



**Mideva v Kaimosi Tea Estates Ltd (Cause 29 of 2021)  
[2022] KEELRC 13276 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13276 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 29 OF 2021  
JW KELI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**SHARON MIDEVA ..... CLAIMANT**

**AND**

**KAIMOSI TEA ESTATES LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant vide undated statement of claim filed in court on the 10<sup>th</sup> July 2017 following her termination from employment by the Respondent sought the following reliefs:-
  - a. Declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the Claimant is entitled to compensation as prayed
  - b. The sum of Kshs. 1,815,870.44/- as set out herein above .
  - c. Costs of this suit and interest at court rates from the time of filing the suit until payment in full and;
  - d. Any other further and better relief the honourable court may deem just and fit to grant.
2. The Claimant together with the memorandum of claim filed her verifying affidavit, claimant's issues for determination, claimant's list of witnesses, claimants witness statement, claimant's list of documents of even date and the bundle of documents at pages 12 to 17 of the bundle.
3. The Claimant in addition filed reply to defence dated 19<sup>th</sup> September 2017 filed in court on the 20<sup>th</sup> September 2017.
4. The claim is opposed. The Respondent entered appearance through the law firm of Wachira Wanjiru & company advocates and filed memorandum of reply dated 31<sup>st</sup> August 2017 and received in court on the 1<sup>st</sup> September 2017 together with respondent's list of documents of even date together with the



bundle of documents paginated 6-33. The Respondent further filed witness statement of Joseph Kitur dated 14<sup>th</sup> September 2020 and of Joshua Kathini dated 14<sup>th</sup> September 2017 on the 27<sup>th</sup> October 2017. The Respondent further filed supplementary list of documents dated 21<sup>st</sup> June 2022 received by court on the 4<sup>th</sup> July 2022 and the bundle of documents.

#### **Claimant's evidence.**

5. The Claimant's case was heard on the 4<sup>th</sup> July 2022 with the claimant testifying on oath as a witness of fact, adopting her statement of claim statement dated 7<sup>th</sup> July 2012 as her evidence in chief, producing bundle of documents under list of documents dated 7<sup>th</sup> July 2017 and relied on prayers under her statement of claim. The claimant was cross examined by counsel for the respondent, Ms.Wachira.

#### **Respondent's evidence.**

6. The Respondent's case was heard on the same date with one of witness of fact namely Joshua Kathini who testified on oath, adopted his statement dated 14<sup>th</sup> September 2017 and the memorandum of response as the respondent's evidence in chief, produced the respondent's documents under list of documents dated 31<sup>st</sup> August 2017 and produced the filed documents as respondent's exhibits numbers 1 and 2 and produced exhibits 3 to 9 under the supplementary list of documents dated 21<sup>st</sup> June 2022. The witness was cross-examined by the Claimant's Counsel Mr. Kirwa.
7. The parties filed written submissions after the hearing.
8. The Claimant's written submissions drawn by Mwakio Kirwa & Company Advocates are dated 20<sup>th</sup> June 2022 and received in court on the 4<sup>th</sup> July 2022.
9. The Respondent's written submissions drawn by Wachira Wanjiru & Company Advocates are dated 19<sup>th</sup> September 2022 and received in court on the 23<sup>rd</sup> September 2022.

#### **Claimant's case.**

10. The Claimant's case as per her statement dated 7<sup>th</sup> July 2017 was that she was employed as a general worker with effect from 6<sup>th</sup> April 2002. That as at time of termination of employment she was earning Kshs. 17,376/-. That she served diligently until 19<sup>th</sup> November 2015 when she alleged her services were orally terminated unfairly. She claims for compensation for unfair termination and other dues as per the claim. .

#### **Respondent's case**

11. The Respondent relied on memorandum of reply, respondent's exhibits under list of documents and witness statement of Joshua Kathini. The case of the Respondent was that the claimant was their employee save that she was earning Kshs. 17,376 with basic salary of Kshs. 10,052/- as at October 2015. That the respondent is a member of Kenya Tea Growers Association which association entered into collective bargaining agreement with Kenya Plantations and Agricultural Workers Union which governs the terms and conditions of employment of employees who are either members of the trade union and unionisable members, that the claimant's employment was terminated on the 18<sup>th</sup> November 2015 on grounds of absenteeism. That before the summary dismissal the claimant was given opportunity to be heard with shop steward present and minutes recorded in her presence. That the Claimant was notified of the reasons for the termination.



