



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiema v Chandaria Brothers Ltd (Cause 986 of 2016)  
[2022] KEELRC 13331 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13331 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 986 OF 2016  
J RIKA, J  
NOVEMBER 30, 2022**

**BETWEEN**

**DAVID KADO KIEMA ..... CLAIMANT**

**AND**

**CHANDARIA BROTHERS LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed his statement of claim on May 27, 2016. He states that he was employed by the respondent, as a General Worker, from the year 2011, to February 9, 2015, when his services were terminated.
2. He states that termination was unfair and carried out against the backdrop of malicious intentions. He was told that the respondent was reducing its workforce, but a new General Worker took his place, performing the same role the claimant was discharging.
3. He was not paid terminal benefits. The respondent did not remit NSSF contributions over the period of service. He never went on annual leave and was not paid in lieu thereof. He similarly was denied house allowance.
4. His salary as at the time of termination was Kshs 11,800 monthly.
5. He prays the court to declare that termination was unfair and award him the following remedies: -
  - a. 1-month salary in lieu of notice at Kshs 11,800.
  - b. Annual leave at Kshs 33,040.
  - c. House allowance at Kshs 84,960.
  - d. Service at 15 days' salary for each complete year of service at Kshs 23,600.



- e. 12 months' salary in compensation for unfair termination at Kshs 141,600.  
Total ... Kshs 295,000.
- f. Costs and Interest.
6. The respondent filed its statement of response on August 3, 2016. It is agreed that the claimant was employed by the respondent on or about January 2011. He was paid basic salary of Kshs 7,285 and house allowance of Kshs 1,085- total Kshs 8,380. He took all his annual leave. Statutory deductions, including NSSF contribution, were made and remitted.
7. On or about October 15, 2014, the claimant was involved in an accident while at work. It was occasioned by his negligence. He was injured and taken to hospital and thereafter stayed at home to recuperate. The respondent paid his hospital bill and also paid his salary while he was at home. On February 9, 2015, he asked the respondent to give him money to pay hospital bills at Guru Nanak Hospital. He was advised that the Respondent required records for the previous treatment, and a letter from the Doctor, showing the claimant's status, and asking for other payment as may be necessary.
8. From this date, the claimant did not report to work. He refused to collect his salary as he had been doing. He continued to be in the payroll, until June 2015, when it became obvious to the respondent, that he did not intend to report back. He soon after, served the respondent with summons in Case Number CMCC No 3086 of 2015, where he sought work injury benefit from the Respondent. The respondent denies that it terminated the claimant's contract unfairly, and that the claimant merits compensation and the terminal benefits as prayed.
9. The claimant gave evidence and closed his case, on February 16, 2022. A loader, former colleague of the claimant at the respondent, Pius Wambua Kakai, gave evidence for the respondent on June 29, 2022, when the hearing closed. The claim was last mentioned in court on September 28, 2022, when the Parties confirmed filing and service of their Last Submissions.
10. The claimant opened his evidence by withdrawing the prayer for service pay.
11. He told the court that he is currently a Guard, serving the County Government of Kitui. He adopted his Witness Statement on record, which reflects the contents in his Statement of Claim, as summarized above. He conceded that he was injured at work, treated at Guru Nanak Hospital, and that his boss Nimesh, paid the hospital bill. It is not true that he demanded for money to pay the hospital, or that he disappeared from work, after he made this demand. He did not desert. He sued the Respondent for work injury benefit, after he left employment. He received salary up to February 6, 2015. He was never called to return to work.
12. On cross-examination, the claimant told the court that Employees signed a work attendance register. There were days when he was absent. He did not know how many days he was absent, in 2011, 2012, 2013, and 2014. He was injured on October 15, 2014. He returned to work in January 2015. He did not work for 3 months. He last signed attendance register on February 6, 2015. It was the last day worked. He never paid hospital bills directly to the hospital. He did not collect cash from the respondent to this end. Receipts on payments made are with the respondent. The Respondent availed the receipts to the claimant, to enable him pursue work injury benefit. He had not seen NSSF and NHIF Statements and did not know that the deductions had been made and remitted. He filed claim for work injury after he left employment. His last salary was Kshs 11,800 monthly. Nimesh sacked the claimant. He told him that he was reducing staff. He did not issue the claimant a letter of termination. The claimant has not taken into account the days he was absent from work, in pursuing annual leave pay. He was paid in full, for the period of his sickness. He does not claim underpayment of salary. Redirected, the claimant



told the court that Nimesh paid the hospital bills. He failed to attend duty when he was unwell. He was not advised that the days would be deducted from his annual leave.

13. Kakai relied on his Witness Statement, and told the court that the claimant was his colleague, from 2011 to 2015. The claimant was employed after Kakai. Nimesh was boss to both the claimant and Kakai. The claimant was injured at work, and treated at Guru Nanak Hospital. The respondent paid his bill. He was paid his salary throughout during his sickness. It is not true that he was told there was a redundancy situation, where the respondent wished to reduce its workforce. The respondent added, rather than reduced its workforce. The respondent paid statutory dues. The claimant stopped coming to work, when he filed his claim for work injury benefit. He used to go on annual leave, as per documents filed by the respondent. If he reported back to work, the respondent would have continued employing him.
14. Cross-examined, Kakai told the court that he was a Loader. He did not pay Employees their salaries. He did not place them on annual leave. Employees were paid different rates of salary, depending on length of service. They signed a certain book acknowledging payment of salary. He did not have the book in court. The claimant did not go on leave in 2011, 2012, 2013 and 2014. He could have been paid if he had written a demand to be paid. He did not make demand. Injured workers were directed to Guru Nanak Hospital. The claimant was asked to avail hospital records by the respondent. Kakai was not present when the request was made. The claimant continued to be paid his salary until June 2015. Kakai was not able to say why the salary was discontinued. Kakai was familiar with a colleague named Peter Kioko. Kioko had recorded a Witness Statement in the matter, but has since left employment. Kakai did not just rehash the Witness Statement made by Kioko, in his evidence. It is true that he is an Employee of the respondent. Redirected, Kakai restated that the claimant did not go on annual leave, but that he would have been paid, if he had lodged a complaint. He did not lodge a complaint.
15. The issues are whether, the claimant's contract was terminated by the respondent unfairly or at all; and whether he merits the reliefs sought.

