



**Mishahame & 4 others v Riley Services Limited (Cause 911 of 2017)
[2022] KEELRC 13214 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13214 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 911 OF 2017
AK NZEI, J
NOVEMBER 10, 2022**

BETWEEN

**SALIM MWINYI MISHAHAME 1ST CLAIMANT
CHIRUNGA MBUDZYA NGORA 2ND CLAIMANT
JOHNSONN JILO DHIDHA 3RD CLAIMANT
RAYANA HIRIBAE ABAE 4TH CLAIMANT
JAMES WAMBUA MUSEMBI 5TH CLAIMANT**

AND

RILEY SERVICES LIMITED RESPONDENT

JUDGMENT

1. The five Claimants herein sued the Respondent vide a Memorandum of Claim dated December 5, 2017 and pleaded that the Claimants were at all material times employees of the Respondent, having been employed on diverse dates without formal contract letters as follows:-
 - a. that the 1st Claimant was employed on May 31, 2013, earning a monthly salary of 8,105, and was terminated on August 30, 2017.
 - b. that the 2nd Claimant was employed on January 1, 2015, earning a monthly salary of Kshs 8,105, and was terminated on August 30, 2017.
 - c. that the 3rd Claimant was employed on May 31, 2015, earning a monthly salary of Kshs 8,105, and was terminated on August 30, 2017.
 - d. that the 4th Claimant was employed on April 24, 2015, earning a monthly salary of Kshs 8,105, and was terminated on August 30, 2017.



- e. that the 5th Claimant was employed on May 7, 2016, earning a monthly salary of Kshs 8,105, and was terminated on August 30, 2017.
2. The Claimants pleading that they were summarily dismissed from employment on August 30, 2017 on unfounded allegations of collusion with suspected thugs to steal.
 3. The Claimants further pleaded that they were not accorded a fair hearing as there was no fair, proper and lawful disciplinary process, to which they were entitled.
 4. It was the Claimant's further pleading that they were not given any reason for their termination, that they were not notified of the impending termination or paid in lieu thereof, and that the decision to terminate their employment was unfair, unprocedural and unlawful since the requirements set out in the Employment Act 2007 were not adhered to.
 5. The Claimants further pleaded that they were, without justifiable cause, unfairly dismissed from employment and were not issued with certificates of service, contrary to the law.
 6. The Claimants set out their claim against the Respondent as follows:-

Salim Mwinyi Mishihame (1st Claimant)

- a) one month salary in lie of noticeKshs 14,421
- b) underpayment of wages;
 - (i) for the year 2015-2016 (12,221-8,105)
X 12 months Kshs 50,220
 - (ii) for the year 2016-2017 (12,221-8,105)
X 12 months Kshs 50,220
 - (iii) May – August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624
- c) leave pay for May 2013-2017.....Kshs 57,684
- d) 12 months compensation for unfair termination
(12 months X14,421)Kshs 173,052
Total Kshs 371,221

Chirunga Mbudzya Ngoka (2nd Claimant)

- a. One month salary in lieu of noticeKshs 14,421
- b. Underpayment of wages
 - i. For the year 2015 -2016 (skh. 12,221-8,105)
X 12 monthsKshs 50,220
 - ii. For the year 2016-2017 (Kshs 12,221-8,105)
X 12 monthsKshs 50,220
 - iii. May 2017-August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624



- c. Leave ay for 2015-2017.....Kshs 28,842
 - d. 12 months compensation for unfair termination
(12 months X Kshs 14,421).....Kshs 173,052
- Total Kshs 342,379

Johnson Jilo Dhidha (3rd Claimant)

- a. One month salary in lieu of noticeKshs 14,421
- b. Underpayment of wages
 - i. For the year 2015-2016 (Kshs 12,221-8,105)
X 12 monthsKshs 50,220
 - ii. For the year 2016-2017 (Ksh 12,221-8,105)
X 12 monthsKshs 50,220
 - iii. May 2017-August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624

- c. Leave pay for 2015-2017Kshs 28,842
 - d. 12 months compensation for unfair termination .
(12 months X Kshs 14,421)Kshs 173,052
- Total Kshs 342,379

Rayan Hiribae Abae (4th Claimant)

