



**Mutsami v Classic Mouldings Limited (Cause 391 of 2018)
[2024] KEELRC 1854 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1854 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 391 OF 2018
NJ ABUODHA, J
JULY 12, 2024**

BETWEEN

MODESTAR ADISA MUTSAMI CLAIMANT

AND

CLASSIC MOULDINGS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her claim on 12th March, 2018 and pleaded inter alia: -
 - a. The Claimant started working for the Respondent in or about 2/5/2006 as a Cleaner/ Tea girl at a monthly salary of Kshs 10,000 and later promoted to an Office Assistant at a monthly salary of Kshs 30,000/=.
 - b. The Claimant averred that she was not issued with a written contract of employment and used to work from 6:30 am to 5:00 pm or thereafter as directed by the management.
 - c. The Claimant averred that she did her work honestly and diligently throughout her work schedule as had been agreed that lasted 126 months.
 - d. The Claimant averred that on or about 21.9.2016 the Respondent without notice or justifiable reason terminated the Claimant and did not pay her terminal dues.
 - e. The Claimant averred that she was dismissed verbally without any payment and was not even given reasons for her dismissal or audience.
 - f. The Claimant further averred that she was paid Kshs. 4,000 for the month of December 2016 and her last salary was Kshs. 30,000 per month.
 - g. The Claimant averred that she was dismissed without a hearing contrary to principles of natural justice and Section 41 of the *Employment Act*.



2. The Claimant prayed for the following against the Respondent;
 - a. A declaration that the termination of the Claimant was illegal and unlawful.
 - b. The Respondent to pay to the Claimant amount of Kshs 1,133,000/= in the following terms:
 - i. Balance salary for December 2016 Kshs 26,000/=
 - ii. Service pay for 10 years Kshs 150,000/=
 - iii. One month's salary in lieu of notice Kshs 90,000/=
 - iv. House allowance 126 months Kshs 567,000/=
 - v. 12 months in compensation Kshs 360,000/=
 - Total..... KSHS 1,133,000.00/=
 - vi. Costs of the Suit.
3. The Respondent filed its Statement of Response and averred inter alia as follows;
 - i. The Respondent admitted that the Claimant was employed as a tea girl/Cleaner at a salary of Kshs 10,000/= but despite being promoted to the position of office assistant on or about 18th August, 2014 the Claimant continued performing her roles as a tea girl/Cleaner until she ceased being an employee of the Respondent Company after deserting her work place.
 - ii. The Respondent averred that the Claimant was accorded numerous opportunities by the Respondent to be out of work because of her health conditions until she is of sound health before resuming her duties. That she was keen not to return to work and opted not to return to work with the Respondent despite the opportunity accorded to her to return to work.
 - iii. The Respondent admitted that there was no written Contract of Employment between itself and the Claimant and by conduct of parties during the Claimant's employment, the Claimant was fully aware of her roles and the Respondent met its obligation as an employer.
 - iv. The Respondent averred that the Claimant performed her works well until sometime in 2016 when she had health complications which affected her ability to perform her roles and duties.
 - v. The Respondent averred that the Claimant's health condition was not connected to the nature of her work and the Respondent granted her sick leave to be away from work until such time that she will be of good health to resume work.
 - vi. The Respondent further averred that the Claimant was granted sick leave for 35 days on full pay and a further 40 days sick leave on half pay.
 - vii. The Respondent averred that despite utilizing the sick leave accorded to her by the Respondent the Claimant deliberately refused to resume work after recovering from health complications and deserted her employment with the Respondent.
 - viii. The Respondent denied that the Claimant was dismissed from employment without any justifiable cause on 21st September 2016.
 - ix. The Respondent averred that the Claimant was paid full terminal dues as at the time when it became clear to the Respondent that she was not going to resume work.



- x. The Respondent denied that the Claimant was not accorded a hearing prior to dismissal from employment.
- xi. The Respondent averred that it honored the Claimant's wishes when she failed to resume work by issuing her with certificate of service which was not challenged by the Claimant.

