



**Mutemi v Gratom Babz Services Limited (Cause 914 of 2017)
[2024] KEELRC 1891 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1891 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 914 OF 2017**

JK GAKERI, J

JULY 24, 2024

BETWEEN

DANIEL MWANGANGI MUTEMI CLAIMANT

AND

GRATOM BABZ SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed the instant suit on 16th May, 2017 alleging unlawful, wrongful and unfair dismissal by the Respondent.
2. The Claimant avers that he was employed by the Respondent on 15th March, 2008 as a security guard and trained him.
3. The Claimant further avers that he was not given a written contract of service and his starting salary was Kshs.4,800/= per month and served diligently for over 8 years.
4. The Claimant alleges that on 11th June, 2016, he reported to work at 6.00 pm and shortly thereafter his supervisor, Mr. Koria came and informed him that he had received information that the Claimant had been reporting to work late, a claim the Claimant denied.
5. That Mr. Koria directed him to report to the office on the following day.
6. The Claimant avers that on 12th June, 2016, he reported to the office as directed and found Mr. Koria who directed him to return the uniform and leave the premises as there was no work for him and did as directed.
7. It is the Claimant's case that as at the date of dismissal, he had worked for 11 days in the month of June 2016 and his salary had risen to Kshs.7,300/= per month.



8. The Claimant avers that the Respondent did not pay terminal dues or refund the Kshs.3,500/= he had in the SACCO.
9. It is the Claimant's case that he had not proceeded on leave and worked during public holidays and seven days per week.
10. The Claimant prays for;
 - i. A declaration that his dismissal from employment was unlawful and unfair.
 - ii. Days worked in May 2016 Kshs.5,170.47
 - iii. Salary in lieu of notice Kshs.12,221.00
 - iv. Pay in lieu of leave Kshs.78,966.72
 - v. Pay in lieu of public holidays Kshs.37,603.20
 - vi. Pay in lieu of rest days Kshs.195,536.64
 - vii. Underpayment of wages Kshs.134,897.70
 - viii. House allowance Kshs.176,534.27
 - ix. 12 months compensation Kshs.146,652.00
 - x. SACCO contribution Kshs.4,000.00
 - xi. Certificate of service.
 - xii. Costs of this suit with interest.
 - xiii. Any other relief this Honourable Court may deem fit and just to grant.

Respondent's case

11. In its statement of response and Counter-claim, the Respondent admits that it employed the Claimant as a security guard on 15th March, 2008.
12. It avers that the Claimant had been warned about reporting to work late and leaving his work station at any time.
13. It is the Respondent's case that while assigned at Dimkes Sacco along River Road, he deserted the work place on 10th May, 2016 and did not report back and retains the Respondent's uniform.
14. That on the material day, the supervisor made an impromptu spot check at 20.01 hours and the Claimant was at the work place and one Maricus Odele who was on standby at Nairobi Textile replaced the Claimant.
15. As regards the Counter-claim, the Respondent avers that since the Claimant absconded duty, he owes it salary in lieu of notice, as well as costs of the claim and Counter-claim.

Claimant's evidence

16. On cross-examination, the Claimant confirmed that he was trained by the employer and given a certificate and performed his duties diligently.



17. The witness admits that on 5th March, 2016, he received Kshs.6,900/= in his bank account from a person other than the Respondent.
18. That the Respondent used to deposit Kshs.4,000/= and later Kshs.6,500/= which subsequently rose to 8,000/= per month, initially at the Co-operative Bank and later at Family Bank.
19. He denied having been warned by the Respondent.
20. The Claimant confirmed that he had no evidence of SACCO membership or deductions and had not contacted the SACCO over the deductions.
21. It was his testimony that he went to the office and was told that his employment had been terminated.
22. Strangely, the Claimant testified that his employment was terminated on 12th May, 2017 not 12th June, 2016.