- a. One month salary in lieu of noticeKshs 14,421
- b. Underpayment of wages
 - i. For the year 2015-2016 (Kshs 12,221-8,105)
X 12 monthsKshs 50,220
 - ii. For the year 2016-2017 (Ksh 12,221-8,105)
X 12 monthsKshs 50,220
 - iii. May 2017-August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624

- c. Leave pay for 2015-2017Kshs 28,842
 - d. 12 months compensation for unfair termination
(12 months X Kshs 14,421)Kshs 173,052
- Total Kshs 342,379

James Wambua Musembi (5th Claimant)

- a. One month salary in lieu of noticeKshs 14,421
- b. Underpayment of wages



- i. For the year 2016-2017 (Kshs 14,421-8,105)
X 12 monthsKshs 50,220
 - ii. May 2017-August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624
 - c. Leave pay for 2016-2017Kshs 15,531
 - d. 12 months compensation for unfair termination
(12 months X Kshs 14,421)Kshs 173,052
Total Kshs 278,848
- 7. The Claimants further prayed that the termination of their employment be declared unfair and unlawful, that they be issued with certificates of service, and that they be awarded costs of the suit and interest at Court rates.
- 8. The Claimants also filed their respective written witness statements dated December 5, 2017 and a list of documents dated the same date, both of which accompanied the memorandum of claim. Documents listed on the said list of documents included copies of some of the Claimants' payslips and Regulations of Wages [General] (Amendment) Order, 2015 and Regulation of Wages [General] (Amendment) Order 2017, among other documents.
- 9. It should be noted at this point that the minimum wage of a night watchman in Nairobi, Mombasa and Kisumu under the 2015 Wage Order was Kshs 12,221, and that the minimum wage of the same category of workers (night watchman) in Nairobi, Mombasa and Kisumu) under the 2017 Wage Order was Kshs 14,421.
- 10. On May 30, 2018, the Respondent filed a Memorandum of Rely and Counter-Claim, and admitted having had the Claimants in its employment as guards. The Respondent pleaded that under the Claimants' watch, a theft occurred at KPLC Mbaraki on August 30, 2017, upon which the Claimants were arrested by the police and charged and that a criminal case No 1328 of 2017, is pending in Court. the Respondent denied having terminated the Claimants wrongfully.
- 11. The Respondent further denied the claim for leave pay and wage underpayment and counter-claimed Kshs 600,000 against the claimants, being the value of three rolls of transformer copper windings which were allegedly stolen due to the Claimants' collusion and failure to avert a theft.
- 12. On November 1, 2018, the Claimants filed Reply to the Respondent's Response and Response to the Respondent's counter-claim.
- 13. When trial opened on September 25, 2019, the 3rd Claimant's claim for leave pay was withdrawn, and the 3rd and 2nd Claimants testified as the Claimants' witness No 1 and No 2 respectively, on their own behalf and on behalf of the other Claimants. The 3rd Claimant adopted his recorded witness statement as his testimony, and produced in evidence the documents listed on the Claimants' list of documents. The 2nd Claimant testified and adopted his filed witness statement as his testimony. Both witnesses were cross-examined by the Respondent and were re-examined.
- 14. The 3rd Claimant further testified:-
 - a. that the Claimants were terminated on August 30, 2017, and were earning Kshs 8,105 per month, inclusive of house allowance.