Evidence

4. Both the Claimant's and Respondent's cases were heard on 27th February, 2024. The Claimant (CW1) herein testified as the only witness.
5. The claimant adopted her witness statement together with the pleadings filed in court dated 12th March, 2018 as her evidence in chief. It was her evidence that she was employed on 2/5/2006 but was not issued with a letter of appointment. Her starting salary was Ksh 10,000/= but at the time of termination it was Kshs 30,000/=. The working hours for weekdays were from 6.30 am to 5.00pm and 9.00am to 4pm on Saturdays.
6. CW 1 further stated that on 21/9/2016 she was at work and not feeling well, she had pain on her left leg and was in a lot of pain such that she could not continue working. She asked the Manager for off to undergo treatment. According to her, the manager gave her 14 days sick off but even thereafter she was still in pain. She therefore called the office and asked for more time to recover. It was her evidence that later one of the directors called her and told her she could not believe her doctors and asked that she seeks a second opinion. She saw Dr. David Oluoch on 26th November, 2016 and was given Kshs. 4000/- for consultation. The doctor examined her and recommended a surgery which the doctor said unless was done, she would not be able to walk or work. According to her the doctor said she was sick on the back and that the disc had moved. The doctors report and recommendations were forwarded to the respondent and that the surgery would cost about Kshs 1.2 Million.
7. CW 1 testified that the Respondent subsequently terminated her services and did not pay his terminal dues. According to her she was terminated due to her medical condition. It was her evidence that she used to clean the stores and floors and worked while standing or on her knees and that she had never had any complications with her back prior to working for the Respondent for 10 years.
8. CW 1 further stated that she had never had any disciplinary issues or any show cause letter served upon her. That she was not given notice of termination. She denied refusing to return to work and that the Respondent was aware she was unwell and undergoing treatment. CW 1 testified that she never received the Kshs. 2.7 million stated in the Respondent bundle of documents but received Kshs. 10,625/- on 29/9/2016 yet her salary was Kshs. 30,000/-.
9. In cross-examination CW1 confirmed that she was employed in 2006 as a cleaner and tea girl and later promoted in 2014. She continued with her duties of cleaning, tea girl and serving clients and further that she used to scrub floors.
10. CW1 confirmed that she never demanded any salary from 2004- 2014 and that she was not aware of any discharge voucher as she never signed any document dated 2nd May 2014 and the signature on the verifying affidavit is different from the signature on the discharge. CW1 confirmed that her salary increased to 30,000/- but her job description did not change and further that her work load increased. That she was paid transport allowance for some time but was stopped. CW1 confirmed that she received house allowance and was a member of NHIF and NSSF with deductions made from her salary.



11. CW1 informed the Court that she had not fully recovered and that Dr Oluoch was paid consultation fee by the Respondent and that she never received Kshs. 5000/- for the doctor but the Respondent gave her money for taxi. She further stated that she never went for surgery as she could not afford and her NHIF got exhausted. According to her it was the responsibility of the Respondent to cater for her treatment and that she has not claimed for injuries at work place from the Respondent.
12. CW1 confirmed that she was given sick leave to continue treatment. It was from September 21 and was to end after 14 days. She was thereafter given another 35 days off by the doctor before the Respondent called her back to work.
13. In Re-examination CW1 clarified she never received the gratuity and did not sign the document. She clarified that in December and November 2016 she was paid Kshs. 24,544/- and that in December she was still the Respondent's employee.
14. The Respondent on the other hand called one witness, (RW1), the Respondent's Operations Manager who testified and adopted his statement as well as the Respondent's documents filed in court as her evidence in chief. She stated that she had worked for the Respondent for 12 years since 2011 and for 5 years she was the Claimant's direct supervisor. It was her evidence that the Claimant started ailing on 21/9/2016 and asked for time off to see the doctor and was given 2 weeks off. The Claimant was to return on 7/10/2016 but called and said that she was still not feeling well. In November, the claimant was called back to work and referred to another doctor for second opinion and that Dr. Oluoch recommended surgery but the Claimant refused.
15. RW1 testified that the Claimant thereafter continued on medication and was allowed 35 days of full pay and 40 days on half pay. In January 2017 the Respondent could not reach the Claimant on phone and sent a driver who said he knew where the claimant was staying but he could not find her. In February 2017 the Respondent sent the Claimant a Certificate of Service which she received but refused to acknowledge receipt. It was further her evidence that in December, the Claimant was on half pay.
16. Regarding working hours, she stated that the Respondent's working hours were from 8.30 am to 5pm during the week and from 9.00 am to 12 pm on Saturdays. In cross-examination RW1 confirmed that the Claimant worked for ten years with a starting salary of Kshs 10,000/= which was later increased to Kshs 30,000/=. RW1 further confirmed that the Claimant received the Certificate of Service in February 2017 and she was not in employment by the time she received Certificate of Service. RW1 further confirmed that the Claimant was last in office on 21/9/2016 and was on payroll until December. She further stated that the Claimant was never issued with any termination notice for absconding duty and that she had no previous disciplinary issues. She further stated that the Respondent never issued the Claimant with a show cause letter because they knew she was unwell and could not work.

