



**Kawilo v Robinson Investment Ltd (Cause 75 of 2017)  
[2022] KEELRC 1635 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1635 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 75 OF 2017  
DN NDERITU, J  
JULY 28, 2022**

**BETWEEN**

**EUNICE KAWIRA KAWILO ..... CLAIMANT**

**AND**

**ROBINSON INVESTMENT LTD ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a statement of claim dated February 20, 2017 filed through Magatta & Associates Advocates, the Claimant prays for the following reliefs against the Respondent:-
  - (1) One month's salary in lieu of notice - Kshs. 10,107.10
  - (2) Unpaid annual leave - Kshs. 35,037.90
  - (3) Pay for public holidays worked - Kshs. 40,428.40
  - (4) Unpaid off duty - Kshs. 48,514.80
  - (5) Underpayments - Kshs. 65,542.80
  - (6) Compensation under section 49(1) of the *Employment Act* - Kshs. 121,285.00  
Total Kshs. 320,916.20
  - (7) Certificate of service
  - (8) Costs of the cause
2. The claim is accompanied, as expected, with a verifying affidavit, Claimant's written statement, and several documents which the Claimant relied on and produced as exhibits during the hearing.



3. The Claimant filed a further list of documents dated July 6, 2021.
4. The Respondent entered appearance through Githiru & Company Advocates and filed a memorandum of response to the claim dated March 15, 2017 in which it denied each and every material aspect of the claim and prayed that the same be dismissed with costs for want of merits.
5. Along with the response to the claim the Respondent filed several documents that it relied on and produced as exhibits during the trial. The Respondent filed a further list of documents on February 7, 2019.
6. The Claimant's case was heard on November 3, 2021 when she (CW1) testified in chief, was cross-examined, and re-examined and she closed her case.
7. The Respondent's case was heard on February 7, 2022 when Agnes Mukami Lutinu (RW1) testified in chief, was cross-examined and re-examined, and the Respondent closed its case.
8. Upon close of the case by both sides Counsel for both parties agreed to address the court by way of written submissions with Claimant's Counsel filing on February 21, 2022 and Respondent's on March 29, 2022.

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

9. As captured from the statement of claim, the oral and documentary evidence adduced, and the written submissions by her Counsel, the Claimant's case is that she was employed by the Respondent as a day guardette in September, 2010. She testified that she started at a monthly salary of Kshs.4,500/= and that as at the time of her dismissal in October, 2016 her monthly salary was Kshs.8,500/=.
10. The Claimant stated that on 1<sup>st</sup> October, 2016 she applied for leave to enable her travel from her working place in Nakuru to Meru to attend to her son's schooling needs. She testified that when she reported back to work on October 7, 2016 as required she was directed by her supervisor to attend a "refresher class" which she did by reporting to the Nakuru Show Ground, where the refreshing was to be carried out on October 8, 2016.
11. The Claimant alleged that when she reported to the venue on October 8, 2016 the training officer instructed her to hand in her uniform. Subsequently, she was informed by the manager that her services had been terminated on medical grounds and that she should write a letter of resignation.
12. The Claimant testified that she then reported the matter to the County Labour office at Nakuru and later on instructed her lawyers to demand for compensation and her terminal dues. This was after she realised that the labour office was not progressing the matter.
13. The Claimant adopted the contents on her statement of claim and her witness statement and produced the documents filed in support of her claim.
14. In cross-examination the Claimant denied that she was a habitual absentee from work and denied having received any warnings for misconduct. She denied that she absconded duty on October 9, 2016 or on any other date or time. She insisted that she was wrongfully dismissed by the Respondent.
15. It is on the basis of the foregoing that the Claimant prays for the reliefs sought for in her claim pleading that her dismissal was wrongful, unreasonable, unfair, and unlawful.



