claimant's contract in writing. The respondent has not proved the date of employment, or disproved the 12th May 2012, advanced by the claimant, and the court must therefore uphold May 12, 2012, as the date of employment.
 23. There was serial admission by the Witnesses for the respondent, that the claimant, whatever his offence was, was not given a disciplinary hearing. Chege told the court, " we did not hear the claimant." Musyoka's poetic refrain was, "we could not give notice because he was involved in theft...I did not participate in any disciplinary proceedings... there was none." Wachira underlined this admission, testifying that, "the claimant was not taken through a hearing... there was no notice."
 24. There is unequivocal admission by the respondent that procedure was unfair.
 25. Was there valid reason? The claimant had taken it upon himself, to discharge the role of guarding Respondent's site at night. He had agreed with his boss on guarding at night, at an extra Kshs. 400 per night. During the day, he was a storekeeper. One wonders when the Claimant slept. On the night of February 18, 2018, he was not at his post guarding. He was at Kibera, on unspecified family matter. Thieves struck and stole respondent's steel bars. They had the time and luxury of loading the steel bars in their lorry. The claimant was not there. He says he had left a colleague Sanya to watch the site for him. He did not call Sanya as his witness. He did not explain how theft occurred, while there was a colleague watching. He was arrested, locked up for a night and freed the following day, upon the intervention of his boss. It was explained that the steel bars were recovered, and the respondent did not deem it necessary to have the claimant criminally prosecuted. The respondent however, did not wish to continue its employment relationship with the claimant.
 26. Section 43 of the *Employment Act* does not require the Employer to have proof of its suspicions against an Employee, in justifying termination. It states that, "the reason or reasons for termination of a contract of employment, are the matters that the Employer, at the time of termination of the contract genuinely believed to exist, and which cause the Employer to terminate the services of the Employee."
 27. The facts above lead the Court to conclude that, the Respondent genuinely believed the Claimant was involved in theft of its steel bars. There was valid reason. Termination was based on valid reason under sections 43 and 45 of the *Employment Act*.
 28. It is declared that termination was unfair on procedure.
 29. Notice is not payable, the claimant having been involved in an act of gross misconduct, warranting summary dismissal under section 44 [4] of the *Employment Act*.
 30. He had worked for 6 years. The Court has not been supplied with any material to show that the Claimant was given to disciplinary lapses, or poor performance. He contributed in no small measure, to the circumstances leading to termination of his contract. He earned Kshs. 1,100 which is commonly pleaded. There was no purpose served by asking the Chege on cross-examination, if she had a document to show that the Claimant earned Kshs. 1,100. This rate is translated into Kshs. 33,000 monthly, which the Court adopts for purposes of compensation. It is also noted that the Claimant was not paid any terminal benefits the Parties having disagreed on the amount payable. He is awarded equivalent of 5 ½ months' salary in compensation for unfair termination, at Kshs. 181,500.
 31. The Claimant was paid for extra duty he opted to carry out at night. He has not established his prayer for overtime of 2,208 hours, staggeringly pleaded at Kshs. 607,200. He did not supply the Court with details of this item. He made a bare pleading. The item is declined.



32. The Respondent did not supply the Court with Claimant's leave records, to discount his prayer for annual leave for the year 2017. In reply to the demand letter which included a demand for annual leave pay, the Respondent simply stated that the Claimant was not entitled to any terminal benefits. In Court, the Witnesses for the Respondent, in particular the Administrator Chege, did not discount the prayer for annual leave. When a prayer for annual leave is made, the Employer must always be ready to disclose to the Court, the full annual leave portfolio of its Employee, as of the date of termination. In drawing employment contracts, Employers are required under section 10 [3] to give details of annual leave. At the end of the contract, the Employer ought to avail such details to the Court, where leave entitlement or utilization is disputed. section 74[1] [f] of the *Employment Act* requires the Employer to have a record of the Employee's annual leave. In event of a dispute, the record must be made available to the court, by its custodian. The prayer is granted as prayed, at Kshs. 33,000.
33. Certificate of Service to issue.
34. No order on the costs.

In Sum it is Ordered: -

- a. Termination was unfair on account of procedure.
- b. The respondent shall pay to the claimant: compensation for unfair termination equivalent of the claimants 5 ½ gross monthly salary at Kshs. 181,500; and annual leave for the year 2017 at Kshs. 33,000 – total Kshs. 214,500.
- c. Certificate of Service to issue.
- d. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

