



REPUBLIC OF KENYA



Amalgamated Union of Kenya Metal Workers v Reliable Electrical Engineering [M] Limited (Employment and Labour Relations Cause E102 of 2021) [2022] KEELRC 12868 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12868 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E102 OF 2021
AK NZEI, J
OCTOBER 13, 2022**

**BETWEEN
AMALGAMATED UNION OF KENYA METAL WORKERS CLAIMANT
AND
RELIABLE ELECTRICAL ENGINEERING [M] LIMITED RESPONDENT**

JUDGMENT

1. The suit herein was filed by the Claimant Trade Union vide a Memorandum of Claim dated December 9, 2021; and is brought on behalf of fourteen grievants who were employees of the Respondent herein and members of the Claimant Trade Union. The 14 grievants are named in the Memorandum of Claim as:-
 - a. Julius Katana (1st grievant)
 - b. Austin Mwachai (2nd grievant)
 - c. Alfred Amani (3rd grievant)
 - d. Walter Otieno (4th grievant)
 - e. Juma Omar (5th grievant)
 - f. Juma Mwambea (6th grievant)
 - g. Ali Mwarandu (7th grievant)
 - h. Hassan Karisa (8th grievant)
 - i. Stephen Washe Nguru (9th grievant)
 - j. Juma Mwagwabi (10th grievant)



- k. Francis Mwaoka (11th grievant)
 - l. Francis Kuya (12th grievant)
 - m. Linus Wanyonyi (13th grievant)
 - n. Ronald Mashiniko Manganga (14th grievant)
2. According to documents filed in the Court by the Claimant together with the statement of claim (Annexure 3), the grievants' dates of employment by the Respondent are shown to be:-
- a. 1st grievant – January 2003
 - b. 2nd grievant – July 2006
 - c. 3rd grievant – August 2008
 - d. 4th grievant – January 2009
 - e. 5th grievant – August 2009
 - f. 6th grievant – January 2009
 - g. 7th grievant – November 2010
 - h. 8th grievant – March 2010
 - i. 9th grievant – June 2011
 - j. 10th grievant – November 2011
 - k. 11th grievant – November 2016
 - l. 12th grievant – February 2017
 - m. 13th grievant – February 2016
 - n. 14th grievant – January 2017.
3. The Claimant pleaded that the Claimant and the Respondent have valid Recognition and Collective Bargaining Agreements, copies whereof the Claimant annexed to its pleadings filed herein.
4. The Claimant further pleaded:-
- a. That on September 1, 2019, the Respondent served the grievants with temporary termination letters, and send the grievants away in a very inhuman manner.
 - b. That the Respondent did not pay the grievants their terminal dues, has not paid any todate; and has not called the grievants back to work.
 - c. That temporary termination can only be equated to suspension, and that this means that the grievants are still in employment.
 - d. That the Respondent's actions were unlawful as there is no provision in law stipulating 'temporary termination.'
5. The Claimant prayed:
- a. That the Court should make a finding that the Respondent's act of sending the grievants home by way of indefinite temporary termination letters was unfair.



- b. That the Court do issue an order reinstating or recalling the services of the fourteen grievant employees; or
 - c. If reinstatement is not possible, an order for payment of the grievants' terminal dues as tabulated by the Claimant herein, and that the tabulation done by the Claimant on the basis of the CBA be adopted.
 - d. That each grievant be awarded twelve months' wages compensation for unfair termination of employment.
 - e. That costs of the claim be awarded to the Claimant.
6. The Respondent did not enter appearance, and did not file any response to the claim, despite having been served and affidavits of service filed in Court. the Court allowed the grievants to proceed with hearing by way of formal proof.
7. When the suit came up for formal proof on April 27, 2022, Ali Mwarandu (the 7th grievant), testified on his own behalf and on behalf of the other grievants except the 11th grievant (Francis Mwaoka) whom the Court was told had passed on during the pendency of the suit herein. The witness adopted his filed witness statement dated February 7, 2022 as his testimony. The witness further testified:-
- a. That he had worked for the Respondent for thirteen years, and had on September 1, 2019 been served with a temporary termination of employment, and had not been called to resume his duties since the said date, and had not been paid anything since the date of termination.
 - b. That the grievants were fourteen, but the 11^h grievant, Francis Mwaoka, had passed on.
 - c. The witness asked the Court to allow the claim as presented.
8. The claim as presented by the Claimant, excluding the claim by Francis Mwaoka whom the court was told is deceased is as follows:-
- a. 1st grievant (Julius Katana)
 - Basic salary Ksh 22,180
 - i. Three months' notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 189,270
 - iii. Gratuity pay (15 days) Ksh 177,440
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave (30 days x 3 years) Ksh 66,540
 - vi. Annual leave travelling allowance
(4,100x3 years) Ksh 12,300
 - vii. House allowance (3000x36 months) Ksh 108,000
 - viii. Twelve months wages in compensation
(22,180x12) Ksh 266,160
 - Total Ksh 885,950
 - ix Certificate of Service.



