



**Ogutu v Central Electrical International Limited (Cause 1450 of 2017)
[2024] KEELRC 1657 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1657 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1450 OF 2017**

**K OCHARO, J
JUNE 28, 2024**

BETWEEN

BRAYAN OTIENO OGUTU CLAIMANT

AND

CENTRAL ELECTRICAL INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

Introduction

1. At all material times the Claimant was an employee of the Respondent. Contending that his employment was unfairly terminated, the Claimant initiated the claim herein, seeking; notice pay, compensation for earned but unutilized leave days; service pay; and a compensatory damages.
2. The Claimant resisted the claim through a memorandum of response that it filed on 19th February 2019. It denied the Claimant's claim and his entitlement to the reliefs sought.
3. The parties respective cases were heard on the 20th March, 2023. The Claimant testified in support of his case, while the Respondent presented one witness to testify on its behalf.

The Claimant's Case

4. At the hearing, the claimant adopted his witness statement herein filed as his part of his evidence in chief, and tendered the documents that he had filed under a list of documents dated 24th July 2017 as his documentary evidence.
5. The Claimant testified that he first came into the employment of the Respondent in the month of February 2012, as an electrician.
6. That throughout his tenure with the Respondent he rendered his services diligently and to the satisfaction of the employer.



7. He asserted that on or about the 8th of March, 2016, when his salary was paid out, he realized that the same was less than he had expected. This prompted him to approach the supervisor, Mr. Patel for an explanation. Mr. Patel instructed him to place the issue before the Deputy Human Resource Manager, Mr. Israel.
8. When he approached him with the grievance, the manager got irked, blaming the Claimant that he had decided to bypass him and directly communicate with the supervisor.
9. The Deputy Human Resources Manager suspended him for two weeks. Upon his return to work, the officer again sent him away with firm instructions not to report back until he was called to. His efforts seeking to know the reason for his exclusion from the workplace did not bear a fruit. The Respondent did not call him back to duty, hence the suit herein.
10. In his view, he was summarily dismissed. The dismissal was wrongful as; he was not given any reason for the dismissal; prior to the dismissal he had not been issued with any warning letter; and due procedure was ignored.
11. The Claimant testified that throughout his employment he was not paid house allowance. Further, he was never given leave. The Respondent did remit any NSSF dues on his account.
12. Cross-examined by Counsel for the Respondent, the Claimant testified that he was suspended by Mr. Josiah, a site manager, when he sought for an explanation as to why his salary had been deducted.
13. On the 8th March 2016, when he approached the Assistant Manager, he informed him that it had been decided that he be suspended for two weeks.
14. He further stated that the Respondent did not try to reach him on the phone, notwithstanding that the Respondent had his number in their records.
15. The letter by the Respondent addressed to the labour officer was never sent to him. Had it been, he could have visited that office. The letter was sent to him through his advocate a few days to the hearing of this matter.

The Respondent's case

16. The Respondent presented, Scaver Makulomba, who testified on its behalf, the witness testified that the Claimant was employed by the Respondent as a general labour.
17. The witness further stated that he received information from the site project manager, Josiah Mukoko that he had got into an argument with the Claimant over late reporting to duty and absenteeism.
18. The complaint against the Claimant from the site project manager was not an isolated one, there had been several complaints from the site foreman on the Claimant's misconduct and insubordination.
19. The witness stated further that he later came to learn that the Claimant had deserted duty and was no longer reporting to the site.
20. The witness testified that upon realizing of the desertion, he wrote to the County Labour Officer Ministry of Labour, informing them that the Claimant had deserted duty and was no longer reporting to work at the site.
21. The witness asserted that the Claimant has never been dismissed as he claims.
22. Cross-examined by Counsel for the claimant, the witness stated that when the argument between the Claimant and site manager, he was not present. He cannot tell where the argument flowed from.



23. The complaint against the Claimant was by the site foremen and Project Manager.
24. The witness stated that the Claimant was called by the Deputy Manager to his office. There he was (the Claimant) was kept waiting for a whole day. The Deputy Manager did not turn up. Though the Claimant was asked to report to the site the following day, he did not turn up;
25. The Respondent's Human Resource Manager called the Claimant to get back to Respondent's to enable a resolution on the issue but he failed to oblige.
26. The Respondent did not write and sent him a letter through his postal address enquiring why he was not reporting for duty. The letter dated 29.03.2016 to the labour office was not copied to him.
27. The Claimant was not paid terminal dues because he was not dismissed from employment.

