



**Berhe v Canaan Developers Limited (Cause E587 of 2022)  
[2024] KEELRC 1148 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1148 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E587 OF 2022  
NZIOKI WA MAKAU, J  
MAY 13, 2024**

**BETWEEN**

**FTSUM MEHARI BERHE ..... CLAIMANT**

**AND**

**CANAAN DEVELOPERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit against the Respondent claiming payment of his salary arrears, employment dues, terminal benefits and compensation for the unlawful and unfair termination of his employment, as set out in his Memorandum of Claim dated 5<sup>th</sup> August 2022. He averred that on 1<sup>st</sup> May 2017, the Respondent employed him as a Site Engineer earning a net monthly salary of Kshs 50,000/-. That he was later promoted to the position of Project Engineer on or around 1<sup>st</sup> September 2018 and by a letter dated 25<sup>th</sup> September 2018, his gross salary was increased to Kshs 100,000/-. The Claimant's case was that on or around 4<sup>th</sup> October 2019 at around 4pm, he was working at the Respondent's project at Brookside Drive, Westlands when the Respondent's Manager, Mr. Medhanie Ghebrebrhan, came to the site and told him to get out and never to come back. That on 8<sup>th</sup> October 2019, he contacted and talked on phone with his immediate boss, Mr. Frezghi Kidane, who informed him never to contact him again. The Claimant then wrote an email to the Respondent on 11<sup>th</sup> November 2019 seeking clarification on whether his employment had been terminated and the Respondent's response in an email dated 11<sup>th</sup> November 2019 was that it had not chased him away and would soon sort out the issues. He contended that despite the Respondent's assurance that it had not terminated his employment, it declined to allow him back to its premises and also refused to allocate him any duties.
2. The Claimant averred that the Respondent has breached the terms of his Employment Contract by failing to pay him his salary and other employment dues since October 2019 thereby causing him extreme financial difficulties and mental anguish. He also noted that the Respondent had not



been remitting to the government monthly deductions of PAYE, NSSF and NHIF as required and that despite his request for the mandatory P9 Form, it has not supplied him with the same. He also sought payment in lieu of annual leave from 1<sup>st</sup> May 2017 to September 2019. In addition, the Claimant alleged that the Respondent discriminated against him by paying him a gross salary of Kshs 50,000/- less than what the other engineers in the Respondent's employment and with comparable experience received. According to the Claimant, he is still in the employ of the Respondent Company and termination of his employment should only take effect after the Respondent conforms to all legal requirements and to the provisions of his Contract. Without prejudice to the foregoing, the Claimant further averred that the Respondent unilaterally terminated his employment on or about 4<sup>th</sup> October 2019 and by commission or omission. He contended that if at all he was terminated from the Respondent's employment, the same can only be a constructive dismissal that was without due notice and lawful procedure. He asserted that he was not accorded any just and fair opportunity to be heard before the dismissal and that the Respondent also failed to pay him his terminal benefits and damages after the dismissal.