Claimant's Submissions

17. The Claimant filed written submissions dated 29th February, 2024 and on the issue whether the claimant was terminated or she absconded duties the Claimant submitted that she fell sick while at work and the doctor recommended that to work again, she needed a surgery which was over a million shillings and the Respondent did not wish to pay.
18. The Claimant submitted that without medication, the Claimant could not work again and in January 2017, she was issued with a certificate of service which effectively meant that she had been terminated.



19. It was the Claimant's submissions that section 45(1) and (2) of the *Employment Act* 2007 provided that no employer should terminate the employment of an employee unfairly. The claimant submitted that she was neither issued with a termination notice nor accorded audience prior to termination in accordance with section 35 *Employment Act* 2007. The Claimant relied on the case of Kenya Union of Commercial, Food and Allied Workers v Meru North Farmers Sacco Limited Cause No. 74 of 2013 and submitted that whatever reason or reasons that arise to cause an employer to terminate an employee, the employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. The Claimant submitted that issuance of the certificate of service was evidence of termination of employment.
20. In the above regard the claimant submitted that the termination was substantially and procedurally unfair as the Claimant was not issued with any termination notice as required by law. She was not aware that she would be terminated on the date she was terminated.
21. On the issue of whether the claimant was entitled to the prayers sought, the Claimant submitted that whereas the Respondent may have had a reason to terminate the Claimant, they did not follow the necessary procedure for termination.
22. It was the Claimant's submission that the Respondent did not issue notice or pay to the Claimant any dues at the time of termination. That the Claimant was not accorded audience prior to termination.

Respondent's Submissions

23. On the other hand, the Respondent filed its written submissions dated 5th April 2024 and on the issue of whether the Claimant was terminated upon deserting duties, or whether the Claimant deserted duties and resigned, the Respondent submitted that there were contradictions arising from the allegation of the Claimant's termination which included the Claimant alleging in the Memorandum of Claim to have been terminated verbally on 21st September 2016 and also alleging that she learnt that she was terminated on 21st September 2016 when she was served with a certificate of Service.
24. The Respondent submitted that the Claimant alleged through her testimony to have been terminated verbally on 30th November 2016 when the Respondent declined to foot her medical expenses. The Respondent submitted that the Claimant conceded that she was granted 35 days' leave with full pay, after lapse of 14 days' sick leave. The Respondent further submitted that the Claimant was to be on 40 days sick leave with half pay as from 12th November 2016 to 24th December 2016 and was to resume duties in January 2017.
25. Respondent further submitted that from the pay slips produced by the Respondent for the months of September, October, November and December it was illogical to conclude that the Claimant was terminated by the Respondent on any of the alleged grounds since the Claimant remained in the Respondent's payroll and was duly paid as per the terms of sick leave granted.
26. The Respondent relied on Section 30(2) of the *Employment Act* and submitted that an employee who fails to attend work for reasons of being unwell had the responsibility of notifying the employer or take reasonable steps to notify the employer if incapacitated. The Respondent relied on the case of Peris Nyambura Kimani v Albit Petroleum Limited[2014].
27. The Respondent submitted that the Claimant never bothered to report to work nor attempted to make efforts to inform the Respondent of her absence and nothing suggested that she was unwell and unable to return to work after completion of her sick leave.