The Claimant's Submissions

28. The Claimant's counsel identified the following issues for determination;
 - a. Whether the Claimant was guilty of any gross misconduct as alleged by the Respondent.
 - b. Whether due process was followed prior to dismissing the Claimant from employment.
 - c. Is the Claimant entitled to the reliefs sought.
 - d. Who bears the cost of this cause.
29. Counsel submitted that the law (section 43 of the *Employment Act*) places a duty on the employer to establish the reasons for termination. To buttress this submission he placed reliance on the case of *Mary Chemweno Kiptui vs. Kenya Pipeline Company Ltd (2014) eKLR*.
30. It was further submitted that the employer alleging that his or her employee deserted duty, must prove the fact of desertion. He or she must demonstrate to court the efforts he or she made to trace or confirm that the employee has deserted. The Respondent did not discharge this duty. As a result this court should be persuaded that the Claimant's employment was terminated verbally as he asserted.
31. To fortify the submission that duty fell on the employer to prove the fact of desertion, reliance was placed on the case of *Joseph Nzioka vs. Smart Costing Limited (2017) eKLR*.
32. It was argued that considering the evidence on record, it is not difficult to conclude that the Respondent did not adhere to the cannons of procedural fairness as contemplated under section 41 of the *Employment Act*. The provision is couched in mandatory terms. A default in compliance with the procedure will often render the determination unfair pursuant to the provisions of section 45 of the *Employment Act*. To support this point, the Claimant's counsel placed reliance on the case of *Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited (2014) eKLR*.
33. The court was urged to find that having proved that the termination of his employment was unfair, the Claimant is entitled to the reliefs set forth in his statement of claim.

The Respondent's submissions

34. Despite this court's directions the Respondent did not put in written submissions. This judgment is therefore without the benefit of considering their submissions.



Analysis and Determination

35. I have carefully considered the parties pleadings, their evidence and submissions by the Claimant, the following issues present themselves for resolution:
- a. How did the parties separate?
 - b. Was the termination of the Claimant's employment fair?
 - c. Is the claimant entitled to the reliefs sought?

a. How did the parties separate?

36. The parties took dramatically opposite positions on how they separated. The Respondent asserted that the Claimant deserted duty hence bringing his employment to termination. The Claimant on the other hand contended that the Respondent terminated his employment verbally, without reason and adherence with the cannons of procedural fairness. A determination as to how the separation occurred is pertinent, it will inform this court's decision on the other issues identified hereinabove.
37. The golden rule of evidence is that he who asserts must prove, and this is amplified in section 107 of the Evidence Act, Cap 80 Laws of Kenya. An asserted fact, however cannot be proved by hearsy evidence.
38. In my view, considering the circumstances of this matter, and that which is required of the employer asserting desertion against an employee under law, the Respondent's assertion could not be proved by the evidence of the witness it presented to testify, but with that of two vital witnesses who it inexplicably failed to present for testimony. All that the witness (its Operations Manager) presented, did was to pour out hearsay evidence. I am clear in my mind.
39. The site manager who allegedly had an argument with the Claimant, the date the Respondent contends he worked for it last, in my view was a vital witness who ought to have been called to testify in support of the Respondent's case. He wasn't. Further, the Respondent's witness asserted that the Human Resource Manager phone called the Claimant to avail himself, so that the matter that was in controversy could be resolved but the Claimant did not turn up. When and through which phone number, are details the witness couldn't and did not give. The Human Resource Manager was the ideal person to testify on this. He didn't testify, leaving RW1 to present hearsay evidence, bald and generalized statements.
40. It is trite law that where an employer alleges desertion against the affected employee, that employer must demonstrate to court with sufficient evidence that he or she made genuine efforts to trace the deserted employee, to ascertain why he or she was not reporting to duty and bring it to the attention of that employee the repercussions the continued absence from duty could visit on him, if the employer is of the view that the absence is unjustified. In my view, this insistence by the law is in accord with the current staturoy protection and rights accorded to employees. It to a large extent checks arbitrary dismissals by employers, and keeps them on track to exercise fair labour practices.
41. In the case of Joseph Nzioka vs. Smart Coatings Limited (2017) eKLR, Nduma J, held and I agree:
- “..... dismissal on account of absconding/desertion must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such an employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”



42. As a result of the foregoing premises, I am not convinced that the separation did occur following the alleged absconding of duty by the Claimant.
43. I am however of a clear view that the Claimant was dismissed from employment in the manner he explained in his evidence. This view is informed by the fact that to this court, his evidence was consistent and unshaken during cross-examination, and that the Respondent deliberately or otherwise failed to present crucial witnesses, the site project manager and its Deputy Human Resource Manager who he asserted verbally terminated his employment, to discount his version.

b. Was the termination fair?

