



**Kenya Union of Commercial, Food and Allied Workers Union v Jamii Distributors E.A. Limited (Cause E09 of 2021) [2022] KEELRC 13407 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13407 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E09 OF 2021  
NJ ABUODHA, J  
NOVEMBER 21, 2022**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS  
UNION ..... CLAIMANT**

**AND**

**JAMII DISTRIBUTORS E.A. LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claim herein was instituted by the claimant *vide* a memorandum of claim filed in court on February 24, 2021, on behalf of four grievants, against the respondent for unlawful termination. The claimant sought the following orders;
  - i. That the respondent's actions be declared unprocedural, unfair and unlawful
  - ii. That the respondent be ordered to reinstate the grievants back to employment unconditionally
  - iii. In the event that the court does not grant prayer 1& 2 above, the court orders as follows;
    - 1) Rosyn Aswani(1<sup>st</sup> grievant)
      - a. One month pay *in lieu* of notice Kshs 15,000
      - b. 4 days worked in March 2019 Kshs 2,000
      - c. One year pending leave Kshs 15,000
      - d. 10 months *pro rata* leave Kshs 8,750
      - e. Salary underpayment as a sales person from May 2017 to March 2019 Kshs 192,082
      - f. 12 months compensation Kshs 180,000



Total Kshs 412,832

- 2) Gideon Kipkirui(2<sup>nd</sup> grievant)
  - a. One month pay *in lieu* of notice Kshs 10,500
  - b. 1 year leave 10,500 x 21 x1/30 Kshs 7,350
  - c. 1 year severance pay 10,500 x 15x1/30 Kshs 5,250
  - d. One year public holidays 9x600 Kshs 5,400
  - e. 8 months underpayment Kshs 31,200
  - f. January 2019 salary Kshs 10,500
  - g. 12 months compensation Kshs 126,000

Total Kshs 196,200
- 3) Evans Koech(3<sup>rd</sup> grievant)
  - a. One month pay *in lieu* of notice Kshs 12,000
  - b. 1 year leave 12000 x 21 x1/30 Kshs 8,400
  - c. 9 months prorated leave 12,000x1.75x 9/30 Kshs 6,300
  - d. 1 year,9 months holidays 15x 800 Kshs 12,000
  - e. 1 year severance pay 12,000 x 15x1/30 Kshs 6,000
  - f. 21 months salary underpayment Kshs 50,400
  - g. January 2019 salary Kshs 12,000
  - h. 12 months compensation Kshs 144,000

Total Kshs 265,700
4. Noah Kiprotich(4<sup>th</sup> grievant)
  - a. One month pay *in lieu* of notice Kshs 10,500
  - b. 6months prorated leave 10,500 x1.75x6/30 Kshs 3,675
  - c. Salary for November and December 2018 Kshs 21,000
  - d. 6 months salary underpayment Kshs 21,000
  - e. 12 months compensation Kshs 126,000

Total Kshs 182,175

  - iv. Certificate of service
  - v. Costs of the suit
  - vi. Any other relief that the honourable court may deem fit to grant



2. In that memorandum of claim, the claimant averred that it does not have a recognition agreement or a collective bargaining agreement, but that the grievants are members of the claimant trade union and are fully paid up members.
3. According to the claimant, the 1<sup>st</sup> grievant was verbally employed by the respondent in May 2017 as a sales person with a gross salary of Kshs 15,000.
4. It was stated that on March 4, 2019, the 1<sup>st</sup> grievant reported to work and Mr Kimutai, the supervisor, informed her to go back home as the director Mr Bharat Krishna did not want to see her at the business premises.
5. As regards the 2<sup>nd</sup> grievant, Gideon Kipkurui, it is contended that he was verbally employed by the respondent on January 27, 2018 as a loader being paid Kshs 400 per day and later on, he was promoted to a turnboy from June 4, 2018 earning a salary of Kshs 10,500 per month.
6. It is alleged that on February 4, 2019, while working at the store at around 4pm, Bharat the director terminated him from employment by informing the 2<sup>nd</sup> grievant to leave the business premises since services were no longer needed.
7. Mr Evans Koech, the 3<sup>rd</sup> grievant, according to the claimant, was also employed verbally on November 23, 2017 as a turn boy at a salary of Kshs 10,500 per month and his salary was later increased to Kshs 12,000 per month effective from August 1, 2018.
8. It was alleged that on February 6, 2019, the 3<sup>rd</sup> grievant reported to work as usual and at around 11 am he was called by the accountant and accused of stealing Kshs 30,000, where he was taken to the police station, detained for two days and later released without any charges being preferred against him. According to the claimant, he reported to work on February 9, 2019 after being released from custody where Mr Kimutai, in charge of transport terminated his services on the allegation that he was a thief.
9. The 4<sup>th</sup> grievant, Noah Kiprotich according to the claimant, was verbally employed by the respondent on June 17, 2017 as a turn boy being paid at Kshs 10,500.
10. It was alleged that the 4<sup>th</sup> grievant employment services were terminated on January 1, 2018 because several biscuits were broken while on transit.
11. The grievants reported to the claimant upon being terminated from employment, where they are members and that the claimant wrote demand letters to the respondent demanding the grievants immediate and unconditional reinstatement but the respondent never acted or defended their actions hence the instant suit.
12. The respondent did not enter appearance nor file a response to this claim. The court issued directions on the suit on July 13, 2021 and the matter proceeded to formal proof on June 10, 2022.

