



Aniara v Motech Systems (Cause 88 of 2018)
[2024] KEELRC 2116 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2116 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 88 OF 2018

K OCHARO, J
JULY 26, 2024

BETWEEN

BONFACE ANIARA CLAIMANT

AND

MOTECH SYSTEMS RESPONDENT

JUDGMENT

1. Through a memorandum of claim dated 29th November 2017, the Claimant initiated the claim herein, seeking compensation for unfair termination of his employment, and other reliefs outside the unfair termination claim [unpaid salary for August 2017, compensation for earned but unutilised leave days, severance pay, unpaid house allowance, overtime compensation worked, compensation for rest days worked but not paid for].
2. The Respondent resisted the claim by a memorandum of response dated 10th March 2018. The memorandum also embodied a counterclaim. In response, the Claimant’s cause of action and his entitlement to the reliefs sought were denied, whilst, in the counterclaim, the Respondent sought notice pay from the Claimant upon the basis that he left his employment without issuing the requisite notice to it.
3. At the hearing of their respective cases, the parties herein had witness statements filed herein adopted as their evidence in chief, and the documents under the respective lists of documents as their documentary evidence.

The Claimant’s Case

4. The Claimant stated that he came into the employment of the Respondent in May 2014 as a technician at a monthly salary of KShs. 16,585.00. The employment was verbal.



5. He contended that on the night of 25th August 2017, the Respondent terminated his employment through a phone call by its Director Mr. Moses Ndale. The director demanded that he returns all the Respondent's property that was in his possession.
6. The Claimant asserted that the termination was without any reason or justifiable cause. He was not allowed an opportunity to be heard on any allegations against him or notified of the Respondent's intention to terminate his employment and the grounds forming the basis thereof.
7. He further stated that the Respondent didn't serve him with a termination notice. Further, the Respondent without justification failed to pay him his August 2017 salary and other terminal dues.
8. The claimant further stated that he used to work from Monday to Saturday and sometimes on Sundays from 8.00 am to 6.00 pm without overtime pay.
9. Cross-examined by Counsel for the Respondent, the Claimant stated that his monthly salary was paid through his Bank account and that where the entries on his bank statement reflected a lower figure than Kshs, 16,585, credited into his account for a specific month, the same would be a result of either deductions for salary advances or surcharges for losses suffered by the Respondent and attributed to him.
10. Further cross-examined, he testified that on his instructions, his Counsel wrote a demand letter to the Respondent and that the latter responded. In the response letter dated 28th September 2017, the Respondent alleged that he had absconded duty, however, it expressed that he should resume duty as he was a valued worker. His Counsel brought the Respondent's response to his attention.
11. He further testified that he was not ready to resume work. Through his Counsel's letter dated 4th October 2017, he informed the Respondent that he could only resume duty upon it satisfactorily explaining to him why they had terminated his employment in the first place. In response to this letter, the Respondent wrote a letter dated 10th October 2017, reiterating its early expressed position, demanding that he report to work on the 14th of October 2017. He declined this offer.
12. He alleged that he didn't desert duty as the Respondent alleged.
13. The Claimant testified that for the three years [April 2015- August 2017], the Respondent didn't allow him to proceed for his annual leave. This notwithstanding that he raised his concern with the Respondent's Director on several occasions. He was not paid a house allowance throughout his service with the Respondent.
14. The Claimant asserted that he only became a member of the National Social Security Fund in 2018 after he had left the employment of the Respondent.

The Respondent's Case

15. The Respondent presented one witness, Moses Ndale, to testify on its behalf. The witness stated that on the 25th of August 2017, the Claimant, without any lawful cause and in blatant breach of the terms of the employment contract, absconded duty. The Respondent didn't know about his whereabouts.
16. The Respondent's efforts to trace him did not bear fruit. However, on 12th September 2017, the Claimant emerged with a demand letter addressed to it demanding an amount of KShs. 621, 656.28 for an alleged unlawful termination of employment.
17. Despite, this, the Respondent was willing to take back the Claimant into its employment and made various invitations;