## Determination

### Issues for determination

12. The Claimant in their submissions identified the following issues for determination:-
  - a. Whether the Claimant was an employee of the respondent
  - b. Whether the Claimant's termination was illegal, unlawful and unfair
  - c. Whether the reason given by the respondent for the termination of the claimant amounts to a fair reason
  - d. Whether the claimant is entitled to relief's sought.
  - e. Whether the Claimant is entitled to an award of certificate of service.
  - f. Who should pay costs and interest in the suit.
13. The Respondent in its written submissions identified the following issues for determination :-
  - a. Whether the claimant's termination was fair and lawful
  - b. Whether the claimant is entitled to prayers sought
  - c. Who should pay costs of the suit
14. The court upon carefully considering the case of both parties and the issues they had addressed was of the considered opinion the issues placed before court for determination of the dispute are as follows:-
  - a. Whether the Claimant's dismissal from employment was fair and lawful
  - b. Whether claimant is entitled to reliefs sought

### The relevant law

15. Section 43 of the [Employment Act](#) addresses proof of termination as follows:-
  - “(a) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
  - (b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.”
16. Section 44 (4) of the [Employment Act](#) provides for justifiable and lawful grounds for dismissal from employment, inter alia if:-
  - (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
  - (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,



- (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
17. Section 45 (2) of the [Employment Act](#) provides that a termination of Employment by an employer is unfair if the employer fails to prove:-
- a. The reason for the termination is a fair reason:-
    - i. Related to the employees conduct, capacity or compatibility or
    - ii. Based on the operational requirements of the employer.
18. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.
19. Section 47(5) of the [Employment Act](#) provides for burden of proof in claims for wrongful dismissal as follows:
- “(5) For any complaint of unfair termination of Employment or wrongful dismissal the burden of proving that unfair termination of Employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
20. Thus the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.
21. Section 41 of the [Employment Act](#) provides for procedural fairness as follows:- ‘41. (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.”
22. In the event the employer is contemplating termination of employment vide summary dismissal under section 44 of the [Employment Act](#), the employee is entitled to hearing pursuant to the provisions of section 41(2) to wit: -“(2) Notwithstanding any other provision of this Part, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.” The court finds and determines this was the applicable law in .the instant claim.

**Issue 1. Whether the Claimant’s dismissal from employment was fair and lawful.**

23. There are two components of the fairness in termination of employment being existence of valid or justified reasons (section 43 and 45(2) of the [Employment Act](#) ) and procedural fairness under section 41 of the [Employment Act](#).
24. Section 45(2) of the [Employment Act](#)(supra). Section 45 (2) summarizes fair reasons for termination to be:

“The reason for the termination is a fair reason:-



- iii. Related to the employees conduct, capacity or compatibility or
- iv. Based on the operational requirements of the employer.”

### **Claimant’s evidence**

25. The Claimant relied on her list of documents dated 7<sup>th</sup> July 2017. The Claimant told the court that on 15<sup>th</sup> November 2015 she was told by one Evelyn to go to the office of the supervisor and was not heard. She also went next day and was not heard. That on 18<sup>th</sup> November together with other two persons she was abused and chased out by Mr. Kathini, the supervisor. That on the 16<sup>th</sup> November 2015 she reported to work and it was the supervisor who recorded attendance. That she did not receive the show cause letter, she was called but did not attend the hearing. She denied membership to the union. On cross-examination, the claimant denied her statement that she worked on that day and was stopped because she did not meet the kilo.(paragraph 5 of statement dated 7<sup>th</sup> July 2017). The claimant admitted that on the 16<sup>th</sup> November she met Caleb and Ibrahim and that she had sired children with both men. She denied they fought. The Claimant admitted that she was aware of the employer understanding with the union to speak for the employees and there was deduction of money to the union to address employees issues. She admitted the union had leaders and added she did not bother with them. The claimant denied she thump prints and stated she signs by name. on re examination stated that if Caleb and Ibrahim with whom she had children with fought it was their issue.