Respondent's evidence

23. RWI, Mr. Mathew Wekesa adopted his witness statement and produced the documents filed and was not cross-examined by the Claimant.
24. The Respondent's case is that the Claimant absconded duty.
25. Strangely, none of the parties had filed submissions by 16th June, 2024 when the court retired to prepare this judgment.

Analysis and determination

26. It is not in dispute that the Claimant was an employee of the Respondent from 15th March, 2008 to 10th or 12th May, 2016. It is however uncertain as to what happened on 10th or 12th May, 2016 as there is no agreement on what transpired and on which date.
27. While the Claimant alleges that he reported to the office as directed by the supervisor the previous day, and was told to return the uniform and leave, the Respondent maintains that the Claimant absconded duty on 10th May, 2016.
28. The issues for determination are;
 - i. Whether the Claimant's employment was unlawfully terminated or he absconded duty.
 - ii. Whether the Claimant is entitled to the reliefs sought.
29. Concerning the 1st issue, the Claimant maintains that when he reported to the office on 12th May, 2016, he was instructed by Mr. Koria to return the uniform and leave as there was no work for him and did as directed.
30. The Respondent on its part alleges that the Claimant absconded duty on 10th May, 2016.
31. It is therefore essential to determine whether the Claimant absconded duty.
32. According to Black's Law Dictionary (10th Edition), desertion means;

“The wilful and unjustified abandonment of a person's duties or obligations.”



33. In the often cited South African decision in *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court stated as follows:
- “ . . . an employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return”.
34. Desertion is a serious administrative infraction and if proved may lead to dismissal from employment.
35. The emerging jurisprudence of this court is that an employer who relies on desertion as a defence is required to establish the alleged desertion. The employer must demonstrate the reasonable steps it took to contact the employee to resume duty or make him or her aware that the disciplinary action is being contemplated on account of the desertion.
36. The foregoing is fortified by the decision in *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR, where the court held thus;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
37. See also *Richard Maingi v wells Fargo Ltd* (2017) eKLR, *Chrispine Onguso Okinyi v Devki Steel Mills Ltd* (2018) eKLR, *Joseph Nzioka v Smart Coatings Ltd* (2017) eKLR, *Sitima v Jokali Handling Services Ltd* (2023) KEELRC 762 (KLR), *Boniface Mwangi v B.O.M. Iyego Secondary School* (2019) eKLR, *Simon Mbiti Mbane v Inter Security Services Ltd* (2018) eKLR and *Nyabiba v Apak Co. Ltd* (2023) KEELRC 672 (KLR) among others.
38. In the instant case, the Respondent has not provided evidence to demonstrate the reasonable and verifiable steps it took to contact the Claimant to resume duty. It availed no evidence of any calls made to the Claimant or text messages to the Claimant.
39. As the Claimant had worked for the Respondent for over 8 years, the Respondent must have had the Claimant’s postal address and contacts of his next of kin.
40. A letter posted to the Claimant’s last known postal address would have persuasively shown that the Claimant was indeed unreachable by phone or other means.
41. The totality of the evidence on record is that the Respondent has failed to prove that the Claimant deserted the workplace or absconded
42. Under Section 45 of the *Employment Act*, 2007, for a termination of employment to pass the fairness test, the employer is required to prove that it had a valid and fair reason, relating to the employee’s conduct, capacity or compatibility or operational requirements of the employer and conducted the termination in accordance with a fair procedure.
43. Put in the alternative, the employer must demonstrate that it had a substantive justification for terminating the employee’s employment and there was procedural fairness.
44. These requirements were aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.



45. The Claimant's uncontested evidence is that he was requested by the supervisor, Mr. Koria to report to the office on 12th May, 2016 and when he did so he found Mr. Koria who directed him to return the uniform and leave as there was no work for him.
46. This evidence appears to be in sync with the fact that the Claimant is not claiming uniform reimbursement and the Respondent has not claimed the same in its Counter-claim.
47. From the foregoing, it is clear that the Respondent has failed to show that the Claimant deserted his post or his employment was fairly and lawfully terminated.