### III. Respondent's Case

16. As it can be discerned from the pleadings filed, the oral and documentary evidence through RW1, and the written submissions by Counsel, the Respondent's case is that it is a limited liability company mainly engaged in the business of providing security services at Nakuru and elsewhere within the Republic.
17. RW1 testified that the Respondent engaged the Claimant as unskilled worker in September, 2010 at a starting monthly salary of Kshs.4,500/= which salary had risen to Kshs.8,500/= as at the time of dismissal of the Claimant on or about 9<sup>th</sup> October, 2016.
18. RW1 testified that the Claimant was a habitual absentee from work and that she was careless and negligent in performance of her work to the extent that the Respondent almost lost contracts from clients due to Claimant's poor performance. RW1 testified that the Claimant was issued with warning letters prior to "dismissal." She alleged that the Claimant refused to attend refresher classes which according to the Respondent the Claimant needed to attend in order to improve her performance at work.
19. RW1 alleged that the Claimant asked for leave to go and take care of her son's schooling needs but never reported back to work. RW1 alleged that she tried to get in touch with the Claimant on her without success. She alleged that the Claimant had blocked her line and as such she could not reach her. She testified that a notice of dissertation was issued to the Claimant on October 13, 2016 but the Claimant did not report back to work and hence the Respondent reported the matter to the County Labour office, Nakuru.
20. RW1 testified that the Respondent was contacted by the said Labour office over the matter but the Claimant hired a lawyer and filed the matter in court before the negotiations at the labour office were concluded.
21. RW1 alleged that the Claimant dissented duty after taking leave and hence she is not entitled to the terminal dues claimed in this cause. She claimed that it is the Claimant who should compensate the Respondent for the inconveniences caused by her bad conduct and poor performance at work.
22. In cross-examination RW1 alleged that the Claimant refused to attend the refresher training to improve her performance and that she "threw" her uniform at the secretary as she left her place of work. She admitted that the Respondent has not computed what may be due to the Claimant to this day.
23. It is on the basis of the foregoing that the Respondent prayed that the Claimant's cause be dismissed with costs.

### IV. Issues for Determination

24. From the above summary of the evidence and positions taken by the parties, the following issues commend themselves to this court for determination:-
  - (a) What was the nature of the employment relationship between the Claimant and the Respondent?
  - (b) Was the dismissal of the Claimant by the Respondent unfair, unreasonable, wrongful, and unlawful?
  - (c) Is the Claimant entitled to the reliefs sought for?
  - (d) Costs



This court shall now tackle each of the above issues as hereunder.

## **V. Employment**

25. The Claimant's evidence is that she was employed by the Respondent as a day time guardette in September, 2010. On the other hand the Respondent's case is that the Claimant was at first engaged as a general unskilled worker who was subsequently trained to become a guardette.
26. The Respondent produced two contracts of employment relating to the Claimant. One contract is for the period between May 1, 2014 and April 30, 2015 (the copy produced in court is not signed by the Respondent), and the other is for period from June 2, 2016 to September 2, 2016. The latter contract does not indicate the salary payable to the Claimant. To a large extent, therefore, the two contracts relied on by the Respondent are incomplete for the reasons stated above and hence of no probative value and the court has thus to rely on the oral evidence adduced by the parties in ascertaining the terms of the employment between the Claimant and the Respondent.
27. However, the parties are in concurrence that as at the time the employment relationship ended in October, 2016 the Claimant was a day time guardette earning a monthly salary of Kshs.8,500/=. This court shall proceed on the basis of the agreed position, as the case may be, in dealing with and determining the issues in controversy.