### **Respondent’s evidence**

26. The Respondent’s witness Joshua Kathini (RW) relied on his statement dated 14<sup>th</sup> September 2020 as evidence in chief, relied on the response to the claim dated 31<sup>st</sup> August 2017 and the list of documents of even date produced as exhibit 1 and 2. Produced as exhibits 3 to 9 documents under supplementary list of documents dated 21<sup>st</sup> June 2022. RW told the court the last date of work for the claimant was 18<sup>th</sup> November 2015 as indicated in the payslip. That the date of 16<sup>th</sup> November 2015 was missing on the payslip as the claimant did not attend work. The Claimant did not sign the dismissal letter dated 18<sup>th</sup> November 2015 as she did not appear. That on the produced minutes is the claimant’s thumbprint against her name and the shop stewards also signed.
27. During cross-examination RW told the court the employer did not keep record of union membership and the record was per the payslip. He confirmed every union member had union number. RW understood requirement to issue notice to show cause personally to the worker. RW told the court that Caleb and Ibrahim were both adults and workers of the respondent. RW had no evidence that the claimant was at the servants quarters on the 16<sup>th</sup> November 2015. RW states that the claimant admitted allegation as per the minutes written by Joseph Kitur the field supervisor. RW told the court the minutes were read out to the claimant by Mr. Kitur who he said had recorded statement in court.
28. RW told the court that camp elders could not trace the claimant in her house to issue the summary dismissal notice. That the NTSC was served by the union representative. RW confirmed the claimant had not issued union membership to the employer, no warning letter had been issued to the claimant, the CBA clause 23 provided for 3 warning letters and that the claimant had no previous warning letters.
29. On re-examination the RW told the court clause 25(a) on absenteeism is a ground of summary dismissal. That clause 1 of the CBA provides for agency fees.



## **Court decision on the reason for termination**

### **Analysis of the evidence**

30. The summary dismissal letter of 18<sup>th</sup> November 2018(exhibit 4) titled absenteeism from work and threat to employer property destruction stated that it referred to meeting held on 18<sup>th</sup> November 2015 between Sharon Mideya, shop steward and the management. That the claimant knowingly absented herself from place of work on Monday 16<sup>th</sup> November 2015, that on same day due to her promiscuous behavior she caused fight between two male workers in the management servant quarters an act detrimental to the employer's property. Based on CBA clause 25(a) and (g) it was unanimously agreed her contract be terminated summarily on gross misconduct.
31. The Claimant admitted that she was called on 18<sup>th</sup> November but denied attendance to the hearing. She told the Court that Origi of the union was called by the company. The Claimant told the court she was illiterate yet denied she thumb printed as indicated in the minutes stating she signs against her name. The claimant admitted she had children with Caleb and Ibrahim and denied they fought.
32. In her witness statement the claimant stated that she was orally dismissed on allegation she did not meet her target standard kilograms required per day of which she denied at cross- examination. In paragraph 5 of the reply to the memorandum of response the claimant avers that she was terminated on 19<sup>th</sup> November 2015 on grounds of absenteeism on 16<sup>th</sup> November without being heard.

### **Finding on validity of the reasons for dismissal**

33. The court finds that the claimant was unionisable and under the CBA. Clause 1 of the CBA(Respondent's exhibit 1 ) states that each unionisable employee covered by the CBA who is not a member of KPAW shall be required to pay agency fees in accordance with section 49 of the Labor Relations Act 2007. The claimant was bound by the CBA as per the terms of letter of employment (exhibit 2 of the claimant).The claimant was dismissed for absenteeism on the 16<sup>th</sup> November 2015 as admitted in paragraph 5 of her reply to defence and as per letter of dismissal dated 18<sup>th</sup> November 2015. The court found evidence of her absence from duty in the November payslip( respondent's exhibit 4) which does not have attendance record of 16<sup>th</sup> November. The payslip also includes kilograms harvested on each day of which the employee is paid productivity bonus end month. The claimant was not to blame for the fighting of the two adults and the employer cannot penalize her for that.
34. The Claimant produced her October payslip which had Kshs. 201.04 deducted as union dues. The claimant contradicted herself in her written statement and oral testimony on the reason for the dismissal. From her oral testimony she had met Caleb and Ibrahim on the date of alleged absenteeism. She was absent on the 16<sup>th</sup> from the November pay slip attendance record.
35. The court found on balance of probabilities from the foregoing and taking into account the November pay slip, Claimant's admission that she met Caleb and Ibrahim on the 16<sup>th</sup> November 2015 as well as contradiction in her evidence. Absenteeism from place of work is a valid reason for summary dismissal.

