



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mwangi v Endmor Steel Milliers Limited (Cause 1601 of 2017)  
[2022] KEELRC 13152 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13152 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1601 OF 2017  
AN MWAURE, J  
NOVEMBER 3, 2022**

**BETWEEN**

**MICHAEL MUTHEE MWANGI ..... CLAIMANT**

**AND**

**ENDMOR STEEL MILLIERS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant filed a memorandum of claim dated July 28, 2017 and respondent filed his response on September 29, 2017.

**Claimant's case**

2. Claimant states he was employed by the respondent on May 1, 2012 as a mechanical fitter at a daily salary of Kshs 1,020/-.
3. He says he worked diligently until July 7, 2017 when respondent unlawfully terminated his employment. He says he was given a letter of termination and that without a notice.
4. The claimant states that though he was initially a casual worker his employment converted to regular employment under section 37 of the Employment Act 2007.
5. He says that the respondent terminated his employment in contravention of sections 12, 28, 35(5) 36, 41, 43, 47(5), 49 and 50 of the Employment Act. He prays for the reliefs set out in his claim.



### **Respondent's case**

6. The respondent admits that the claimant worked as a mechanical twisting fitter and the twisting machine was no longer used in the company and the claimant was advised to move to another section but opted to leave on his own free will.
7. He says the claimant was paid all his dues and issued a certificate of service. He says the claimant's suit is therefore malicious and should be dismissed with costs.

### **Claimant's evidence**

8. The claimant's brief evidence in court is that he was dismissed from work when he was told there was no more work. He says he was paid Kshs 13,000/-. In re-examination claimant said he was earning Kshs 1,020/- per day.

### **Respondent's evidence**

9. The respondent witness is Laban Waigua who testifies he is the HR manager of the respondent. He says that the claimant was called in the Human resource office and was told he would be transferred to another department but he declined the offer. He says claimant opted to resign and he signed the separation form. The witness says there were no minutes of the meeting where claimant was being given an opportunity for transfer.
10. The witness also says the claimant resigned from the company and signed a separation form which is an official company document.

### **Claimant's Submissions.**

11. The claimant in his submission says he was dismissed by the respondent and that he never refused to be transferred but was dismissed from employment.
12. He says he was never subjected to disciplinary hearing and further was not given reason for termination. There were no minutes taken for the meeting where it was alleged he was informed he would be transferred to another department. claimant relied on several authorities including [\*Five Forty Aviation Limited v Erwan Lande \(2019\) eKLR\*](#) quoted with approval the decision of [\*Janet Nyandiko v Kenya Commercial Bank Limited 2017 eKLR\*](#) where it was held

“Section 45 of the act makes so the claimant has proven he was unlawfully terminated and was not given his terminal dues.”

### **Respondent's Submissions**

13. The respondent in his submissions says they were to allocate other duties to a number of staff affected by Kenya Bureau of Standards (KBS) directive not to use twisting mills. He says claimant was one of those to be allocated other duties and he decided to quit employment. He says claimant was paid terminal dues totalling Kshs 13,036/39 and he signed the clearance from dated July 15, 2017.
14. He is affirmative that this is not a case of unfair termination in contravention of section 45 of the [\*Employment Act\*](#). He says that the claimant simply walked out of employment. He submits that on reliance on the case of [\*Robert Indiazzi v Tembo Sacco Limited \(2018\) eKLR\*](#) the court held that the claimant was not entitled to any of the reliefs sought since he resigned without notice. The court further avers that in effect the claimant should have paid the respondent in lieu of notice.



15. The respondent therefore prays the claimant case be dismissed as he was not unfairly terminated.

### **Determination**

16. The issues for determination are whether the claimant was unlawfully terminated from employment or did he resign voluntarily. Secondly is he entitled to the reliefs sought.
17. The claimant claims he was terminated from employment on July 7, 2017 and worked for respondent since May 1, 2012. He says he was given a letter of termination but there is no such a letter in the court file. There is no other explanation from the claimant as to how the termination happened.
18. On the part of the respondent he says that when claimant was informed he would be transferred to another section he opted to leave employment. He simply handed over the company tools and left. He says claimant was paid his dues and he signed the certificate of service.
19. The case is quite intriguing as there are no documents whatsoever to assist the determination of the suit. The claimant says he was terminated and was given a termination letter. The same is not produced in court. The respondent says the claimant walked out of deployment when he was informed there would be transfers due to the directive from the government that there would be no use of twisting fitter which machine is what the claimant was operating with.
20. There is an annexure of a copy of the said directive in the respondent's documents. This is a document from Kenya Bureau of Standards dated March 29, 2019 which is advising on stoppage of twisted steel bars. The respondent then attached a memo advising all those who are affected by that directive to forward their names to the HR office for deployment.
21. This is a general memo and there is no evidence that the claimant was given the option to be transferred to work elsewhere. The respondent witness testifies that the claimant was called to the human resource office and was given an option to be transferred to another department. There is no evidence that this meeting took place. The respondent witness admits there were no minutes taken to support that this meeting took place.
22. The claimant's averment that he was told there was no more work seem plausible considering he had worked for the claimant from 2012 to 2017. It is not very convincing that he just walked out because he was informed he would be given other duties since his work had come to an end due to government directive.
23. The claimant seems to have cleared with the respondent and even received his certificate of service. There is no other evidence on the circumstances of his leaving employment except the evidence from the pleadings and from the submission and oral evidence in court. What is particularly lacking is documentary evidence to clearly inform what exactly took place pertaining to this separation.
24. All in all the court is more persuaded that the claimant was terminated without a valid reason contrary to section 45 of the *Employment Act* probably because the government directed stoppage of twisted steel bar and probably there was reduction of business but this is a speculation only.
25. Further the respondent failed to prove the reason for termination under section 43 of the *Employment Act*. The termination therefore must be found to be unfair.
26. The case of *Five Forty Aviation Limited v Erwan Lanoe* *supra* amongst many other authorities buttresses this provision by stating:-

"Section 45 of the act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an



employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination is a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.”

27. The court is persuaded the claimant did not abandon his employment but was terminated without following the due process of the law by the respondent. Court therefore enters judgment in his favour.

### **Remedies**

28. Having entered judgment in favour of the claimant the court proceed to award him the following reliefs:-

- a. Payment of one month in lieu of notice Kshs 24,480/-
- b. Payment in lieu of leave: No proof that he was denied leave so prayer is declined.
- c. Underpaid overtime is specific relief and without supporting evidence it cannot be sustained so is disallowed.
- d. Damages for unlawful termination are awarded for 5 months (salary for 5 months 122,400/-).
- e. Interest at court rates from date of judgment till full payment.

Costs of the suit.

Total awarded therefore is Kshs 146,880/-

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 3<sup>RD</sup> NOVEMBER, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the Constitution and the provisions of section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**ANNA NGIBUINI MWAURE**

**JUDGE**