28. It was the Respondent's submission that the Claimant was not entitled to sick leave with or without pay without consultation with the Respondent which she had exhausted after two consecutive months of service as well as the additional sick leave granted at the discretion of the Respondent.
29. The Respondent relied on the case of *Nyabiba v Apak Company Limited* and submitted that desertion takes place when a person leaves work place with no intention of returning or having left decides not to return to the work place. It was the Respondent's submission that as per its witness there were several efforts made by the Respondent to locate and establish the whereabouts of the Claimant without success.
30. The Respondent submitted that the Claimant did not challenge the fact that she was issued with the Certificate of Service delivered to her on February 2017 and not January 2017. The Respondent held on the hope that the claimant would return to work and that a termination notice was not served due to the simple reason that the Respondent did not have a reason to terminate the Claimant's service.
31. The Respondent submitted that it produced a gratuitous payment of Kshs. 28,098/00 made by the Respondent to the Claimant on 28th April 2014 for the Claimant's service between 2nd May 2006 and 2nd May 2009.
32. On the issue of whether the Claimant was entitled to the remedies pleaded the Respondent submitted that salary for December 2016 was on half pay basis and evidence tendered to that effect and the Claimant's Sacco loan deductions were Kshs. 15,000/=.
33. On Service pay for 10 years the Respondent submitted that the Claimant was a member of the National Social Security Fund (NSSF) hence not entitled to service pay.
34. On House allowance, the Respondent submitted that the house allowance was consolidated with the Claimant's basic salary. On Leave allowance, the Respondent submitted that the Claimant had not provided any evidence on leave days not taken and not paid. On compensation and One month's salary in lieu of Notice, the Respondent submitted that it did not terminate the employment of the Claimant and that the procedure for termination does not apply.
35. The Respondent submitted that the Certificate of Service did not show that the Respondent terminated her services and that an employee may also terminate the contract and will be issued with a Certificate of Service.

Determination

36. The Court has reviewed and considered the pleadings, testimonies and submissions by the Claimant's and Respondent's counsels in support of the case as well as authorities relied on.
37. I have The Court therefore comes up with two main issues;
 - a. Whether the claimant was unfairly terminated or deserted duties.
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the claimant deserted duties or was unfairly terminated.

38. In this case, the Claimant in her testimony stated that she was terminated because she could not work again due to health complications and that she was not issued with a termination notice and was not accorded audience prior to termination. The Claimant submitted that without medication, she could not work again and in January 2017, she was issued with a certificate of service which effectively meant that she had been terminated.