### **On the procedural fairness**

36. RW admitted that the NTSC was issued to the union representative and not the claimant. The said letter was allegedly dated 17<sup>th</sup> November 2015. The hearing took place on the 18<sup>th</sup> November 2015 as per the minutes. Section 41(2) of the *Employment Act* provides for the mandatory process to be complied with before the termination of employment on basis of summary dismissal. The employee must be explained in a language they understand the reason the employer is contemplating the dismissal



in the presence of fellow employee or union representative and given opportunity to be heard. This is a mandatory procedure. The Claimant stated she was dismissed without being heard. From the evidence before the court, the court deduced that the claimant did attend a meeting accompanied by the union members. The court also found she was represented by the union by virtue of agency fees as deducted under clause 1 of the CBA. The court faults the process for failure to personally issue NTSC to the claimant and ambushing her with the union representative to discuss her conduct as stated in the statement by RW. The court finds that her association with the 2 men who the employer stated she was a concubine weighed heavily on her dismissal rather than the absence from work. The lack of advance notice personally to the claimant, whose job was at risk and not the union representative, of the charges for which the employer was contemplating the termination tainted the procedural fairness. The finding is consistent with the decisions of the court cited in *Kenya Tertiary & Schools Workers Union v Ananda Marga Academy*(2019) eKLR where the court finds the employee was issued with notice to explain whereabouts, and in *Anthony Mkala Chivati v Malindi Water & Sewage Company Limited* (2013) eKLR where the court highlighted the first ingredient of procedural fairness being for the employer to inform the employee as to what charges the employer was contemplating using to dismiss the employee.

The court for the foregoing reason finds and determines the procedure leading to the summary dismissal was unfair.

### **Whether the claimant is entitled to reliefs sought**

#### **Claim for house allowance**

37. During the hearing the court struck off the record produced of housing record for not being original record and the number being different. Consequently, the court reverts to the produced payslip which did not have housing allowance. The claimant submits that the burden to prove terms of contract lay with the Employer under section 10(7) of the *Employment Act*. The employer relied on the CBA clause 16 which provides the employer will provide housing or paid housing allowance. The Respondent in their submissions relied on the housing register but as per the record of the proceedings the same was not admitted as evidence having been struck off the record.

Consequently, the court find no prove of provision of housing. Section 31 of the *Employment Act* reads:- ‘31. Housing (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation. (2) This section shall not apply to an employee whose contract of service— (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).’

38. The court considered the payslip by the claimant (exhibit 4). The claimant was only paid basic salary and productivity bonus. The basic salary was Kshs. 10,052.- The CBA CLAUSE 16 provides for pay of unhoused employees at 15% of basic wages as the housing allowance. Thus 15/100x 10,052/- total housing allowance award at Kshs. 1507.80. under section 90 of the *Employment Act* the claim in arrears is limited to 3 years. Which the court awards as follows 1507.80x12 months x 3 years total award of housing allowance arrears Kshs. 54,280.80/-.



### **Notice pay in lieu**

39. Having found unfair and unlawful termination the claimant is entitled to notice pay of 1 months as sought. The court awards the claimant notice pay of 1 month in lieu for- Kshs. 10,052.-/- plus housing allowance 1507.80. Total one month salary notice pay of Kshs. 11,559.80 awarded. The productivity bonus is not applicable as it is dependent on productivity.