## **VI. Termination/dismissal**

28. The parties have taken diametrically opposed positions in regard to how the Claimant left her employment with the Respondent. On the one hand, the Claimant testified that she was verbally dismissed without notice. On the other hand, the Respondent alleges that the Claimant deserted duty from 9<sup>th</sup> October, 2016 never to return to work.
29. Vide a letter dated October 1, 2016 the Claimant requested for permission from the Respondent to go and attend to her son who was schooling in Meru. She requested for five (5) days and the request for off-duty was approved to commence on 2<sup>nd</sup> October for her to return to work on October 7, 2016.
30. The Claimant testified that she returned to work on October 7, 2016 but instead of being allocated duty she was directed by the manager to attend refresher training at Nakuru Show Ground. The Claimant testified that when she went to the venue of the refresher training as directed on 8<sup>th</sup> October, 2016 she was instead of training ordered to hand in her uniform. She went back to the office where the manager and the director (RW1) informed her that she had been terminated on medical grounds and she was demanded to write a letter of resignation.
31. RW1 on the other hand alleged that before the Claimant left for Meru she abandoned her official uniform at the office and never went back to work.
32. From the evidence on record this court is inclined to believing the version of the events as outlined by the Claimant rather than the version by the Respondent through RW1. First, it is not contested that the Claimant asked for permission to attend to her son in Meru vide a letter dated 1<sup>st</sup> October, 2016. It is also not disputed that the requested permission was granted. At that point there was no bad blood between the Claimant and the Respondent. There was no dispute or disagreements between the parties. It is the opinion of this court and holding that the Claimant had no reason not to report back to work and that she indeed reported back to work on October 7, 2016.



33. Further, it is the finding of this court that while the Claimant was away the Respondent hatched an apparent plan to dismiss the Claimant on allegations of poor performance. Unfortunately, the Respondent failed and or neglected to follow the law in carrying out the said dismissal.
34. The Claimant testified that she had not obtained another job as at October 7, 2016 and she therefore had nowhere else to earn a living from. She had no reason to leave the job or to dissent duty.
35. Whether the Claimant was a poor performer or a habitual absentee, she was entitled to both substantive and procedural fairness before dismissal in line with article 47 of *the Constitution*, Sections 41, 43, and 45 of the *Employment Act* (the Act), in line with the Rules of natural Justice.
36. The absolute necessity for both substantive and procedural fairness has been emphasized by this court (ELRC) in many a decision including *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.
37. In terms of substantive fairness the Respondent alleges that the Claimant was a poor performer and a habitual absentee from work and that she dissented duty. The Respondent has displayed warning letters allegedly served upon the Claimant but she has denied ever receiving the said notices. The Respondent did not call evidence in support of the alleged misconduct or poor performance beyond the evidence of RW1, the Director. The supervisor of the Claimant, the manager, or the Human Resource manager/officer were not called to testify in support of the reason for dismissal to corroborate RW1, whose testimony, in the opinion of this court, was unreliable and not forthright.
38. RW1 contradicted herself in her evidence. On the one hand, she alleged that the Claimant was dismissed for poor performance while on the other hand the same witness alleged that the Claimant dissented duty.
39. If the Claimant was performing poorly, the Respondent was obliged to place her under a performance improvement programme (PIP) and assess her performance regularly and periodically before taking the drastic action of dismissing her-See *Jane Samba Mukala v Oltukai Lodge Limited* (2010) eKLR and *Peter Kamau Mwaura & Another v National Bank of Kenya* (2020) e KLR.
40. There is no evidence from the Respondent whatsoever on what steps it took to improving the alleged poor performance from the Claimant. Instead of conducting the refresher training that it had proposed to the Claimant, the Respondent dismissed the Claimant when she attended the same and ordered her to hand in the uniform. It is the view and holding of this court that the Respondent failed to take all the necessary steps towards improving the alleged poor performance by the Claimant and hence the Respondent was wrong in using that same alleged reason of poor performance in dismissing the Claimant. No records of scores on evaluation of the Claimant were produced by the Respondent to illustrate and demonstrate that indeed the Claimant was performing poorly.
41. On the issue of desertion, this court has already found that the Claimant did not dissent duty but was orally dismissed by the Respondent through RW1. First, the Claimant asked for permission to be away from duty which permission was granted as stated elsewhere in this judgment. She reported back to work only to be dismissed on allegations of poor performance and later on the allegation of desertion of duty was made.
42. It is the view and finding of this court that the allegations of poor performance and desertion by the Respondent are an afterthought intended to justify the unfair and unjust dismissal of the Claimant.
43. There is no evidence on what efforts the Respondent made in tracing the Claimant after she allegedly dissented duty. There are no letters produced addressed to the Claimant or memos. If RW1 was blocked



from accessing the Claimant through her phone, what other efforts were made to trace the Claimant for example by sending a colleague employee to look for her at her residence or even involving the police? See the decisions in *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* (2016) eKLR and *William Gituma Gatere v RAA Limited* (2020) eKLR.