- b. that the Claimants were not issued with termination letters, but were told to go away by the General Supervisor.
 - c. that the Claimants were employed as night guards.
15. Cross-examined, the 3rd Claimant testified that a theft incident occurred on August 30, 2017 at night while he was on duty. That thieves gained access to where the Claimants were guarding by jumping over the fence. That the thieves were armed while the Claimants only had rungun and whistles.
16. The Respondent's witness, one Elijah Cheruiyot (RW-1), the Respondent's Mombasa Branch Manager, adopted his witness statement dated April 28, 2022 as his testimony, and produced the documents listed on the Respondent's list of documents, save for the document listed as item No 3 in the said list (CCTV footages) which were not availed in Court.
17. The witness (RW-1) further testified: -
 - a. that the Claimants are entitled to leave pay if they did not proceed on leave.
 - b. that it was not possible to issue the Claimants with one month termination notice after their arrest and arraignment in Court.
 - c. that the Respondent was not underpaying the Claimants and that the Court should determine what is due to the Claimants.
 - d. that the Claimants should pay the Respondent the counter-claimed sum, being the sum adjudged against the Respondent upon being sued by KPLC (over the stolen property).
18. Cross-examined by the counsel for the Claimants; the Respondent's witness (RW-1) testified that the Respondent did not terminate the Claimant's employment, but had not been paying their salaries, and that the witness did not know whether the Claimants had been paid any salaries after August 30, 2017.
19. RW-1 further testified that the Claimants had not been found with any stolen property, and had not been found guilty by any Court as the criminal case against them was still pending; and that the Respondent had not conducted any disciplinary proceedings against the Claimants after the alleged theft. The witness further told the Court that there was no evidence to show that the Claimants were accomplices in the alleged theft as an alleged CCTV footage did not form part of the evidence presented in Court.
20. The Respondent's witness (RW-1) further testified, under cross-examination, that the Respondent had no evidence to show that it had paid the counter-claimed sum of Kshs 600,000 to KPLC(in connection with the alleged theft incident); and that he had no evidence to show that the Claimants ever proceeded on leave.
21. Upon considering the pleadings filed by the parties and evidence adduced thereon, issues that emerge for determination are:-
 - a. whether termination of the Claimant's employment was unfair.
 - b. whether the Claimants are entitled to the reliefs sought.
22. It is not in dispute that the Claimants were employed by the Respondent, and it is also not disputed that the Claimants stopped working on August 30, 2017. The Claimants testified that they were on August 30, 2017 told by the Respondent's General Supervisor to go away and were not given written termination letters. The Respondent did not controvert this evidence. RW-1 testified that he had no evidence to show that the Claimants were paid any salary after August 30, 2017 or that any disciplinary



proceedings were initiated against them for desertion. The fact of the Claimants' termination on August 30, 2017 is therefore not in dispute.

23. Section 41 of the *Employment act* sets out a mandatory procedure that must be adhered to by any employer considering termination of an employee's employment. The Section 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.”

24. The Respondent did not demonstrate that it in any way complied with the foregoing mandatory procedural requirements.

25. Further, the validity of the allegation of the Claimants having been accomplices in the alleged theft that led to termination of their employment was not proved. The Claimants were not subjected to any disciplinary proceedings before termination of their employment and were not given an opportunity to be heard. Further, the Respondent did not make any effort to prove the validity of its allegations against the claimants before this Court.

26. It was held as follows in the case of *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

27. In the case of *Kenfright [EA] Limtied v Benson K Nguti [2016] eKLR*, the Court of Appeal noted that a termination is considered unfair if the employer fails to demonstrate that the reason for the termination is valid and fair, and is related to the employee's conduct, capacity and compatibility or is based on the employer's operational requirements. That the employer must also prove that the termination was in accordance with fair procedure. The Court noted that Section 43 of the *Employment Act* places the burden of proving fairness of termination on the employer, while the employee's burden is limited only to asserting that an unfair termination has occurred.

28. I make a finding that termination of the Claimants' employment was procedurally and substantively unfair, and I so declare.

29. On the second issue, and having found that termination of the Claimants' employment was unfair, I award each of the five Claimants the equivalent of six months' salary for unfair termination of employment, at a rate which I will shortly determine in this Judgment.

30. On the claim for underpayment of wages, the Claimants exhibited copies of the Minimum Wage Guidelines issued in 2015 and 2017 respectively. Under the 2015 Minimum Wage Guidelines, the



minimum monthly wage for a night watchman working in Nairobi, Mombasa and Kisumu was Kshs 12,221, while the minimum wage for the same category of workers was Kshs 14,421 under the 2017 Minimum Wage Guidelines. This position was not controverted by the Respondent. The Claimants pleaded and testified that the Respondent paid them Kshs 8,105 per month throughout their respective periods of employment, and the Respondent did not present any evidence showing otherwise.