### **Compensation for unfair termination**

40. The court having found unprocedural fairness considered the relief for compensation. The court considered the employee by conduct contributed to her dismissal and hence not entitled to maximum compensation. The claimant had served effective 6<sup>th</sup> April 2002 (letter of employment dated 1<sup>st</sup> February 2007 exhibit 1) to 18<sup>th</sup> November 2015 (letter of dismissal) making a period of approximately 13 years, she had no history of warning letters, she was a single mother and reinstatement was not an option due to time limitation and the other terminal dues were negligent being NSSF only. The court finds and determines compensation the equivalent of 10 months gross salary fair and justified compensation. The monthly salary being Kshs. 10,052.-/- (basic salary under October 2015 pay slip) plus housing allowance of Kshs. 1507.80 total monthly salary Kshs. 11,559.80. The claimant is awarded compensation for unfair termination at total Kshs. 11,559.80 x 10 months making award of Kshs. 115,590.80/-.

### **Leave claim**

41. The Respondent produced leave record for 2015 indicating the claimant went on leave for 26 days (exhibit 9). During cross-examination the claimant told the court she went on leave in 2015 but did not go on leave for the time she was sacked. Clause 9 of the CBA provided for 26 days annual leave for employees who have served over 5 years of continuous service. The court finds and determines the claimant took her annual leave of 26 days in 2015. The claim for leave is dismissed.

### **Claim for overtime**

42. Overtime is a claim that requires strict proof. The court found the claimant was compensated for productivity under her payslip. The claim for overtime fails.

### **Service pay**

43. The Claimant sought payment of service pay for every 15 days worked. The claimant submits that they rely on the CBA dated 6<sup>th</sup> June 2012 (produced by the respondent) and also section 35 (5) of the *Employment Act* and a decision of the court in *Elijah Kipkoros Tonui V Ngara Operations t/a Bright Eyes Limited* (2014) e KLR where the court held that 15 days service pay under redundancy law was the bare statutory minimum.
44. The Respondent submits that at the hearing the claimant indicated they would not be pursuing the claim of service pay. The court perused its record and did not find such withdrawal. The respondent further submits that the claimant having been under NSSF as evidenced by the payslips before court (September, October, November 2015, exhibit 4 by respondent) and having been dismissed for gross misconduct the gratuity under the CBA was not payable. That section 35 states service pay is not payable where the employee was under NSSF.
45. Clause 32(d) of the CBA states that an employee who is dismissed or terminated for gross misconduct shall not be entitled to gratuity. The claimant was dismissed for gross misconduct under clause 25(a)



of the CBA being absent from place proper and appointed for performance of work. The CBA is a binding contract between the parties and the court cannot re write the contract. By her conduct the claimant released herself from the gratuity.

46. The Court considered *Elijah Kipkoros Tonui v Ngara Operations t/a Bright Eyes Limited* (2014) eKLR and found that the decision is not applicable. Section 35(6) excludes payment of service pay where NSSF is applicable.
47. The claim for service pay fails.

#### **Certificate of service**

48. The claim is allowed certificate of service being a statutory right of every employee on exit from employment notwithstanding the reasons for their employment termination under section 51 of the [Employment Act](#).

#### **Costs**

49. The Claimant has substantially succeeded in her claim and is awarded costs of the suit payable by the respondent.

#### **Conclusion and disposition**

50. The Court enters judgment for the claimant against the Respondent as follows: -
  - a. A declaration that the claimant's termination from employment was procedurally unfair.
  - b. Compensation award the equivalent of 10 months salary for total sum of Kshs. 115,590.80/-.
  - c. Notice payment in lieu for Kshs. 11,559.80/- .
  - d. Award housing allowance of Kshs. 54,280.80/- . (awards in b, c and d above subject to statutory deductions).
  - e. The Respondent to issue the Claimant with certificates of service pursuant to the provisions of section 51 of the [Employment Act](#).
  - f. The Claimant is awarded interest on award amounts at court rates from date of judgment until payment in full.
  - g. The Claimant is awarded costs of the suit.

51. Stay 30 days.

52. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> NOVEMBER, 2022 IN OPEN COURT AT BUNGOMA.**

**J. W. KELI,  
JUDGE.**

**In the presence of:-**

Court Assistant -Brenda Wesonga



For Claimant: Kirwa

For Respondent : Ms Wachira

