



**Oloo v H Young & Co (EA) Limited (Cause 654 of 2018)  
[2022] KEELRC 3792 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3792 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 654 OF 2018**

**L NDOLO, J  
JULY 28, 2022**

**BETWEEN**

**WALTER OCHIENG OLOO ..... CLAIMANT**

**AND**

**H YOUNG & CO (EA) LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his memorandum of claim dated May 4, 2018 and filed in court on May 7, 2018, the claimant sued the respondent for unlawful and unfair termination of employment. The respondent responded by way of a memorandum of reply dated May 23, 2018 and filed in court on May 24, 2018.
2. The matter went to trial, with the claimant testifying on his own behalf and the respondent calling its Human Resource Officer, Serah Wangethi. Thereafter, the parties filed written submissions.

**The Claimant’s Case**

3. The claimant states that he was employed by the respondent on November 12, 2012 in the position of driver. He claims to have earned a monthly salary of Kshs 44,473 at the time of separation.
4. The claimant further claims to have been entitled to the sum of Kshs 3,000 as monthly commuter allowance, which was paid to him until April 2015, when he was transferred to the respondent’s Meru office. He states that the respondent had no justification for withholding this allowance.
5. The claimant worked for the respondent until March 5, 2018, when his employment was terminated. He terms the termination as unlawful and unfair and adds that he was not paid his terminal dues.
6. The claimant seeks the following reliefs:
  - a) 1 month’s salary in lieu of notice.....Kshs 44,473



- b) Salary for March 2018 (5 days).....7,412
- c) Leave (prorata for 31 days).....45,955
- d) Commuter allowance (May 2015-Feb 2018).....102,000
- e) 12 months' salary for wrongful termination.....533,676
- f) Overtime
- g) Costs plus interest

### **The Respondent's Case**

7. In its memorandum of reply dated May 23, 2018 and filed in court on May 24, 2018, the respondent admits having employed the claimant as pleaded in the memorandum of claim.
8. The respondent however denies the allegation that the termination of the claimant's employment was unlawful and unfair and states that the termination was on account of gross negligence on the part of the claimant.
9. The respondent accuses the claimant of causing a serious road accident while driving the respondent's motor vehicle registration number KAZ 941V on February 27, 2018, as a result of which the said motor vehicle was severely damaged.
10. The respondent adds that the termination was effected fairly in accordance with the specific terms as contained in the claimant's employment contract as read with the *Employment Act, 2007*.
11. The respondent denies owing any terminal dues to the claimant. Specifically, the respondent contests the claimant's claim that he was entitled to commuter allowance.

### **The Claimant's Evidence**

12. The claimant adopted his witness statement dated May 4, 2018 as his evidence in chief.
13. On cross examination, the claimant admitted that an accident had occurred on February 27, 2018. He told the court that at the time of the accident, he was in the company of a mechanic and that the subject motor vehicle had mechanical issues.
14. The claimant stated that he had notified the mechanic of the mechanical issues, who in turn instructed him to drive the motor vehicle. On further cross examination, the claimant admitted that he did not report the accident to the respondent.
15. The claimant denied receiving any terminal dues in March 2018 as contended by the respondent. He however confirmed that in the payslip for March 2018 the respondent had made a provision for pay in lieu of 35 leave days at Kshs 39,850. He further admitted that he had a sacco loan that was pending at the time of his separation with the respondent.
16. The claimant maintained that he was eligible to payment of commuter allowance of Kshs 3,000 per month.
17. On re-examination, the claimant stated that the accident of February 27, 2018 occurred at about 5.10 am while he was travelling from Nairobi to Meru. He added that he did not report the accident because the respondent's office was not open.



### **The Respondent's Evidence**

18. The respondent's witness, Serah Wangethi testified that the termination of the claimant's employment was for a just cause and that due process was followed. She stated that the claimant was not paid any money in terminal dues because he had an outstanding sacco loan. She added that the claimant's last payslip for March 2018 included leave pay as well as salary for 5 days worked in March 2018.
19. On cross examination, the witness conceded that she was not in the respondent's employment at the time of the claimant's separation, noting that the letter of termination was signed by an administrator by the name Millicent Ojwang'.
20. Wangethi further confirmed that she did not see any show cause letter issued to the claimant, prior to the termination. She however maintained that the claimant was given a right to appeal the termination despite the fact that this was not expressly provided for in the termination letter.
21. The witness told the court that the termination of the claimant's employment was as a result of the claimant having caused an accident. Wangethi maintained that the termination was effected in accordance with the provisions of section 44 of the [Employment Act, 2007](#).

### **The Claimant's Submissions**

22. In his final submissions, the claimant argues that the termination of his employment was unlawful and unfair as it did not comply with the mandatory provisions of sections 41, 43 and 45 of the [Employment Act, 2007](#).
23. The claimant relies on the decision in [Grace Muthoni Muhoro v Githunguri Dairy and Community Sacco Limited](#) [2020] eKLR where the requirement on an employer to establish a valid reason for termination of the employment of an employee in accordance with section 43 of the [Employment Act](#), was underscored.
24. The claimant points out that the respondent had, through its witness, admitted that the claimant was never issued with any show cause letter nor was he accorded a disciplinary hearing prior to the termination, contrary to the mandatory provisions of section 41 of the [Employment Act, 2007](#).
25. The claimant further submits that the respondent had failed to prove that it had conducted its own independent investigation as to the cause of the accident to ascertain whether or not the claimant was negligent in performing his duties as contended in the memorandum of reply.
26. The claimant therefore argues that the respondent had no valid reason for terminating his employment. In this regard, the claimant cites the decision in [Charles Kawai \(suing as the Administrator of the Estate of the late Kevin Kioko Charles\) v Boniface Mutunga & another](#) [2020] eKLR.
27. The claimant argues that he was not to blame for the accident and that the motor vehicle he was driving had faulty head lights that went off, thus causing the accident. The claimant maintains that the respondent had a duty to ensure that the motor vehicle was in good working condition and to assure the safety of its members of staff, a duty the respondent failed to execute to the required standard.
28. The claimant further submits that the respondent failed to frame the charges, if any, and to conduct a hearing as contemplated under section 41 of the [Employment Act](#).