#### **The Court Finds:**

16. The claimant worked for the respondent Company for 4 years, between 2011 and February 9, 2015. He was a General Worker. His last salary was Kshs 11,800.
17. He pleads that he was unfairly dismissed by the respondent, " against the backdrop of malicious intentions." He did not give details of malice. He nonetheless avers that he was told by the respondent that the respondent was reducing its workforce. He repeated this in his evidence, saying that Nimesh, advised the claimant, that the Respondent was reducing its workforce.
18. The respondent opted to send to court a colleague of the claimant, himself a Loader at the Respondent, to give the position of the respondent.
19. The court does not attach much weight to the evidence given on behalf of the respondent, by a Non-Management staff. Kakai was not in Management. He did not have anything to do with the claimant's annual leave details; salary details; or the process of termination. He could not explain any of the employment records supplied by the respondent as exhibits. He was not the custodian of these records under Section 74 of the *Employment Act*. He could not speak for the respondent. He did not work in the Respondent's Human Resource Section. He did not have anything to do with the making, or termination, of the Claimant's contract of employment. He was not in Management, and did not have any authority to speak for the respondent. Kakai had no decisional control at the Respondent. He was a Loader, not an Employer. Employers who send subordinate Employees to come and give evidence on behalf of their Enterprises, do a lot of disservice to themselves, in litigation involving them, filed in



various courts. They also do a lot of disservice to such junior Employees, because like Kakai, questions will be asked at the proceedings, which the Employee cannot comprehend.

20. The court shall not therefore attach weight to anything said by Kakai, as being evidence given by the respondent.
21. The uncontested evidence of the claimant, is that he was employed by the respondent as a General Worker. He did not take annual leave for the 4 years worked. He was paid Kshs 11,800 monthly. It was not shown by the Respondent that this salary, included the housing element. He was dismissed on account of redundancy. There is no evidence that he deserted, after a period of illness.
22. The court has taken into account that the claimant was away from work for prolonged period, when he was said to have been taken ill. It would be unreasonable for the court to award annual leave, while the record shows he was away for many months, during which he continued to receive his full pay. An Employee, is under section 30 of the Employment Act, entitled to sick-leave of not less than 7 days with full pay, after 2 consecutive months of service, and thereafter, to sick leave of 7 days with half pay, in each period of 12 consecutive months of service. The claimant by his own evidence, was injured in October 2014. He reported over 3 months later, in February 2015, when he alleges he was told there was no more work for him. Throughout the over 3 months, he was paid his salary in full. He continued to be in the payroll, until June 2015. To award him annual leave pay in arrears, would in the circumstances, amount to unjust enrichment.
23. As observed above, there was no evidence given by a competent Witness for the Respondent, on house allowance paid to the claimant. The prayer for house allowance at 15% of the basic salary of Kshs 11,800 over a period of 4 years is allowed, at Kshs 84,960.
24. The prayer for service pay has been withdrawn.
25. Notice pay equivalent of 1-month gross salary, at Kshs 13,750 is granted.
26. The respondent did not justify termination as required under sections 43 and 47[5] of the Employment Act. There was no valid reason or reasons given, to justify termination. Nimesh advised the claimant that the Respondent was downsizing its workforce, but recruited another Employee to fill the claimant's docket. The reasons given by Kakai are neither here nor there, as he did not have decisional control at the Respondent's. Procedure was not fair. It did not meet the statutory threshold of fairness, under section 40, 41 and 43 of the Employment Act 2007. It would seem to the court that the respondent became tired of the claimant's prolonged sick off, and decided to get rid of him, without considering the dictates of due process. It did little to help the claimant's cause, when he served summons upon the respondent, in pursuit of work injury benefit, shortly after the claimant was out of the workplace. There was little chance that the claimant could return, and continue working. The court would find that termination was not based on valid reason or reasons, and was not preceded by a fair procedure. It was unfair and the claimant merits compensation.
27. He worked for 4 years. His record was clean. There does not seem to have been adverse information, on the claimant's performance and discipline, prior to his being taken ill. He expected to continue working. He secured alternative job as a Security Guard at Kitui County Government. He mitigated loss of employment. He is granted equivalent of 6 ½ months' salary in compensation for unfair termination, at Kshs 89,375.
28. Costs to the claimant.
29. Interest allowed at court rates, from the date of Judgment, till payment is made in full.

In Sum, It Is ordered: -



- a. It is declared that termination was unfair.
- b. The Respondent shall pay to the Claimant: house allowance at Kshs 84,960; notice at Kshs 13,750; and compensation for unfair termination at Kshs 89,375 – total Kshs 188,085.
- c. Costs to the Claimant.
- d. Interest allowed at court rates, from the date of Judgment till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTHY AND JUDICIARY COVID-19 GUIDELINES, THIS 30TH DAY OF NOVEMBER 2022.**

**JAMES RIKA**

**JUDGE**