Appropriate reliefs

i. Declaration

48. Having found that termination of the Claimant's employment was neither substantively justifiable nor procedurally fair, a declaration that it was unfair is merited.

ii. Days worked in May 2016

49. It is common ground that the Claimant worked for about 10 or 11 days in May 2016 and the Respondent adduced no evidence of having paid for the same.
50. The Claimant is awarded salary for 11 days worked in May 2016, Kshs.3,264.51.

iii. Salary in lieu of notice

51. The Claimant testified that as at the date of termination of employment, his salary was Kshs.8,000/=. It is unclear where the sum of Kshs.12,221.10 was extracted from.
52. Having found that termination of the Claimant's employment was unfair and neither pay in lieu of notice nor notice was given, the Claimant is awarded the sum of Kshs.9,200/= as pay in lieu of notice.

iv. Pay in lieu of leave, public holidays and rest days

53. These three claims lack supportive evidence and are unsustainable.
54. It is unclear to the court how the figures indicated in the prayers were arrived at.
55. For instance, when did the leave days accrue and how many are they? The same may be asked of the rest days.
56. Finally, during which public holidays did the Claimant render services to the defendant and when?
57. These claims lack the requisite particulars and are accordingly dismissed.

v. Underpayment of wages

58. Neither the Claimant's written statement nor the oral testimony adduced in court make reference to any underpayment of salary or by how much or the law relied upon in the computation of the sum of Kshs.134,597.70.
59. Needless to underscore, this is a claim for special damages which must be specifically pleaded and strictly proved.
60. How for instance was the amount claimed arrived?



61. What was the underpayment per month, if any?
62. The claim lacks particulars and is declined.

vi. House allowance

63. From the evidence on record, it is decipherable that the Respondent was not paying the Claimant's housing allowance and did not provide housing as ordained by the provisions of Section 31 of the [Employment Act](#), 2007.
64. Relatedly, the Respondent neither pleaded nor demonstrated that the Claimant's salary was consolidated.
65. Needless to belabour, housing is one of the statutory rights of the employee and must be provided at the employer's expenses.
66. Consequently, the Claimant is awarded housing allowance at 15% of the basic salary for 3 years, Kshs.43,200/=.

vii. 12 months compensation

67. Having found that termination of the Claimant's employment was unfair for non-compliance with the provisions of the [Employment Act](#), 2007, the Claimant is entitled to compensation under Section 49(1)(c) of the [Employment Act](#).
68. In determining the level of compensation, the court has taken into consideration the fact that the Claimant served the Respondent diligently from 15th March, 2008 to 12th May, 2016, over 8 years and had no recorded cases of misconduct, though he may have contributed to the termination of employment.
69. The Claimant did not express his wish to remain in the Respondent's employment or appeal the decision communicated by Mr. Korja.
70. In the circumstances, the court is satisfied that the equivalent of four (4) months' gross salary is fair, Kshs.36,800.00.

viii. SACCO contribution Kshs.4,000/=

71. The Claimant appears to be unsure of the amount allegedly contributed to the unnamed SACCO.
72. While the claim indicates a figure of Kshs.4,000/=, his undated written witness statement indicates a figure of Kshs.3,500/=.
73. More significantly, the Claimant tendered no evidence of membership of the SACCO or contributions for the alleged 7 months and admitted as much on cross-examination.
74. The claim lacks supportive evidence and is declined.

ix. Certificate of service

75. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007.
76. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;
 - a. Declaration that termination of employment was unlawful and unfair.



- b. 11 days worked in May 2016 Kshs.3,264.51.
- c. Salary in lieu of notice Kshs.9,200.00.
- d. House allowance Kshs.43,200.00.
- e. Equivalent of 4 months' gross salary Kshs.36,800.00.
Total Kshs.92,464.51
- f. Certificate of service.

77. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF JULY 2024

DR. JACOB GAKERI

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 Civil 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.

DR. JACOB GAKERI

JUDGE