44. The allegation by the Respondent that the Claimant had disserted duty only surfaced after the Claimant had reported the unfair and unlawful dismissal to the County Labour Office, Nakuru. This is confirmed by the letter from the Respondent to the said office dated January 5, 2017. The “warning for dissertion” letters dated October 10, 2017 and 9<sup>th</sup> October, 2017 are clearly an afterthought manufactured by the Respondent in defence to this cause. In any event, the same were not served upon the Claimant.
45. In terms of procedural fairness, no notice was issued to the Claimant, no hearing was conducted, and hence the Claimant was totally denied due process.
46. Therefore, the Respondent breached Sections 41, 43, and 45 of the Act in that it denied the Claimant both substantive and procedural fairness before dismissal and this court holds so.
47. To this day the Respondent has not invited the Claimant for a hearing and or issued her with a notice of termination or dismissal notwithstanding that the Respondent has been in touch with the Claimant or her Counsel all along and specifically since the Claimant’s lawyers issued the demand letter dated January 24, 2017 which the Respondent replied vide a letter dated 9<sup>th</sup> February, 2017.
48. Even if the Respondent had any reason to terminate and dismiss the Claimant, and none has been advanced to convince this court so, the Respondent completely denied the Claimant procedural fairness rendering the dismissal, wrongful, unfair, unreasonable, and unlawful.

## VII. Reliefs

49. The reliefs sought by the Claimant have been set out in the introductory part of this judgment. This court shall now consider each of the prayers as hereunder.
50. Prayer (1) is for one (1) month’s salary in lieu of notice. As at the time of dismissal the Claimant’s gross monthly salary was Kshs.8,500/=, all inclusive. In paragraph 10 of the memorandum of claim the Claimant pleads that she was always underpaid by the Respondent.
51. The Respondent has not denied that the Claimant’s salary as at the time of termination was Kshs.8,500/=. However, the Respondent has denied that there was underpayment. It is the Claimant who claimed and pleaded that she was underpaid and hence it was incumbent upon her to prove that allegation by alluding to the relevant Government wage regulations, demonstrating that she was indeed underpaid as alleged – See section 107 of the *Evidence Act* (Cap 80).
52. This court has gone through the pleadings, the documentary evidence adduced, and the written submissions by her Counsel wherein Legal Notice (LN) 71 of 2012, LN 24 of 2015, and LN 117 of 2015 are cited as the basis for the claim on underpayments. The Respondent’s Counsel who filed written submissions on March 29, 2022 after the Claimant’s had filed on February 21, 2022 has not disputed the existence of the above mentioned Legal Notices. Instead, the Respondent through RW1 alleges that the said monthly salary of Kshs.8,500/= was agreed by and between the parties.
53. In the circumstance, it is the view and holding of this court that the Claimant was underpaid as pleaded and if there was an agreement between the parties as alleged by the Respondent, to the effect that the Claimant be underpaid, then such agreements or terms were null and void as they were in violation of the law.