- b. 2nd grievant (Austin Mwachai)
- Basic Pay Ksh 22,180
- i. Three months notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 153,781
 - iii. Gratuity pay (15 days) Ksh 144,170
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave (30 days x 3 years) Ksh 66,540
 - vi. Annual leave travelling allowance
(4,100x3 years) Ksh 12,300
 - vii. House allowance (3000x36 months) Ksh 108,000
 - viii. Twelve months wages in compensation
(22,180x12) Ksh 266,160
Total Ksh 829,491
 - ix. Certificate of Service.
- c. 3rd grievant (Alfred Amani)
- Basic pay Ksh 22,180
- i. Three months notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 130,123
 - iii. Gratuity pay (15 days) Ksh 121,990
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave Ksh 66,540
 - vi. Annual travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. Twelve month wage compensation Ksh 266,160
Total Ksh 782,653
 - ix. Certificate of Service.
- d. 4th grievant (Walter Otieno)
- Basic salary Ksh 22,180
- i. 3 months notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 118,293
 - iii. Gratuity pay (15 days) Ksh 110,900
 - iv. Baggage allowance Ksh 12,000



- v. Annual leave days Ksh 66,540
 - vi. Annual leave travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. 12 months' wage compensation Ksh 226,660
 - Total Ksh 720,733
 - ix. Certificate of Service.
- e. 5th grievant (Juma Omar)
- Basic salary Ksh 22,180
- i. 3 months notice pay Ksh 66,540
 - ii. Severance pay(16 days) Ksh 118,293
 - iii. Gratuity (15 days) Ksh 110,900
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave days Ksh 66,540
 - vi. Annual travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. 12 months' wage compensation Ksh 226,160
 - Total Ksh 720,733
 - ix. Certificate of Service.
- f. 6th grievant (Juma Mwabea)
- Basic salary Ksh 22,180
- i. 3 months' notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 118,293
 - iii. Gratuity (15 days) Ksh 110,900
 - iv. Baggage allowance Ksh 12,000
 - v. Annual eave days Ksh 66,540
 - vi. Annual leave travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. 12 monts' wage compensation Ksh 226,160
 - Total Ksh 720,733
 - ix. Certificate of Service.
- g. 7th grievant (Ali Mwarandu)
- Basic salary Ksh 22,180



- i. 3 months notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 106,464
 - iii. Gratuity pay (15 days) Ksh 99,810
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave days Ksh 66,540
 - vi. Annual leave travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. 12 months' wage compensation Ksh 226,160
 - Total Ksh 697,814
 - ix. Certificate of Service.
- h. 8th grievant (Hassan Karisa)
- Basic salary Ksh 22,180
- i. 3 months' notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 106,464
 - iii. Gratuity pay (15 days) ksh 99,810
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave days Ksh 66,540
 - vi. Annual leave travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. 12 month' wage compensation Ksh 22,160
 - Total Ksh 697,814
 - ix. Certificate of Service.
- i. 9th grievant (Stephen Washe Nguru)
 - Basic salary Ksh 22,180
 - i. 3 months' notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 94,635
 - iii. Gratuity pay (15 days) Ksh 88,720
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave days Ksh 66,540
 - vi. Annual leave travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. 12 months' wage compensation Ksh 226,160



Total Ksh 674,895

- ix. Certificate of Service
- j. 10th grievant (Juma Mwagwabi)
 - Basic salary Ksh 22,180
 - i. 3 months' notice Ksh 66,540
 - ii. Severance pay (16 days) Ksh 94,634
 - iii. Gratuity pay (15 days) Ksh 88,720
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave days Ksh 66,540
 - vi. Annual leave travelling allowance Ksh 12,300
 - vii. House allowance Ksh 108,000
 - viii. 12 months' compensation Ksh 226,160
 - Total Ksh 674,895
 - ix. Certificate of Service.
- k. 12th grievant (Francis Kuya)
 - Basic salary Ksh 22,180
 - i. 1 month notice Ksh 22,180
 - ii. Severance pay (16 days) Ksh 23,659
 - iii. Gratuity pay (15 days) Ksh 22,180
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave days Ksh 44,360
 - vi. Annual leave travelling allowance Ksh 8,200
 - vii. House allowance Ksh 72,000
 - viii. 12 months' wage compensation Ksh 266,160
 - Total Ksh 470,739
 - ix. Certificate of Service
- l. 13th grievant (Linus Wanyonyi)
 - Basic salary Ksh 21,144
 - i. 1 month notice Ksh 21,144
 - ii. Severance pay (16 days) Ksh 33,830
 - iii. Gratuity pay (15 days) Ksh 31,716
 - iv. Baggage allowance Ksh 12,000



