



REPUBLIC OF KENYA



KENYA LAW
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**Omonyi v Keroche Breweries Limited (Cause 483 of 2016)
[2022] KEELRC 13580 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13580 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 483 OF 2016
HS WASILWA, J
DECEMBER 20, 2022**

BETWEEN

ANDREW NYABUTO OMONYI CLAIMANT

AND

KEROCHE BREWERIES LIMITED RESPONDENT

JUDGMENT

1. The claimant, instituted this claim vide a memorandum of claim dated February 17, 2016, alleging to have been unfairly terminated and seeking compensation for the unfair termination. He seeks for the honourable court to; -
 - i. Declare that the termination/ declaration of redundancy of the claimant as unfair, wrongful, unlawful and illegal.
 - ii. Find that the claimant is eligible for payments of; -
 - a. Days worked and not paid of Kshs 20,000.
 - b. On month salary in lieu of notice of Kshs 100,000.
 - c. Salary arrears for November and December, 2013 of Kshs 12,500.
 - d. Annual leave of Kshs 238,000.
 - e. Gratuity/Severance pay of Kshs 200,000.
 - f. Compensation for unfair termination of Kshs 1,200,000.
 - g. Certificate of service.
 - iii. Costs of the suit.



2. The summary of the claimant's case is that he was employed by the respondent on April 1, 2008 as market intelligence officer at a salary of Kshs 80,000 per month. That he served the respondent faithfully till January 6, 2013 when he was abruptly terminated from service while earning Kshs 100,000 per month.
3. He contends that the right procedure was not followed by the respondent in executing his termination. He added that he was not subjected to any disciplinary hearing, neither was he given reason for termination.
4. He avers that he maintained a clean employment record for the time he was employed by the respondent and was never engaged in any disciplinary issues.
5. The respondent entered appearance on the January 26, 2017 through the firm of Ndungu Karanja and Company Advocates and filed a response to claim on the March 2, 2017 admitting to employing the claimant and denying unfairly terminating him. It is stated that the respondent followed due procedure in terminating the service of the claimant and reason for termination was due to continuous absenteeism which had accumulated to three months forcing the respondent to terminate his services.
6. After entering appearance and filing a response the claim, the respondent did not appear in court or summon any witnesses to defend their case. Therefore, the claim herein proceeded for hearing of the claimant's case only.
7. On October 6, 2022, this case was slated for hearing where the claimant testified as CW1 and adopted his undated witness statement filed on December 5, 2016 and produced the document of February 17, 2016 as his exhibits. The claimant then closed his case and filed submissions.

Claimant's Submissions

8. The claimant submitted on three issues; whether the dismissal was wrongful, unfair and unlawful, whether the reliefs sought should issue and who should bear costs of this case.
9. On the first issue, it was submitted that for termination of any employee to be justified, it must meet both substantive and procedural fairness as envisaged under sections 41 and 43 of the *Employment Act*. To support this, he cited the cases of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR*, the case of *Walter Ogal Anuro v Teachers Service Commission [2012] eKLR* and the case of *Loise Otieno v Kenya Commercial Bank Limited [2013] eKLR*.
10. With regard to procedural fairness, it was submitted that the claimant was not subjected to any disciplinary hearing before the abrupt termination. On substantive fairness, it was submitted that he was terminate for allegedly being absent from work when he had medical issue which he raised with the respondent and the respondent was aware of at all times. He argued that the respondent has not tendered any evidence to justify the termination as such the termination is unfair as envisaged under section 45 of the *Employment Act*.
11. In conclusion, the claimant submitted that he has made a case against the respondent and prayed for the claim to be allowed as prayed.
12. I have examined the evidence and submissions of the claimants herein. This claim as indicated in this judgment proceeded ex parte due to the absence of the respondents on the date slated for hearing on October 6, 2022.
13. The claimant proved through his evidence that he was indeed terminated on November 6, 2013 on account of absenteeism.



14. There is no indication that the claimant was accorded any chance to defend himself before the termination.

15. In the circumstances of this case, I find the termination of the claimant unfair and unjustified as provided for under section 45 (2) of the Employment Act 2007 which states as follows;-

“ 45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

16. In view of this finding, I award the claimant as follows;

1. Days worked and not paid = $6/30 \times 100,000/=$
= 20,000/=

2. 1 month’s salary in lieu of notice = 100,000/=

3. Salary arrears for November & December 2013
= 12,500/= as pleaded

4. Annual leave for 1 year = 100,000/=

5. 8 months salary as compensation for the unfair and unlawful termination = $8 \times 100,000$
= 800,000/=

TOTAL = 1,032,500/=

Less statutory deductions

6. Issuance of a certificate of service

7. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF DECEMBER, 2022.

ON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muthanwa for claimant – present

No appearance for respondent

Court Assistant - Fred