44. Having found as I have hereinabove that the Claimant's employment was verbally terminated by the Deputy Human Resources Manager, I now turn to consider the fairness or otherwise of the termination.
45. Invited to render itself on fairness or otherwise of termination of an employee's employment, the court immediately gets enjoined to consider two statutory aspects, substantive fairness and procedural fairness. In order for a termination to be considered fair, it must be demonstrated that; there was a reason for the termination (section 43 of the *Employment Act*), that the reason(s) was valid and fair (section 45(2) of the Act, and there was due compliance with the edicts of procedural fairness (section 41 and 45 (2) of the Act.
46. In the Court of Appeal case, Kenfreight (E.A.) Ltd vs. Benson K. Nguti (2016) eKLR, the court held;

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice) as provided, an employer is duty bound to explain to an employee in the presence of another employee or union official in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract.

In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service.”

47. Hereinabove, I concluded that the Respondent advanced the position that the Claimant absconded his duty. In my view, in the context of section 43 of the Act, the reason for the termination could be desertion/absconding. Having found that the desertion was not proved, it is easy for me to conclude, as a result, that the Respondent did not discharge its legal burden under sections 43 and 45(2) mentioned hereinabove. The termination of the Claimant's employment was substantively unfair.
48. In the Respondent's witness's evidence, not even the slightest effort can be seen to have been made to establish that there was an adherence to procedural fairness in the dismissal of the Claimant's employment. As was explained by the Claimant, the procedure contemplated under section 41 of the Act was not complied with. In conclusion, the termination was procedurally unfair.

Of the Reliefs

49. The Claimant's employment in its nature, was terminable by twenty eight days' notice pursuant to the provisions of section 35 of the *Employment Act*. It is not in dispute that the termination was without



notice. Considering the finding hereinabove that the termination was unfair, I hesitate not to direct payment of salary in lieu of notice, KShs.14,400.00.

50. The Claimant contended that throughout his tenure with the Respondent, he was not accorded an opportunity to proceed for his leave. Section 28 of the Employment Act provides the right to annual leave for employees. It in my view, places a corresponding duty on the employer to facilitate and allow enjoyment of that right. The Respondent did not at all challenge the Claimant's evidence on this relief sought (compensation for unutilized leave days). I am persuaded to grant the claimant compensation under this head, KShs. $14,400 \times 12 / 30 \times 4 = 40,320.00$.
51. Section 35 of the Employment Act provides for service pay. However, it excluded some classes of employees from the benefit or pursuing the benefit. Among those excluded are employees who are members of the National Social Security Fund. The Claimant has tender a statement in connection with his NSSF account. I note that in a couple of months for the period the Claimant was in the employment of the Respondent, remittances were made into his account. In my view, this disentitles the Claimant from pursuing the benefit, service pay. Appropriately he could have sued for the unremitted contributions, any penalty amounts that the law could allow plus interest. As a result, I decline to grant the relief under this head.
52. Section 49(1)(a) of the Employment Act bestows upon this court the power to give a compensatory award in favour of an employee who has successfully assailed his or her employer's decision to terminate his or her employment. However, it is imperative to state that exercise of the power is discretionary. Whether to grant the relief or not depends on the peculiar circumstances of each case. In this matter, I have considered the fact that the Claimant's employment was terminated without substantive and procedural fairness, the fact that the termination sounds heavily retaliatory, that the Claimant did not contribute in any proven manner to the termination, and the length of service he rendered to the Respondent, and hold that he is entitled to the compensatory relief, seven months gross salary, KShs.100,800.00.
53. In the upshot, judgment is hereby entered in favour of the Claimant, in the following terms:
- a. One month's salary in lieu of notice -----KShs.14,400.00
 - b. Compensation for unutilized leave days -----KShs.40,320.00
 - c. Compensation pursuant to the provisions of section 49(1)(c) of the Employment Act ---- KShs.100,800.00
 - e. The Respondent shall issue the Claimant with a Certificate of Service, in accordance with Section 51 of the Employment Act, within 30 days of this judgment.
 - f. Interest at court rates on the sums awarded above, at court rates, from the date of this judgment till full payment.
 - g. Costs of this suit shall be to the Claimant.

READ, SIGNED AND DELIVERED THIS 28TH DAY OF JUNE, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms. Omamo for the Claimant



Ms Wamanga for the Respondent

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 15th March 2020 and subsequent directions of 21st April 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