39. On the other hand the Respondent alleged that the Claimant deserted her employment duties. It was the Respondent's case that the Claimant never bothered to report to work or attempt to make efforts to inform the Respondent of her absence.
40. Whereas the Respondent has told the court that nothing suggested that the Claimant was unwell and unable to return to work after completion of her sick leave, the the Respondent failed to prove the same using an expert opinion. Besides it was respondent's evidence in Court that it sent the claimant for a second medical opinion and that the claimant was recommended for surgery but refused.
41. Desertion, is not the same as absence without permission or leave, which occurs when the employee has an intention to return to work. Desertion is the act of an employee leaving work with a clear intention never to return. It is a form of repudiation of contract of employment by an employee. An employer alleging desertion against an employee must show efforts were made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration. In this respect, the Court is guided by the case of *Stanley Omwoyo Onchwari v Board of Management Nakuru YMCA Secondary School [2015] eKLR*, where the court held that:-
- “Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties”.
42. In this case the court notes that the Respondent's witness testified that the Respondent made efforts and sent a driver who said he knew where the Claimant was staying but could not find her. However, the driver who is said to have made these efforts was not called as a witness and the Court was therefore unable to assess the efficacy of these efforts. At the very least, the Respondent should have issued a reasonable notice to the employee that termination of employment was being considered.
43. In the case of *Peris Nyambura Kimani v Albit Petroleum Limited[2014]* relied on by the respondent, the Court observed:-
- “...in the circumstances where an employee is unwell for whatever reason, within the employment and labour relations regime, the basic requirement on the part of the employee under the *Employment Act* is that when one is sick or unwell, this is to be brought to the attention of the employer within a reasonable time. In this case the court is of the opinion that the circumstances of this case are different as the medical condition of the Claimant was well within the knowledge of the Respondent which was also evidenced by the treatment notes produced by the Respondents in the further bundle of documents. The Respondent also sought a second opinion from a different doctor who they paid and who suggested that the Claimant required to undergo a surgery for her to continue working. The said recommendations were forwarded to the Respondent. The allegation of absconding duty by the claimant is therefore not correct.
44. This then leads us to the question on whether then the Claimant was unfairly terminated. It is the Claimant's contention that she was issued with a certificate of service which effectively meant that she had been terminated. The Respondent's case on the other hand was that the Certificate of Service did not show that the Respondent terminated the Claimant's services and that the Claimant was paid full terminal dues. The question that then arises is the implication of a certificate of service and terminal dues payment. The Court is of the view that terminal dues payment and a certificate of service are



evidence of termination of employment. It is curious that the respondent alleges that they could not reach the Claimant yet they were able to serve her with the Certificate of Service.

45. The Court therefore reaches the inevitable conclusion that the Claimant's employment was terminated because of her illness and in carrying out the termination, the respondent never adhered to the provisions of the law as provided under section 41 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought.

46. The Court having come to the conclusion that the respondent unfairly terminated claimants service compensation for unfair termination will be considered in the context of the fact that the claimant had worked for the respondent for approximately 10 years and unfortunately became unwell and could not continue working. The claimant was working as a general worker and did not have any special skills necessary for the performance of her work. Further the respondent supported the claimant at the initial stages in getting medical attention. In the circumstances and award of eight month's salary would be reasonable compensation for unfair termination.
47. On the prayer for balance of salary for December 2016, I note from the Respondent's testimony and evidence that the Claimant was on half pay and was equally servicing a Sacco loan and the deductions amounted to Kshs. 15,000/=. The Court therefore declines to award the same.
48. On the prayer for Service pay, the Claimant in her evidence confirmed that NSSF deductions were made from her salary. Under Section 35(6) an employee who is a member of NSSF is not entitled to service pay. This prayer is therefore refused. On the prayer for three month salary in lieu of notice, termination notice or pay in lieu thereof, whereas this is a statutory requirement under Section 35 of the Employment Act, the actual notice period is normally provided in the contract itself and in the absence thereof is deductible from the interval at which salary is paid. The parties never provided the contract of employment therefore the payment in lieu of notice will be equivalent of one month's salary. The prayer for House allowance fails because the Claimant confirmed during cross-examination that she received house allowance.
49. In conclusion the Claimant's claim is hereby allowed with costs as follows;
- i. Balance salary for December 2016.....NIL
 - ii. Service pay for 10 years.....NIL
 - iii. One month's salary in lieu of notice Kshs 30,000/=
 - iv. House allowance.....NIL
 - v. 8 months' salary compensation Kshs 240,000/=
 - Total.....KSHS 270,000/=
 - vi. Costs of the suit.
 - vii. Items (iii) and (v) shall be subject to taxes and statutory deductions but shall attract interest at Court rates from date of Judgment until payment in full.

DATED AT NAIROBI THIS 12TH DAY JULY, 2024 DELIVERED VIRTUALLY THIS 12TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE

