



**Dantrack Logistics Limited v Chief Magistrate Court at Nairobi Milimani
Commercial Courts (CMEL Cause No 336 of 2019) & another (Appeal
E026 of 2022) [2024] KEELRC 1830 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1830 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E026 OF 2022
AN MWAURE, J
JULY 10, 2024**

BETWEEN

DANTRACK LOGISTICS LIMITED APPELLANT

AND

**CHIEF MAGISTRATE COURT AT NAIROBI MILIMANI COMMERCIAL
COURTS (CMEL CAUSE NO 336 OF 2019) 1ST RESPONDENT**

NAHASHON MWONGERA MANYARA 2ND RESPONDENT

*(Being an Appeal from the judgment of Hon. Elizabeth Wanjala
(PM) dated 28th January 2022 in Milimani CMEL Cause No. 336 of 2019)*

JUDGMENT

1. The Appellant being dissatisfied with the judgement of the Hon. Elizabeth Wanjala, PM delivered on 28th January 2022 at Nairobi, filed this appeal vide a Memorandum of Appeal dated 25th February 2022 on grounds that: -
 1. the learned magistrate erred in law and fact by holding that the 2nd Respondent’s services had been unprocedurally, unfairly and unlawfully terminated on 6th November 2018 when the Appellant’s vehicle was repossessed;
 2. the learned magistrate erred in law and in fact by concluding that there was no evidence that the 2nd Respondent had absconded duty;
 3. the learned magistrate erred in law and fact by relying on the Claimant’s evidence when the Claimant was an incompetent and unreliable witness.
2. The Appellant prayed for orders that: -



1. This Honorable court set aside the judgment of Hon. Elizabeth Wanjala, PM made in Nairobi Chief Magistrate Court CMEL Cause No. 336 of 2019 on 28th January 2022.
2. An order that the decision by the Thika Sub-county Labour Office made on 11th January 2019 was indeed correct and that the payment of Kshs. 26,200 made by the Appellant by way of cheque was in full settlement of the 2nd Respondent's claim.
3. The costs of the suit appealed against being Nairobi Chief Magistrate Court CMEL Cause No. 336 of 2019 as well as the costs of this appeal be granted to the Appellant against the 2nd Respondent.

Appellant's Submissions

3. The Appellant avers that on 06/11/2018 the Appellant's financiers repossessed motor vehicle registration KBY 166M while the 2nd Respondent was driving it. It subsequently asked the 2nd Respondent to return to work on 07/11/2018 and drive another vehicle as a reliever, however, he proceeded to the Thika Sub-county Labour Office and made a complaint that his services were unlawfully terminated.
4. That Appellant submitted that the 2nd Respondent has failed to prove to this Court how his services were terminated unprocedurally, unfairly and unlawfully by the Appellant as he was asked to drive another vehicle as a reliever immediately the vehicle he was driving was repossessed.
5. The Appellant submitted that it made an effort by asking the 2nd Respondent to resume duty and drive another vehicle as reliever, but the 2nd Respondent refused to drive it. He never gave any reason for his refusal and never reported to work from that day. For this reason, it urges the court to find and hold that the 2nd Respondent absconded duty on his own volition.
6. It is the Appellant's submission that the 2nd Respondent secured another employment 10 days after his refusal to take up the replacement vehicle. It is the Appellant's assertion that this is a sign the 2nd Respondent absconded duty on his own volition and refused to take up a new vehicle.
7. It was submitted for the Appellant that the 2nd Respondent was an incompetent and unreliable witness as he averred in his memorandum of claim dated 05/03/2019 that he was employed by the Appellant on 20/07/2018 and was its employee for a period of 10 years and 3 months. However, during cross examination, the 2nd Respondent admitted he was employed by m/s Spinner and Spinners between 2009 and 2013.
8. Further, the 2nd Respondent admitted he was employed by another company barely 10 days after he absconded duties. Additionally, he admitted he went to the labour office yet he could barely recall the date contrary to the position in his memorandum of claim.
9. The Appellant submitted that the evidence tendered by its witness before the trial court was uncontested by the 2nd Respondent and the court should rely on the same as true and credible evidence. Therefore, the court should base the outcome of this Appeal on this evidence.
10. It is the Appellant's submission that upon reporting the matter to the labour office and the 2nd Respondent demanding to the Appellant to pay him Kshs 23,000 for the days worked in November, leave days and notice pay.
11. Both parties attended a meeting at the labour office on 11/01/2019 wherein the matter was heard and determined that the 2nd Respondent be paid his unpaid leave of 3 years totaling Kshs 46,200. The 2nd



Respondent was issued a cheque of Kshs 26,200 having deducted a loan of Kshs 20,000 which was acknowledged through a letter dated 11/01/2019.

2nd Respondent's Submissions

12. The 2nd Respondent submitted that he did not abscond work but was terminated from employment by the Appellant after their motor vehicle was repossessed by Chase Bank while he was driving on 06/11/2018. He was specifically asked to go home and never reinstated by the Appellant despite making numerous calls to the Respondent's manager. Further, the Appellant did not provide any proof in form of a notice to show cause, emails, call logs or text messages that they tried to contact him.
13. The 2nd Respondent submitted that the termination of his employment lacked both substantive and procedural fairness. The Appellant lacked a valid reason to terminate his employment and neither was he invited to defend himself hence his seeking redress from Thika Sub County Labour Office and subsequently the suit at the trial court.
14. The 2nd Respondent submitted that the Appellant failed to tender proof that he was asked to return to work as he was assigned another vehicle. Therefore, the trial court was correct in holding that his termination was unfair and unlawful.
15. The 2nd Respondent submitted that the memorandum of claim indication that he was employed on 20/07/2018 was a typographical error because his witness statement and testimony he maintains that he was employed on 20/07/2008.
16. Further, the 2nd Respondent confirmed that he was a part time employee of Spinners & Spinners between 2009 and 2013 but a full-time employee of the Appellant. His only task at Spinners & Spinners was to pick children from school and drop them home between 2pm and 4,30pm whereas his working hours at the Appellant was between 6pm and 12 noon. He cannot be faulted for doing extra work on the side to supplement his income as long he was reporting to work and doing his duties diligently.
17. It is the 2nd Respondent's submission that the Appellant has not produced any records to rebut the 2nd Respondent's evidence on the disputed commencement of his employment.
18. The 2nd Respondent submitted that there is no agreement entered between the parties settling the matter at the labour office as claimed in the letter dated 11/01/2019; the letter only indicates payment for leave days however notice pay and days worked in November had not been paid. Further, the letter is addressed to Faith Karoki, who is unknown to the 2nd Respondent. Therefore, the 2nd Respondent was within his right to file the suit as his attempt to settle the claim at the labour office did not bear any fruit.
19. It is the 2nd Respondent's submission that the case was not resolved by the labour office and it was properly filed at the trial court.

Analysis and determination

20. Arising from the grounds of appeal, the following are the issues for determination:
 - a. Whether learned magistrate erred in law and in fact by holding that the 2nd Respondent's services had been unprocedurally, unfairly and unlawfully terminated on 6th November 2018 when the Appellant's vehicle was repossessed.
 - b. Whether the 2nd Respondent was an incompetent witness.



Whether learned magistrate erred in law and in fact by holding that the 2nd Respondent's services had been unprocedurally, unfairly and unlawfully terminated when the Appellant's vehicle was repossessed.

21. The Appellant submitted that the 2nd Respondent failed to prove that his employment was unlawfully and unfairly terminated in the trial court. It is the Appellant's case that the 2nd Respondent absconded duty as once its car was repossessed by its financier on 06/11/2018, the Appellant tried asking the 2nd Respondent to resume duty and drive another vehicle as reliever, but the 2nd Respondent refused to drive to drive it.

22. In *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR, the court held:-

“The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels.

It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.

23. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR, the court observed as follows on the issue: -

“.....the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.”

It is up to the employee to show up to explain his absence from duty. It is possible that he may have been prevented from reporting on duty for justifiable reasons such as incapacitating sickness or natural calamities.

If the employee: fails to resume duty or respond to the notice to show cause; or is not traced by the employer despite diligent effort; or responds to the employer but the reasons for his absence are considered unjustifiable, then the employer may proceed to terminate such employee for unauthorized absenteeism. These principles are well articulated in a series of decisions by this court including *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR.

24. The essence of this procedure is to ensure that the employee is terminated in a manner that meets the requirements of section 41 of the *Employment Act* as read with articles 41 and 47 of *the Constitution*. It must be demonstrated that the employer had a justifiable ground to terminate the employee and that he accorded the employee the procedural safeguards guaranteed under the law in the process leading to the termination. The implication of the foregoing is that absent evidence that the Respondent followed the procedure aforesaid in handling the Appellant's absenteeism the Respondent cannot lawfully plead



abandonment of employment by the Appellant as a way of closure of the employer-employee relation between them.”

25. It is the 2nd Respondent’s case that on 06/11/2018, he was suspended from work for no apparent reason after the vehicle he was driving was repossessed by auctioneers. He tried to reach out to the Appellant’s manager, Ms Judy Wachira after 2 weeks to enquire on the status of his employment as he had not been assigned another vehicle but he was not afforded any response.
26. However, it was the Appellant’s case that it reached out to the 2nd Respondent on 07/11/2018 to act as a reliever and drive another vehicle but he refused. The Appellant has not provided this court any evidence to prove that it indeed reached out to the 2nd Respondent in any manner and he refused to report back.
27. Further, the Respondent neither instituted any disciplinary proceedings on account of the 2nd Respondent’s action nor informed the labour office of the same when it attended the meeting on 11/11/2018.
28. In view of the foregoing, the learned magistrate did not err in law and fact by holding that the 2nd Respondent’s services had been unprocedurally, unfairly and unlawfully terminated; and by concluding that there was no evidence that the 2nd Respondent had absconded duty.

Whether the 2nd Respondent’s evidence was incompetent and unreliable

29. It is the Appellant’s submission that the 2nd Respondent was an incompetent and unreliable witness as his memorandum of claim stated that he was employed by the Appellant on 20/07/2008 and was its employee for a period of 10 years and 3 months. However, during cross examination, the 2nd Respondent admitted he was employed by M/s Spinner and Spinners between 2009 and 2013.
30. On the other hand, the 2nd Respondent stated that he used to be part time employee of Spinners & Spinners between 2009 and 2013 but a full-time employee of the Appellant. His only task at Spinners & Spinners was to pick children from school and drop them home between 2pm and 4,30pm whereas his working hours at the Appellant was between 6pm and 12 noon. He cannot be faulted for doing extra work on the side to supplement his income as long he was reporting to work and doing his duties diligently.
31. It is key to note that the Appellant did not produce any evidence to show the exact period the 2nd Respondent was employed and his working hours so as to rebut the 2nd Respondent’s evidence in the trial court. It is the responsibility of the employer to keep records of his employees and the respondent failed to do so.
32. The court finds no evidence is adduced that the respondent proved the claimant was not a competent witness. The issues raised by the respondent in attempt to prove the respondent was not a reliable witness are not conclusive enough to support such a strong allegations. The court finds the appellant’s evidence is not conclusive enough. The appellant is a competent witness.

Whether the amount agreed upon at the Thika Sub County Labour Office was sufficient.

33. It is the Appellant’s submission that both parties attended a meeting at the labour office on 11/01/2019 wherein the matter was heard and determined that the 2nd Respondent be paid his unpaid leave of 3 years totaling Kshs 46,200. The 2nd Respondent was issued a cheque of Kshs 26,200 having deducted a loan of Kshs 20,000 which was acknowledged through a letter dated 11/01/2019.



34. It is trite law that he who alleges must prove; the burden of proof is on he who alleges a fact. Sections 107 and 108 of the Evidence Act provide as follows:

‘107

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

35. It is key to note that the Appellant did not produce any evidence in court such as the said determination by the labour officer or documents to show that the 2nd Respondent indeed took a loan of Kshs. 20,000 from the Appellant.

36. The Appellant has failed to prove the parties entered into an agreed Amount which the 2nd Respondent was to receive at the Thika Sub County Labour Office and that the same was sufficient to cover his terminal dues.

37. The Court is indeed satisfied the trial magistrate did not err in entering judgment in favour of the 2nd respondent and so the court rules the appeal is not merited and is dismissed in its entirety.

38. The Court further holds the remedies awarded to the 2nd respondent are merited and are upheld. Further, the costs of this appeal are awarded to the 2nd respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