### **Respondent's Case**

3. The Respondent averred in Response to Memorandum of Claim dated 4<sup>th</sup> October 2022 that the Claimant joined the Company on 13<sup>th</sup> May 2019 and worked for only two weeks before leaving on his own volition and without notice to the Respondent. The Respondent denied that the Claimant was ever promoted and averred that after he left without notice, it deemed the employment as terminated and reassigned his duties to a new employee. Its case was therefore that the Claimant abdicated his responsibilities at work and it does not owe him any salary or employment dues. It noted that the Claimant was seeking payment for a period he had already left the Respondent's employment and was thus not an employee and that it was not under any obligation to pay him during the said period. It further denied having made any statutory deduction from him considering he left after two weeks of joining the Company. According to the Respondent, the Claimant's claim is malicious, actuated by bad faith and intended to unjustly enrich him at the expense of the Respondent.
4. The Respondent further averred that there have been previous proceedings between it and the Claimant on the same subject matter in Milimani MCELRC No E1857 of 2021, *Ftsum Mehari Berhe v Canaan Developers Limited*. It asserted that the Claimant is on a fishing expedition in search of a favourable Court, an act that is frivolous, vexatious and an abuse of court process. That the Claimant is also abusing the process of the Court to unjustly hoodwink the Respondent to pay him for an alleged termination that never occurred. The Respondent thus denies the jurisdiction of this Honourable as the matter is *res judicata* having been litigated in Milimani MCELRC No E1857 of 2021 and seeks for the Claimant's suit to be struck out or dismissed with costs.
5. The Respondent also filed a Witness Statement made by its Technical Manager, Mr. Kidane Frezghi Ghebregabher, on 26<sup>th</sup> May 2023. Mr. Kidane stated that he was aware that the Respondent offered the Claimant employment as an expatriate sometime in May 2019 on a monthly salary of Kshs 50,000/-, which the Claimant accepted. That before the Claimant came to Kenya, the Respondent facilitated the processing of his work permit by paying Kshs 400,000/- as bond security and that the Claimant then joined the company as a Project Engineer sometime around 13<sup>th</sup> May 2019. He maintained that the Claimant only worked in the Company for about two weeks before deserting duty and thus unilaterally terminated his services. He asserted that the Claimant left the Respondent's employment even before his first salary and statutory deductions became due.
6. The Claimant's rejoinder in his Reply to Defence dated 20<sup>th</sup> October 2022 was that a Memo dated 21<sup>st</sup> December 2017 indicates the Respondent's promise to pay him a bonus upon achievement of the



target at the Riverside Drive Project. He further averred that he withdrew Milimani MCELRC No E1857 of 2021 on 19<sup>th</sup> July 2022 after the Respondent admitted paying him gross monthly salary of Kshs 100,000/- and asserted that there is no pending suit between them on the subject matter. He thus prays that the Defence be dismissed with costs to the Claimant.

### **Evidence**

7. The Claimant testified that he was paid lower compared two others that were paid Kshs 100,000/- though he had more experience (6 years) and they had one and two years as at 2017. He stated that he never took any leave and worked continuously and that in 2018, he handled three projects including Mzima Springs and Riverside, for which he made reports. He further testified that though he achieved the target for the Riverside Project, he was not paid the bonus promised. He further stated that he quit after making efforts to meet staff of the Respondent in vain
8. The Respondent's witness Frezghi Kidane testified that when the Claimant disappeared from site, he jeopardised the project and he himself had to step in and work. He stated under cross-examination that they informed the HR about the Claimant's disappearance. He confirmed that they did not issue payslips and that the cashier would either go on site and pay in cash or deposit in the bank and that since the Claimant was temporary, the cashier paid him cash on site. He denied that the Claimant was at the Company in 2017 or that he received any email from the Claimant and further refuted that the Claimant was a casual. He maintained that the Claimant disappeared from work and was not fired and confirmed that the work permit they processed for the Claimant was for 2019.

### **Claimant's Submissions**

9. The Claimant submitted that the issues for determination before this Honourable Court are:
  - a. Whether there were valid reasons for the Respondent to terminate Claimant's employment.
  - b. Whether the Claimant was subjected to due process prior to being dismissed from employment.
  - c. Is the claimant entitled to the reliefs sought?
  - d. Who should bear the costs of the suit?
10. It was the Claimant's submission that section 43 of the *Employment Act* of 2007 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 they fail to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. Further, that the reason or reasons for termination of a contract are the matters the employer, at the time of termination of the contract, genuinely believed to exist and which caused the employer to terminate the services of the employee. He further noted that under section 45 of the Act, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. It was the Claimant's submission that the Respondent never tabled any evidence in Court to demonstrate that it furnished him with any allegations prior to dismissing him. He argued that the Respondent has not substantiated the reasons warranting his dismissal from employment and maintained that there were no valid reasons for the dismissal. The Claimant relied on the case of *Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club* [2014] eKLR (Cause No 440 of 2013) in which Radido J. held that termination of employment is unfair if the employer fails to prove that the reason for the termination is valid and that the reason for the termination is a fair reason.