- I. On 28th September 2017, the Respondent invited the Claimant to report to work at the earliest opportunity despite having absconded duty.
 - II. Via a letter dated 4th October 2017, the Claimant informed the Respondent that he was not ready to work and demanded that he be paid terminal dues.
 - III. On 10th October 2017, the Respondent gave the Claimant a deadline of close of business on 16th October 2017, to resume duty in the defaulting its offer could lapse.
 - IV. On 12th October 2017, the Claimant replied and informed the Respondent that he was not willing to resume work.
18. Surprisingly, instead of picking the Respondent's offers and resuming duty, the Claimant elected to file the suit herein. There is no doubt therefore that the Claimant absconded duty.
 19. The Claimant breached the contract between him and the Respondent. His actions constrained the Respondent to employ another technician to step in temporarily pending the recruitment. This caused it to incur an extra expense. He terminated the contract without notice. He should be directed to pay one month's salary in lieu of notice.
 20. Cross-examined by Counsel for the Claimant, the witness stated that the Claimant joined the Respondent as a trainee in May 2014. At the time of separation, he was earning KShs.16,585/-, an amount that was inclusive of statutory deductible amounts. Further, however, the Respondent has not placed forth any document[s] from where it can be deduced that the Respondent dutifully made remittances of the deducted sums to the relevant Authorities.
 21. Contrary to the Claimant's allegation, he didn't terminate his employment.
 22. The Claimant was not paid his salary for August 2017, as his whereabouts were unknown. Further, he utilized all his earned leave days.

Claimant's Submissions.

23. It was submitted that the Claimant established that the Respondent's Director terminated his employment. The termination was without the notice contemplated under section 35[1][c] of the *Employment Act*. Contrary to the Respondent's allegation, he didn't abscond duty. The termination was therefore without justifiable reason[s].
24. It was further submitted that the law enjoined the Respondent in the dispute herein, to show due procedure was adhered to in the process leading to the termination of the Claimant's employment. Undoubtedly, the Respondent didn't issue any show cause letter to the Claimant stating that it intended to act against him and the reasons stirring the intention. He was not heard on the reasons before his employment was terminated. This was in breach of Section 41 of the *Employment Act*. To support this submission, Counsel placed reliance on the case of the *Kenya Union of Commercial Workers and Allied Workers Union v- Meru North Farmers Sacco Ltd* [2017] eKLR.
25. Any employer alleging that his or her employee absconded duty must demonstrate that he or she made efforts to trace the employee to find out the reasons for desertion and that the efforts were unsuccessful. To support this point, the case of *Boniface Francis Mwangi v B.O.M Iyego Secondary School* [2019] eKLR, was cited.
26. The Respondent didn't sufficiently demonstrate to the Court that it made any efforts to trace the Claimant. The Respondent's letters came in after the Claimant had issued it with a demand letter.



27. Having proved that the termination of his employment was unfair, and considering the material placed before the Court, it is clear that the Claimant is entitled to the reliefs sought.
28. Submitting on the Respondent's Counterclaim, Counsel for the Claimant submitted that the contract was not terminated by the Claimant but by the Respondent. Therefore, there cannot be a justification for the relief, notice pay under the Counterclaim.
29. On the prayer for compensation for the loss suffered for hiring a replacement as alleged by the Respondent it was submitted the claim is for specific damage, it needed to be specifically pleaded. To buttress this submission reliance was placed on the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya Limited & another*.

The Respondent's Submissions.

30. The Respondent's Counsel submitted that from the chain of events as revealed by the evidence of both the Respondent and the Claimant, it is very clear that it didn't terminate the Claimant rather the Claimant absented himself from duty without authority. The Claimant abandoned his duties voluntarily and refused to return to work notwithstanding the invitation by the Respondent to.
31. Critically looking at the Claimant's conduct, it evinced his intention not to return to work after he absented himself without permission. Undoubtedly, this amounted to desertion as defined in *James Ashiemi Namasyi v Menengai Oil Refineries Ltd* [2016] eKLR.
32. The Claimant's contention that he was not served with a show-cause letter is unfounded considering the circumstances of this matter. After absconding from duty and being invited to return to work, the Claimant declared that he wouldn't. There wouldn't be a need to issue a show cause letter.
33. On the reliefs sought, Counsel for the Respondent submitted that the Bank statements tendered in evidence by the Claimant show that he was paid his salary on 1st August 2017. Further, he couldn't expect to earn when he hadn't worked.
34. The relief sought for notice pay cannot be availed in favour of the Claimant as he was not dismissed from employment. He deserted duty.
35. It was further argued that the Claimant didn't put forth any documentary evidence to show that he didn't proceed for annual leave at any time. As a result, he didn't prove his claim under the head "unpaid leave".
36. Submitting on the claim for severance pay, it was submitted that this same is only payable for terminations flowing from redundancy declarations. The termination in the instant matter didn't. Further, the Claimant hasn't shown how he arrived at the figure prayed for.
37. It was further argued that the Claimant didn't put any evidence before this Court to demonstrate that he was entitled to house allowance and that the same was not paid to him during the period of service to the Respondent.
38. On the counterclaim it was submitted that the Claimant terminated the employment contract unprocedurally and unilaterally. He ought to be sanctioned for it. Section 36 of the Employment applies to both the employer and the employee. Therefore, whenever any of them desires to terminate the contract of employment, he or she must issue the other with a termination notice or payment in lieu of notice. The Claimant didn't do either of the two. He should be condemned to pay one month's salary in lieu of notice.



Analysis and determination

39. I have carefully considered the pleadings, evidence and submissions by the parties, and the following issues emerge for determination thus;
- I. Was the Claimant's employment terminated by the Respondent?
 - II. If the answer to [I] above is in the affirmative, was the termination unfair?
 - III. Is the Claimant entitled to the reliefs sought or any of them?
 - IV. Is the Respondent's counterclaim merited?

Was the Claimant's employment terminated by the Respondent?

40. The rival parties herein took diametrically opposite positions regarding how their separation in their employer-employee relationship occurred. While the Claimant asserted that the Respondent's Director terminated his employment by phone, the Respondent contended that the Claimant absented himself from duty without authority only to turn up after about two weeks with a demand letter from his Counsel, purporting to have been unlawfully dismissed from employment and demanding for what he termed terminal benefits. However, there is one point of convergence, the Claimant was last at his place of work on the 25th August 2017.
41. Section 47[5] of the *Employment Act* places a burden on the employee asserting unfair termination of his employment to prove that an unfair termination occurred. To discharge this burden, the employee must first demonstrate that the termination occurred by an act of the employer, before moving further to show that it was unfair. Where the existence of the termination is highly contested, as is in the instant matter, it won't suffice for the employee to just state that "I was fired on the phone". He must demonstrate that he was called on the date he asserts by the person who fired him. In the instant matter, the Respondent's Director vehemently denied that he didn't call the Claimant on the date forestated to convey the termination of his employment. Consequently, it became imperative for the Claimant to produce a call log from the service provider, to discount the Respondent's position.
42. Undeniably, from the date it received the first letter from the Claimant's Counsel, the Respondent was clear that it had not terminated the Claimant's employment and asked him to report back to work. Further, in response to the Respondent's invitation, the Claimant through his Advocate's letters dated 4th October 2017 and 12th October 2017 was very categorical, he was not willing to resume work. In my view, the Respondent's conduct after receiving the first demand letter does not speak to an employer who had terminated an employee's employment or who had an intention to. The Claimant's clear adamance that he won't resume duty notwithstanding the invitation by the Respondent, was not reasonably explained. It leaves one with the impression that he no longer had the interest to continue working with the Respondent, and that indeed he out of his own volition left his employment, albeit without notice.
43. With great respect, the Claimant appears to be a party attempting to play a lottery with the court process. Unfortunately for him, the scheme has not passed this Court without detection.
44. In the upshot, I am not persuaded that the Respondent did terminate the Claimant's employment. The latter quit his employment out of his own volition. As a result, I find that the Claimant has not discharged the legal burden under Section 47[5] of the *Act*. His claim for unfair termination fails at this hurdle.



45. Having found as I have hereinabove, it becomes unnecessary to proceed and consider the second issue identified, but turn to interrogate the 3rd.

Is the Claimant entitled to the reliefs sought or any of them?

46. The Claimant sought a declaration that the termination of his employment was procedurally unfair, and unlawful. Having found as I have hereinabove, I have no hesitation finding that this relief cannot be availed to the Claimant. The allied compensatory relief under Section 49[1][c] too.

Further, as the prayer for one month's salary in lieu of notice is connected to the claim for unfair termination, it should meet and hereby meets the fate of rejection.

47. The Claimant further sought the salary for August 2017. As stated hereinabove, it was common cause that the Respondent worked up to the 25th of August 2017. Counsel for the Respondent submitted that the Claimant could not be paid yet he didn't work. This reasoning is unfounded. It can only make sense if the argument was that the Claimant could not be paid for the five days on which he didn't work in that month. It was argued further, that the salary was paid as the Bank statements indicate that on 1st August 2017, his salary was credited into his account. I am unable to comprehend this submission, was the salary being paid in advance? Certainly not, going by the salary payments in respect of the other months. I am not convinced that the Claimant is not entitled to the salary sought. Lastly, I have not lost sight of the fact that the Respondent's witness admitted under cross-examination that the salary wasn't paid.

48. Against the Claimant's claim for leave days earned but not utilized, the Respondent argued that the Claimant utilized all his earned leave days and that burden lay upon him to prove that he didn't. Section 28 of the *Employment Act* bestows a right on the employee for annual leave, therefore, a corresponding duty on the employer to allow enjoyment of the right. Section 74 of the *Employment Act* places upon the employer a duty to keep employment records of employees. In my view, where the employer alleges that the employee did proceed for his leave, the duty falls on the employer to prove by way of the documents that it allowed the employee to. The Respondent didn't discharge this burden. As a result, I am persuaded that the Claimant didn't proceed with his leave at any time when he was in the services of the Respondent. He is entitled to compensation under this head.

49. Section 35 of the *Employment Act* provides for service pay for an employee[s] are terminable under the provision. In my view, it won't matter whether the termination was at the instance of the employer or the employee, considering the purpose for which service pay exists, social security. However, in so saying, I have not lost sight of the fact that the provision specifically excludes employees who are members of particular schemes from the benefit. It was not contended, and proved by the Respondent that, the Claimant belonged to any of those schemes set out in the section.

50. This Court declines to award the sums sought under the heads "overtime" and "rest days" as there was no sufficient evidence placed forth to enable this Court to grant the same. The Claimant just threw the figures at the Court.

51. Section 31 of the *Employment Act* places a duty on the employer to accord his employee[s] reasonable accommodation or in the alternative reasonable house allowance to enable the employee[s] secure accommodation. In the instant matter, the Respondent didn't assert and prove that it provided the Claimant reasonable accommodation or that it paid him a house allowance. Consequently, it isn't difficult to conclude that the Claimant wasn't paid a house allowance and is thus entitled to compensation thereof.



52. Turning to the Respondent's Counterclaim, I hold that the claim for one month's salary in lieu of notice is merited. The Claimant abruptly left his employment without notice. Section 36 of the *Employment Act* enjoined him to issue a termination notice or pay one month's salary in lieu of notice. He neither issued the notice contemplated under the section nor made the payment. As a result, I cannot help but condemn him to pay one month's salary in lieu of notice to the Respondent.
53. I agree with Counsel for the Claimant that the Claim for loss suffered as a result of the Respondent engaging a replacement for the Claimant when emerged a void courtesy of an unauthorized absence was a special damage claim which needed to be specifically pleaded and proved. The Respondent didn't plead or prove as such, the relief sought under this head of the counterclaim is declined.
54. In the upshot, Judgment is hereby entered in favour of the Claimant, and in favour of the Respondent on its Counterclaim, in the following terms;
- [a]. Unpaid salary for August 2017..... KShs. 16, 585.
 - [b]. Compensation for leave earned but unutilised.....KShs. 34, 828.
 - [c]. Service Pay.....KShs. 15,150.
 - [d]. Unpaid House allowance.....KShs. 89,559.
- The awarded sums shall be less the Counterclaim sum, KShs.16,585.00 and statutory deductions.
- [e]. Each party is to bear its own costs.

READ, SIGNED AND DELIVERED THIS 26TH DAY OF JULY, 2024.

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OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Munene for Mr. Ayieko for the Claimant.

Mr. Gekonge 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