### **The Grievants Evidence**

13. The 1<sup>st</sup> grievant, Rolyn Aswani testified as CW1. She stated that she was employed by the respondent in May 2017. CW1 further stated that in March 2019 while at work, she was told by the supervisor to leave the premises as the director did not want to see her again. CW1 maintained that she was not given a reason for her dismissal nor issued with a show cause letter. She also stated that she was never called for a disciplinary meeting. CW1 prayed for the court to order for her compensation for unfair termination and also for payment of her terminal dues.
14. Gideon Kipkurui, the 2<sup>nd</sup> grievant testified as CW2. He stated that he was employed by respondent on January 27, 2018 as a turn boy. He stated that he was called one day and told to leave the work



- premises and to never go back, without any reason . He further stated that he was never issued with a show cause letter and that he was never invited for a disciplinary meeting. His prayers to court was for compensation for unfair termination and payment of his terminal dues.
15. CW3 was the 3<sup>rd</sup> grievant, Evans Koech. According to CW3, he was employed by the respondent on November 23, 2017 as a turn boy. He stated that he was called one day called by the supervisor and accused of stealing KShs 30,000; that he was taken to the police station where he recorded his statement, locked for 2 days and later on released without any charges being preferred on him. He stated that he went back to work on February 9, 2019 where his services were terminated on the grounds that he was a thief. CW3 maintained that he was not paid his terminal dues and that his prayers to court was for compensation and payment of his terminal dues.
  16. The 4<sup>th</sup> grievant, Noah Kiprotich testified as CW4 and contended that he was employed by the respondent on November 17, 2017 as a turn boy. His testimony was that he was terminated because some of the biscuits which were being delivered to a customer crushed. He prayed to be compensated and be paid his terminal dues.
  17. With that evidence, the claimant closed its case and the court directed it to file written submissions.
  18. The claimant filed its submissions on June 28, 2022.

#### **Determination**

19. I have considered the pleadings on record, the evidence tendered in court and the claimant's submissions and I find the issues for determination to be;
  - a. Whether the grievants were employees of the respondent
  - b. Whether the termination of the grievants from employments was unfair and unlawful
  - c. What reliefs should issue to the grievants.
20. On the first issue, it is important that I address the same although it has not been raised in this claim.
21. From a perusal of the record and particularly the claimant's documents filed in court on February 24, 2021, the respondent herein, through its director one Bharat Krishna Pavuluri wrote a letter to the claimant where the respondent denied being the employer of the grievants and maintained that all their employees are employed through Real Carriers Ltd who supply manpower to the respondent.
22. The claimant on the other hand maintained that the grievants were employees of the respondent
23. In my view, the issue of the nature of the relationship between the grievants and the respondent is an issue that could have been proved through evidence and considering that the respondent chose not to participate in these proceedings, the balance of probability tilts in favour of the grievants. I therefore find and hold that the grievants were employees of the respondent.
24. As regards the issue as to whether the grievants termination was unfair and unlawful, it is now settled that before an employer terminates the services of an employee, the threshold that must be met is procedural fairness as stipulated under sections 41 and 45 of the [Employment Act](#) and substantive justification for the termination as provided under sections 43 and 45 of the [Employment Act](#).
25. Section 43 (1) of the [Act](#) provides that:

“In any claim arising out of termination of a 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 of the act.”

26. The grievants while giving their testimony contended that they were not issued with show cause letters and neither were they taken through the disciplinary process.
27. Noting that no evidence was tendered before this court to confirm that the provisions of section 43 and 45 were complied with before the grievants services were terminated by the respondent, it therefore follows that the dismissal of the grievants was not grounded on a valid and fair reason, and therefore was unfair and unlawful within the meaning of section 45 of the Employment Act.
28. Having found that the termination of the grievants was unfair and unlawful, I find that they are entitled to damages for unfair and unlawful termination by dint of section 49(1) of the Employment Act.
29. In the end, I find the claimant’s claim to be meritorious and enter judgement as follows;
  - a. A declaration is hereby made that the grievants termination from employment was unfair and thus unlawful. Regarding the quantum of compensation, the respondent never tendered any evidence to rebut the allegations as to the circumstances under which the grievants were terminated. The court had no material to the contrary hence the claims sought by the claimants will be granted as prayed in the claim. That is to say:
    - i. Rosyn Aswani Kshs 412,832
    - ii. Gideon Kipkirui Kshs 196,200
    - iii. Evans Koech Kshs 265,700
    - iv. Noah Kiprotich Kshs 182,175
  - b. Costs of this suit and interests on at court rates from the time of filing suit until payment in full
  - c. A certificate of service to be issued by the respondent to the four grievants.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022**

**Abuodha Nelson Jorum**

**Judge ELRC**