31. I make a finding that the Claimants' respective gross monthly salaries at the time of termination on August 30, 2017 were Kshs 14,421. Compensation for unfair termination of employment shall be calculated at that rate. I allow each of the Claimant's claim for wage underpayment as prayed. I also allow each of the Claimant's claim for one-month salary in lieu of notice pursuant to Section 35 (1) (c) of the Employment Act.
32. The 1st, 2nd, 4th and 5th Claimants' claim for leave pay is allowed as prayed by each of them. The 3rd Claimant's claim for leave pay was withdrawn as already stated in this judgment. The Respondent (RW-1) testified that the Respondent had no evidence to show that the Claimants ever took their leave. Section 74(f) of the Employment Act obligates an employer to keep all leave records of its employees. In the absence of any contrary evidence from the Respondent, the claims for leave pay must succeed, and I allow the same as prayed by the 1st, 2nd, 4th and 5th Claimants.
33. Ultimately, Judgment is hereby entered in favour of the 1st, 2nd, 3rd, 4th, and 5th Claimants against the Respondent for:-

Salim Mwinyi Mishihame (1st Claimant)

- a) one month salary in lieu of noticeKshs 14,421
- b) underpayment of wages;
 - (i) for the year 2015-2016 (12,221-8,105)
X 12 monthsKshs 50,220
 - (ii) for the year 2016-2017 (12,221-8,105)
X 12 monthsKshs 50,220
 - (iii) May – August 2017 (Kshs 14,421-8,105)
X 4 months Kshs 25,624
- c) leave pay for 2013-2017.....Kshs 57,684
- d) six months' salary being compensation for unfair termination
(6 months X14,421)Kshs 86,526
Total Kshs 284,695

Chirunga Mbudzya Ngoka (2nd Claimant)

- a. One month salary in lieu of noticeKshs 14,421
- b. Underpayment of wages:- For the year 2015 -2016
(skh. 12,221-8,105) X 12 monthsKshs 50,220
 - i. For the year 2016-2017 (Kshs 12,221-8,105)
X 12 monthsKshs 50,220



- ii. May 2017-August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624
 - c. Leave pay for 2015-2017.....Kshs 28,842
 - d. six months' salary being compensation for unfair termination
(6 months X Kshs 14,421).....Kshs 86,526
- Total Kshs 255,853

Johnson Jilo Dhidha (3rd Claimant)

- a. One month salary in lieu of noticeKshs 14,421
 - b. Underpayment of wages
 - i. For the year 2015-2016 (Kshs 12,221-8,105)
X 12 monthsKshs 50,220
 - ii. For the year 2016-2017 (Ksh 12,221-8,105)
X 12 monthsKshs 50,220
 - iii. May 2017-August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624
 - c. 6 months' salary being compensation for unfair termination (6 months X Kshs 14,421)Kshs 86,526
- Total Kshs 227,011

Rayan Hiribae Abae (4th Claimant)

- a. One month salary in lieu of noticeKshs 14,421
 - b. Underpayment of wages
 - i. For the year 2015-2016 (Kshs 12,221-8,105)
X 12 monthsKshs 50,220
 - ii. For the year 2016-2017 (Ksh 12,221-8,105) X
12 monthsKshs 50,220
 - iii. May 2017-August 2017 (Kshs 14,421-8,105)
X4 monthsKshs 25,624
 - c. Leave pay for 2015-2017Kshs 28,842
 - d. 6 months salary being compensation for unfair termination
(6 months X Kshs 14,421)Kshs 86,526
- Total Kshs 255,853

James Wambua Musembi (5th Claimant)

- a. One month salary in lieu of noticeKshs 14,421



- b. Underpayment of wages
 - i. For the year 2016-2017 (Kshs 14,421-8,105)
X 12 months Kshs 50,220
 - ii. May 2017-August 2017 (Kshs 14,421-8,105)
X 4 monthsKshs 25,624
- c. Leave pay for 2016-2017Kshs 15,531
- d. 6 months' salary compensation for unfair termination
(6 months X Kshs 14,421) Kshs 86,526
Total Kshs 192,322

- 34. The awarded sums shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
- 35. The Respondent's Counter-Claim was not proved and is hereby dismissed with costs to the claimants.
- 36. The claimants are awarded costs of the suit and interest. Interest shall be calculated from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF
NOVEMBER 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:

..... for Claimant

..... for Respondent