11. The Claimant submitted that due process is envisaged under section 41 of the Act and that the Court in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR held that there must be both substantive justification and procedural fairness for a termination of employment to pass the fairness test. The Claimant noted that he was neither issued with a show cause letter nor subjected to any disciplinary hearing and that he was sent off work in an inhumane and embarrassing manner. He cited the case of Kenya Union of Commercial Food And Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR (Cause No 74 of 2013) in which Mbaru J. stated that section 41 of the Employment Act is couched in mandatory terms and where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee would not be accorded a hearing. Further, the Claimant submitted that the Respondent did not avail to Court any communication made to the Claimant regarding his alleged desertion and did not call any of the Claimant's colleagues to testify in court on the allegation. He argued that the Court has on countless occasions held that if an employee is not heard, the termination is ipso facto unfair. That if at all the Respondent thought that the Claimant was guilty of any gross misconduct for absconding duty as alleged, section 44 of the Act presumes that the Respondent as the employer must produce evidence in court to prove the elements of absconding. To wit, that the Respondent should have produced a record of work reporting showing the Claimant never reported, overt efforts made to call up or checkout on him, a notice sent to the employee's last recorded address, and a notice to the labour department. The Claimant relied on the case of Simon Mbiti Mbane v Inter Security Services Limited [2018] eKLR in which Abuodha J. stated that an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. The Claimant further relied on the case of Boniface Musyoka Kyambo v DPL Festive Limited [2021] eKLR, where Nderitu J. held that while the respondent may have had reasonable grounds of gross misconduct against the claimant, it failed by not following the procedural steps that are vital in finding an employee guilty or otherwise, and which informed its action of summarily dismissing the claimant. The Claimant urged this Court to further find recourse in the provisions of Articles 41 and 47 of the Constitution of Kenya and the customary practices governing good labour practice.
12. Regarding the reliefs sought, the Claimant submitted that he had proved his case to the required standards and that since he was never given notice or paid in lieu, the same is valid and payable under section 36 of the Employment Act. For untaken leave, the Claimant asserted that the Respondent never provided any proof that the Claimant took out his leave days or that it paid him for untaken leave and that it also did not dispute the Claimant's testimony, meaning the claim is payable pursuant to section 28 of the Act. In this regard, the Claimant cited the case of Rajab Barasa & 4 others v Kenya Meat Commission [2016] eKLR where the Court held that the employer must ensure each employee has taken their annual leave when due or make payment in lieu thereof. As regards salary underpayments, the Claimant noted that the claim remains due and owing as sought in the Claim since the Respondent did not avail records showing that they actually paid him as required in law. He asserted that he has demonstrated his entitlement to the Riverside Project Bonus and asked to be issued with a certificate of service pursuant to section 51 of the Employment Act and within 30 days from the date of judgment. The Claimant further urged the Court to award him damages for unfair and unlawful dismissal to the full extent of 12 months' gross salary.

### **Respondent's Submissions**

13. According to the Respondent, the issues arising for determination by this Court are:
  - a. Whether the Claimant was unlawfully and unfairly terminated from employment by the Respondent or he deserted his employment; and