- v. Annual leave days Ksh 60,432
- vi. Annual travelling allowance Ksh 12,300
- vii. House allowance Ksh 114,178
- viii. 12 months' wage compensation Ksh 253,728
- Total Ksh 539,328
- ix. Certificate of Service.
- m. 14th grievant (Ronald Mashiniko)
 - Basic salary Ksh 22,180
 - i. 1 month notice Ksh 22,180
 - ii. Severance pay (16 days) Ksh 33,830
 - iii. Gratuity pay (15 days) Ksh 31,716
 - iv. Baggage allowance Ksh 12,000
 - v. Annual leave days Ksh 60,432
 - vi. Annual leave travelling allowance Ksh 12,300
 - vii. House allowance Ksh 114,178
 - viii. 12 months' wage compensation Ksh 253,728
 - Total Ksh 539,328
 - ix. Certificate of Service

9. The Claimant's pleadings and evidence were not controverted or rebutted by the Respondent, as the suit was not defended. The Claimant produced in evidence some of the temporary termination of service letters issued to the grievants by the Respondent on September 1, 2019. The letters read in part:-

' RE: Temporary Terminatin of Service

We refer to the above subject and regret to inform you that due to low business on our side, we will not require services as from September 1, 2019.

Please take note that this is a temporary remedial and we will be calling you back immediately we start any future project.

Thank you for your understanding and commitment of service to the company.'

10. Termination of employment is just that, termination of employment. The inclusion thereto of the word 'temporary' does not change the meaning of the word. The grievants were issued with letters of 'temporary termination of employment' on September 1, 2019, and had not been called back to work at the time of filing the suit herein on December 9, 2021, over two years down the line.

11. Issues that present for determination are:-

- a. Whether termination of the grievants' employment by the Respondent was unfair.
- b. Whether the grievants are entitled to the reliefs sought.



12. On the first issue, the mandatory procedure that must be followed by any employer contemplating termination of an employee's employment, for whatever reason, is set out in Section 41 of the *Employment Act* 2007 which provides:-
- ' (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 his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.'
13. The Respondent is not shown to have complied with the foregoing mandatory statutory requirement. It did not notify or inform the grievants of the impending termination before it happened, and validity of the reason given for the abrupt termination was not proved. The grievants were not given an opportunity to be heard before their employment could be terminated.
14. The Court of Appeal stated as follows in the case of *Kiai Mbaki & 2 others vs Gichuhi Macharia & another*[2005] eKLR:-
- ' It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.'
15. The Court of Appeal held as follows in the case of *CMC Aviation Limited -vs- Mohammed Noor*[2015] eKLR:-
- ' In view of the foregoing, we find that the appellant's act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the *Employment Act*. In Kenya Union of Commercial Food and Allied Workers –vs- Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui –vs –kenya Pipeline Company Limited [2014] eKLR'
16. I find and hold that termination of the grievants' employment by the Respondent was procedurally and substantively unfair.
17. On the second issue, I disallow the prayer for reinstatement in view of the fact that three years have lapsed since the unfair termination of the grievants' employment was effected by the Respondent.
18. On the rest of the grievants' claims as set out in paragraph 8 of this Judgment, I award the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 12th, 13th and 14th grievants each the equivalent of six months' basic salary as compensation for unfair termination of employment. I disallow the claim for severance pay as termination was not on account of redundancy. Save for these two items, I allow the grievants'



respective claims as set out in paragraph 8 of this Judgment. Calculations as pleaded and set out in the said paragraph are shown to be based on a valid CBA between the Claimant and the Respondent.

19. Consequently, Judgment is hereby entered for the Claimant against the Respondent as follows:
- a. Julius Katana (1st grievant) Ksh 563,600
 - b. Austin Mwachai (2nd grievant) Ksh 542,630
 - c. Alfred Amani (3rd grievant) Ksh 520,450
 - d. Walter Otieno (4th grievant) Ksh 509,360
 - e. Juma Omar (5th grievant) Ksh 509,360
 - f. Juma Mwabea (6th grievant) Ksh 509,360
 - g. Ali Mwarandu (7th grievant) Ksh 498,270
 - h. Hassan Karisa (8th grievant) Ksh 498,270
 - i. Stephen Washe Nguru (9th grievant) Ksh 487,180
 - j. Juma Mwagwabi (10th grievant) Ksh 487,180
 - k. Francis Kuya (12th grievant) Ksh 314,000
 - l. Linus Wanyonyi (13th grievant) Ksh 378,634
 - m. Ronald Mashiniko (14th grievant) Ksh 385,886
- Total Ksh 6,204,180
20. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#) 2007.
21. The Respondent shall issue each of the grievants with a Certificate of Service pursuant to Section 51(1) of the [Employment Act](#) 2007. This shall be done within 30 days.
22. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF OCTOBER, 2022.

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Odienge for Claimant

N/A for Respondent