## The Respondent's Submissions

29. On its part, the respondent submits that the termination of the claimant's employment was lawful and fair as required under the *Employment Act*.
30. The respondent maintains that it had a valid reason for terminating the claimant's employment, being that the claimant had caused an accident involving the respondent's motor vehicle registration number KAZ 941V, occasioning the respondent costs in repair. The respondent terms this act by the claimant as gross misconduct.
31. The respondent urges the court to dismiss the contention by the claimant that it owed him a duty of care, insisting that the claimant was in a position to decide not to proceed with the journey if he felt that the motor vehicle was un-roadworthy. The respondent contends that the claimant had a duty to take reasonable precaution to avert the accident.
32. In pursuing this argument, the respondent relies on the Court of Appeal decision in *Abdalla Baya Mwanyule v Said T/A Jomvu Total Service Station* [2004] eKLR where it was held that the only duty owed by an employer to an employee is that of reasonable care against risk of injury caused by foreseeable events, or which would be prevented by taking reasonable care.
33. The respondent asserts that it was justified in terminating the claimant's employment, as he was guilty of breaching the relationship of mutual confidence between the parties through his negligence when he caused the accident of February 27, 2018. To fortify this argument, the respondent cites the decision in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR.
34. On the issue of procedural fairness, the respondent submits that the claimant's employment was only terminated upon conclusive investigations and hearing. The respondent maintains that the claimant was accorded an opportunity to defend himself prior to the decision to terminate his employment.

## Findings and Determination

35. There are two (2) issues for determination in this case:
  - a) Whether the termination of the claimant's employment was lawful and fair;
  - b) Whether the claimant is entitled to the remedies sought.

## The Termination

36. The claimant's employment was terminated by letter dated March 5, 2018 stating thus:

“RE: Summary Dismissal

On the February 27, 2018, you caused an accident at Narumoro area while driving vehicle registration No KAZ 941V which you were assigned by the company. From the investigations and report produced by the technical team, it was noted that the accident was severe causing damages which shall make the company incur cost on repairs.

The *Employment Act* section 44(c) states:

If an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer's property he is liable for summary dismissal.



Thus the management has been left with no alternative but to terminate your services summarily on grounds of careless driving effective Monday March 5, 2018.

You will be paid salary up to and including March 5, 2018 and outstanding leave days less any company liability.

Please clear with the site and stores before you leave.

Your final dues will be processed and prepared for collection.

Yours sincerely,

For: H Young & Co (EA) Ltd

(signed)

Millicent Ojwang

Administrator

37. From the evidence on record, the reason given by the respondent for termination of the claimant's employment is that the claimant had caused an accident while driving the respondent's motor vehicle registration number KAZ 941V.
38. On his part, the claimant states that he was not to blame for the accident and adds that the subject motor vehicle had faulty head lights that went off, thus causing the accident. The claimant blames the respondent for failing in its duty of care of ensuring that the motor vehicle was in good working condition.
39. In effect, the respondent accuses the claimant of causing an accident through negligence. Negligence was defined in the case of *Blyth v Birmingham Water Works Co* (1856) 11 Ex Ch 781, 156 ER 1047 as:  

“...the failure to do something a person of ordinary prudence would do or the taking of an action that a person of ordinary prudence would not take.”
40. It follows therefore that a party alleging negligence as the cause of an accident must, at the very least, adduce evidence that links the conduct of the indicted party, with the accident. In an employment situation, an employer alleging such negligence against an employee is required to establish this nexus at the shop floor, prior to taking disciplinary action against the employee. This is the essence of sections 41 and 43 of the *Employment Act*.
41. The respondent's witness, Serah Wangethi was unable to confirm to the court whether the charge against the claimant had been put to him for his response as required by the procedural fairness dictates of the *Employment Act*. The said charge was therefore unproved and I consequently find and hold that the termination of the claimant's employment on account of an unproved charge was substantively and procedurally unfair.

## Remedies

42. Pursuant to the foregoing findings, I award the claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the claimant's length of service as well as the respondent's unlawful conduct in the termination transaction.
43. I further award the claimant one (1) month's salary in lieu of notice.



44. From the evidence on record, the claimant's terminal dues, made up of salary for 5 days in March 2018 and pay in lieu of leave, were tabulated and applied towards offsetting his outstanding Sacco loan. These claims are therefore without basis and are disallowed.

45. The claims for commuter allowance and overtime were not proved and are dismissed.

46. In the end, I enter judgment in favour of the claimant as follows:

- a) 6 months' salary in compensation.....Kshs 208,146
- b) 1 month's salary in lieu of notice.....34,691
- Total.....242,837

47. This amount will attract interest at court rates from the date of judgment until payment in full.

48. The claimant will have the costs of the case.

**DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr Ongeru for the claimant.

Miss Ngugi for the respondent.