54. In the circumstances, this court has no difficulties in awarding the Claimant the sum claimed of Kshs.10,107.10 being one month's salary in lieu of notice.
55. Prayer (2) is for unpaid leave based on section 28(1) of the Act. It is the duty of an employer to keep records of employment as obligated under Sections 10 and 74 of the Act. Once the Claimant herein alleged that she had not taken annual leave for the periods stated, it became incumbent upon the Respondent to avail records to rebut that claim.
56. The Respondent did not avail records to prove that indeed the Claimant took all her annual leave days and that nothing was thus owed to her under that head. In the circumstances, the claim for Kshs.35,037.90 in unpaid annual leave is granted.
57. Prayer (3) is a claim for Kshs.40,428.40 being pay for public holidays worked. For the same reasoning applied above in respect of unpaid leave, this claim is allowed as no records were availed by the Respondent to rebut the evidence by the Claimant that she worked on all public holidays without pay -See *Robert Chaka Ndupha v Crow Bus Services* (2017)eKLR in respect of interpretation of section 10(7) of the Act. Payment for leave not taken, public holidays worked, and overtime pay are all implied in every contract of employment as they are based on provisions of the Act and other applicable laws.
58. Prayer (4) is pay for-off duty days not taken in the sum of Kshs.48,514.90. In the record produced by the Respondent there is no record on off duty days taken by the Claimant. In the circumstances, this court has not been presented with any evidence to rebut the allegation by the Claimant that she did not take off duty days and that she was not paid for the same as tabulated in the memorandum of claim. Consequently, the claim under this head in the sum of Kshs.48,514.80 is allowed.
59. Prayer (5) is for underpayment of salary in the sum of Kshs.65,542.80. This court has detailed above the reasons why prayer 1 was granted. This is in regard of what ought to have been the gross monthly salary for the Claimant as at the time of dismissal. This court has accepted Kshs.10,107.10 as the gross monthly salary that ought to have been due and payable to the Claimant as at the time of dismissal. Mutatis mutandis, this court finds in favour of the Claimant in the claim for Kshs.65,642.80 for underpayments and the same is hereby allowed.
60. Prayer 6 is for compensation under section 49(1) (c) as read with Section 50 of the Act. The Claimant has pleaded and prayed for the maximum compensation of 12 months gross monthly salary under this head. This court has considered the factors that ought to be summoned when determining compensation based on the provisions of the above law as hereunder.
61. The Claimant's wish is to be completely separated from the Respondent hence this cause and claim for compensation. She has not expressed any desire for reinstatement (which in any event would be way out of time) or re-engagement. From the evidence on record, the Claimant did not in any way contribute to her dismissal. The Claimant served the Respondent for a considerably long period of time of about six(6) years. The Respondent did not and has not paid any terminal dues or other compensation to the Claimant and did not issue her with a certificate of service.
62. The dismissal of the Claimant by the Respondent was wrongful, unfair, unjust, unreasonable, and unlawful. The Respondent did not act in accordance with justice and equity. As observed elsewhere in this judgment, the Respondent was not forthright in pleadings and evidence on the circumstances leading to the dismissal of the Claimant.
63. The Claimant informed the court that she did not secure another job after the dismissal and that she now vends vegetables (mama mboga) in Lodwar, Turkana County.



64. Considering the entire circumstances of this cause, this court finds that this is an appropriate case for award of the maximum compensation of 12 months gross pay. The Claimant is awarded in the sum of Kshs.121,285/= as prayed. This amount is subject to statutory deductions.
65. The other prayer is for a certificate of service under Section 51 of the Act. There is no reason advanced as to why the Respondent may not issue the same to the Claimant. The Respondent is hereby ordered to issue the same and deliver the same to the Claimant or her Counsel within 30 days of this judgment.

#### **VIII. Costs**

66. Costs follow event and therefore the Claimant is awarded costs of this cause to be agreed on or taxed in the usual way.

#### **IX. disposal/orders**

67. This court issues the following orders in determination of this cause:-
- (a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful, unreasonable, unfair, unjust, wrongful and hence unlawful.
  - (b) The Claimant is awarded the following:-
    - (i) One month's salary in lieu of Notice - Kshs. 10,107.10
    - (ii) Unpaid annual leave - Kshs. 35,037.90
    - (iii) Public holidays pay - Kshs. 40,428.40
    - (iv) Off duty days pay - Kshs. 48,514.80
    - (v) Salary underpayments - Kshs. 65,742.90
    - (iv) Compensation for wrongful dismissal -Kshs.121,285.00Total-Kshs.320,916.20  
This amount shall earn interest at court rates from the date of this judgment till payment in full.
  - (c) The Respondent is hereby ordered to issue and deliver a certificate of service to the Claimant or her Counsel within 30 days of this judgment.
  - (d) Costs of the cause to the Claimant.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**DAVID NDERITU**

**JUDGE**

