



Beti v Davis (Cause 1949 of 2016) [2024] KEELRC 2013 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2013 (KLR)

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

CAUSE 1949 OF 2016

BOM MANANI, J

JULY 25, 2024

BETWEEN

ALFRED MUHONGO BETI CLAIMANT

AND

CLIVE DAVIS RESPONDENT

JUDGMENT

1. The parties to this action had an employment relation whose closure is contested. Whilst the Claimant contends that the Respondent unlawfully terminated the relation, the Respondent's position is that the Claimant absconded duty.

Claimant's Case

2. The Claimant contends that the Respondent hired his services as a domestic worker on 1st December 2012. He states that his work entailed gardening, feeding dogs, tending to the swimming pool among other assignments. He avers that his salary on exit was Ksh. 13,900.00 per month.
3. He avers that although his contract clearly defined his hours of work, the Respondent often required him to work outside these hours. Further, he contends that he was neither housed nor paid house allowance.
4. The Claimant avers that whilst he was going about his duties on the afternoon of 17th October 2015, the Respondent called in police officers from Karen Police Station who arrested him. He states that he was thereafter placed in police custody until 21st October 2015 when he was arraigned in court to face a charge of stealing by servant. However, the court eventually cleared him of the charge on 6th July 2016.
5. The Claimant contends that the Respondent verbally dismissed him from his employment after he was released from custody on bond. He states that after the court processed his bond, he went back to his workplace to resume his duties but the Respondent informed him that his services had been



terminated. He avers that his arrest was malicious and intended to lay ground for his dismissal from employment.

6. The Claimant avers that the decision to terminate his employment was contrary to the law and the principles of natural justice. Thus, he prays for various reliefs which he has set out in the Statement of Claim.

Respondent's Case

7. On his part, Respondent admits that he had employed the Claimant as his gardener. He contends that the Claimant was housed by him (the Respondent) throughout their relation. He denies that he required the Claimant to work outside the agreed work hours.
8. The Respondent contends that on 17th October 2015, he left his laptop computer at his dining room to attend to other matters. He says that when he went back to the dining room, he found the laptop missing.
9. He contends that at the time of the incident, he was in the compound with the Claimant and a house help. He avers that efforts to trace the computer proved futile and hence the decision to call in the police to investigate the matter.
10. The Respondent avers that the police questioned the Claimant and the house help regarding the disappearance of the machine but the two denied knowledge of its whereabouts. As a result, they were arrested and placed in police custody pending further investigations.
11. The Respondent avers that the police released the house help after two days. However, they continued to hold the Claimant until after four days.
12. The Respondent contends that he reported the loss of his laptop to the police in exercise of his right as a victim of crime. He denies that he was involved in the decision to apprehend or confine the Claimant. It is his case that the decision was by the police in the discharge of their mandate.
13. The Respondent avers that after the Claimant was released from police custody, he did not report back to work for close to two weeks without explanation. He avers that the Claimant only came in later to collect his belongings. In the Respondent's view, the Claimant absconded duty. As such, he terminated himself from employment.
14. The Respondent avers that on 24th December 2015, the Claimant was paid his terminal dues to wit: salary for the seventeen (17) days worked in October 2015; salary in lieu of notice to terminate his contract; accrued leave days; and severance pay. It is the Respondent's contention that the Claimant signed to acknowledge receipt of the payment thereby closing the matter.

Issues for Determination

15. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues that fall for determination:-
 - a. Whether the Claimant's contract of service was unlawfully terminated.
 - b. Whether the Claimant is entitled to the reliefs that he seeks in the Statement of Claim.

Analysis

16. The record shows that the incident which triggered the separation of the parties was the unexplained disappearance of the Respondent's laptop computer on the afternoon of 17th October 2015.



- According to the evidence on record, the Respondent had left the laptop at his dining room to attend to other matters. However, he found the gadget missing when he went back to the room.
17. The Respondent avers that at the time of the incident, only the Claimant, a house help and himself were in the compound. He contends that when he asked the two about the whereabouts of the gadget, they denied having seen it. He says that efforts to find the machine proved futile.
 18. The Respondent contends that due to this development, he asked a private security firm that was guarding his compound to trace the computer but the gadget was not found. As a consequence, a decision was taken to refer the matter to the police.
 19. The Respondent contends that the police questioned the two employees who were in the compound with him but they did not yield information on where the gadget was. Hence the decision to arrest them for further investigations.
 20. Under section 43 of the *Employment Act*, an employer is entitled to terminate an employee's services if he has genuine reason to believe that the employee has committed an infraction at the work place. The law does not require the employer to have infallible evidence to support his conclusion in this respect. It is sufficient that he has reasonable grounds to entertain a genuine belief that the infraction in question has occurred (see *Kenya Revenue Authority v Reuel Waitihaka Gitahi & 2 others* [2019] eKLR).
 21. The Respondent states that at the time of loss of his computer, the only other persons who were in the compound were the Claimant and the house help. Therefore, he genuinely believed that the two knew how the gadget had disappeared. And hence his decision to call in the police to interrogate them.
 22. In the court's view, the circumstances of the aforesaid occurrence provided the Respondent with reasonable grounds to suspect that the two employees were privy to the loss of his computer. The fact that apart from him, the two were the only other persons who were in the compound when the loss occurred provided reasonable justification for the Respondent to entertain the belief that they may have had a hand in the disappearance of the gadget. As a consequence, I do not find the Respondent's decision to seek police assistance to interrogate them as unreasonable.
 23. The evidence on record shows that after the police took over the matter, they arrested the two employees and placed them in custody. There is evidence that the Claimant was thereafter charged with the offense of theft by servant but was eventually set free after the case failed to proceed.
 24. I do not think that the Respondent can be held responsible for the decision to charge the Claimant with the criminal offense. This was entirely a decision by the police after they concluded their investigations into the matter.
 25. The parties agree that the Claimant was admitted to bail after he was charged in court. However, they disagree on what transpired regarding the Claimant's employment.
 26. On the part of the Claimant, he contends that he went back to his work place but the Respondent told him that his contract had been terminated and that he should leave the compound. On the other hand, the Respondent insists that after the Claimant was released from custody, he did not report back to work for two weeks without explanation. He allegedly only went back to collect his belongings and terminal dues.
 27. Despite the absence of consensus on how the parties separated, it is evident that the contract between them terminated. In order to lawfully sever an employment relation, the employer is required to comply with the procedural strictures under the *Employment Act*. Although the Respondent asserts that the Claimant absconded duty, there is no evidence of the efforts that were made by the Respondent to ascertain the reasons for his (the Claimant's) absence and whether he was ready to resume duty.



28. The law provides for two ingredients which the employer must satisfy before he can lawfully release an employee from employment. First, he must have a substantive ground to warrant the decision. Second, he must process the release in accordance with the dictates of fair procedure (see sections 41, 43, 44, 45 and 47 of the *Employment Act*).
29. The Respondent contends that the Claimant lost employment in terms of section 44 of the *Employment Act* after he absconded duty. This section recognizes unjustified absenteeism from duty as a legitimate ground for closure of an employment relation. However and by virtue of section 41(2) of the Act, an employee who is to forfeit employment by reason of any of the grounds under section 44 of the Act must be subjected to due process.
30. In effect, the fact that the Claimant had absconded duty did not operate to automatically terminate the contract of employment between the parties. Despite the fact that the Claimant had allegedly absconded duty, it was still incumbent on the Respondent as the innocent party to take steps to lawfully terminate the employment relation by subjecting the Claimant to a disciplinary process. This position is made clear in a number of judicial pronouncements by this court (see *James Okeyo v Maskant Flower Limite* [2015] eKLR and *Mkoba v Coast Agency Limited* (Appeal E007 of 2022) [2023] KEELRC 1199 (KLR) (18 May 2023) (Judgment)).
31. The record does not demonstrate that the Respondent complied with this procedure. Although he said that he called the Claimant to ascertain his whereabouts, there is no evidence that he subjected him to a disciplinary process when he allegedly came back to collect his belongings. In the premises, I arrive at the conclusion that he (the Respondent) failed to uphold the requirements of due process in closing the employment relation between them.
32. The Respondent avers that he did not prevent the Claimant from resuming duty. However, it is not contested that the Claimant did not resume duty as a matter of fact. This being the position, it was incumbent on the Respondent as the innocent party to close the relation as suggested above. The fact that he did not do so renders the separation procedurally flawed.
33. The next question for determination relates to whether the Claimant is entitled to the reliefs that he seeks in the Statement of Claim. From the statement, he (the Claimant) prays for the following reliefs: a declaration that his contract of service was unfairly terminated; unpaid salary for October 2015; accrued leave for three years; service pay; underpayments; and compensation for unfair termination of his contract.
34. In his testimony, the Respondent stated that he paid the Claimant salary in lieu of notice, accrued leave days and severance pay. The record does not show that the Claimant controverted this evidence. As such, I arrive at the conclusion that he (the Claimant) received the aforesaid payments. He is thus not entitled to pursue them through this action as this would offend the principle against double compensation.
35. As demonstrated earlier, the Respondent may have had justifiable reasons to consider terminating the contract of service between the parties. However, the contract was unprocedurally terminated. As such, the Claimant is entitled to compensation for unfair closure of his employment.
36. Having regard to the factors to be considered in assessing the compensation to award for unfair termination of a contract of service under section 49 of the *Employment Act*, I award the Claimant compensation which is equivalent to his salary for four months, that is to say, Ksh. 13,900 x 4 = Ksh. 55,600.00. The amount is subject to the applicable statutory deductions.
37. I award the Claimant interest on this amount at court rates from the date of this decision.



38. I award the Claimant costs of the case.

Summary of the Award

39. Having considered the evidence on record, I make the following findings and award:-

- a. The Respondent failed to uphold due process in closing the employment relation between the parties.
- b. I award the Claimant compensation for unfair termination of his employment which is equivalent to his salary for four months, that is to say, Ksh. 13,900 x 4 = Ksh. 55,600.00.
- c. The amount is subject to the applicable statutory deductions.
- d. I award the Claimant interest on this amount at court rates from the date of this decision.
- e. I award the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