- b. Whether there are terminal benefits due to the Claimant.
14. The Respondent submitted that section 45(2)(a) of the *Employment Act* provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for termination is valid. Further, section 44(4)(a) of the Act provides that where an employee absents himself from the place appointed for the performance of his work without leave or other lawful cause, the employer has a valid ground for summary dismissal for lawful cause. The Respondent noted that the *Black's Law Dictionary*, 10<sup>th</sup> Edition defines desertion as "The willful and unjustified abandonment of a person's duties or obligations". It cited the case of *Kyalo v Central Farmers Garage Limited* (Cause 1068 of 2016) [2022] KEELRC 13108 (KLR) (3 November 2022) (Judgment) in which Gakeri J. relied upon the South African decision in *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA) which interpreted desertion to take place when an employee deserts their post with the intention of not returning, or having left their post, subsequently formulates the intention not to return. The Respondent contended that the Claimant having unilaterally abandoned his duties as a Project Engineer and owing to the sensitivity and nature of the Respondent's work, it was prudent for the Claimant's roles to be assigned to other staff. It maintained that the Claimant was neither unfairly nor unlawfully terminated and that instead, he deserted his employment. As to whether there are terminal benefits due to the Claimant, the Respondent submitted that the claim for terminal benefits cannot arise because the Claimant left employment within the first month of his employment and the claim for unfair and unlawful termination cannot thus arise. In regard to the claim for Bonus for the Riverside Project, the Respondent submitted that the same is unfounded as the Project was carried out in 2017-2018 before it employed the Claimant. Furthermore, that the internal Memo the Claimant produced as proof for the said Bonus is in itself an internal company document sent before the Claimant's employment and ought not to be relied upon. It further submitted that the claim for severance pay ought to be dismissed as it is an attempt to mislead this Court and unjustly enrich the Claimant considering the same is only available under section 40 of the *Employment Act* where termination of employment is occasioned by redundancy. The Respondent asserted that the Claimant is not entitled to payment in lieu of annual leave because he did not serve for 12 consecutive months to warrant payment of the same as guided under section 28 of the *Employment Act*. That the Claimant is also not entitled to a certificate of service because he had not worked for more than four (4) consecutive weeks as set out in section 51(1) of the Act. Lastly, the Respondent submitted that the Claimant is not entitled to damages and costs of the suit plus interest having failed to prove that he was unlawfully and unfairly terminated from his employment.
15. The Claimant's case before the court is said to be res judicata. It is asserted that there was a previous proceeding between the parties being Milimani MCELRC No E1857 of 2021, Ftsum Mehari Berhe v Canaan Developers Limited. The case would seem related to salary and not the termination of the Claimant. No judgment of the court was exhibited as the claim was withdrawn in July 2022 before this case was mounted. For a matter to be determined as being res judicata, there must have been a judgment on the merits. In other words, a plea of res judicata prevents a party from bringing a claim once that particular claim has been subjected to a final judgment in some previous lawsuit. As this was not the case here, the dispute before me is not res judicata.
16. The Claimant mounted the claim seeking relief for the alleged unlawful and illegal termination from employment. He had joined the Respondent in May 2017 as a site engineer earning Kshs 50,000/-. He asserts that he was orally terminated on 4<sup>th</sup> October 2019 and that at the time of termination, he was earning Kshs 100,000/-. The Respondent on its part asserts the Claimant deserted its employ and was as a consequence not entitled to any of the reliefs sought since he was never terminated from the employ of the Respondent.



17. The Claimant seemingly lost his employ circa November 2019. He had by email sought to know why he was chased away and was informed that no one had chased him but rather it was disciplinary action taken against him because of disobedience and threat to the project. He was advised that the issue would be sorted out soon. It is clear the Claimant did not willingly leave the Respondent's site. It seems there was a disciplinary issue which triggers the requirement of adherence to section 41 of the Employment Act. It is apparent there was no hearing as contemplated in the Act. This renders the termination ipso facto unfair and unlawful within the meaning of sections 43, 45 and 47 of the Employment Act. As such, the Claimant would be entitled to recover for the unfair and unlawful termination. The Claimant had served the Respondent for slightly over 2 years and would as a factor be entitled to 6 months salary as compensation. He claimed payment arrears of salary from October 2019. The Respondent as his employer is required to keep records in terms of section 74 of the Employment Act. Having failed to show there was payment made to the Claimant, the Respondent will pay the Claimant 2 months salary which had been withheld for the months of October and November 2019 when the contract was unilaterally terminated. The Claimant shall also have costs of the suit.
18. In the final analysis, I enter judgment for the Claimant for:
- a. 2 months salary withheld by the Respondent for October and November 2019 – Kshs 200,000/-.
  - b. 6 months salary as compensation for unfair and unlawful termination of employment – Kshs 600,000/-
  - c. Costs of the suit.
  - d. Interest on the sums in a) and b) above at court rates from the date of judgment till payment in full.
  - e. A certificate of service in terms of section 51 of the Employment Act.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

