



**Nzioki v Gratom Babz Services Limited (Cause 915 of 2017)  
[2024] KEELRC 1976 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1976 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 915 OF 2017**

**JK GAKERI, J**

**JULY 24, 2024**

**BETWEEN**

**PAUL KIILU NZIOKI ..... CLAIMANT**

**AND**

**GRATOM BABZ SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 16<sup>th</sup> May, 2017 alleging unlawful, wrongful and unfair termination of employment.
2. It is the Claimant's case that he was employed by the Respondent in July 2012 at Kshs.5,500/= per month, was not issued with a contract of employment, was deployed at Kibwaru House, South B as a night guard and remained at the same work station until dismissal.
3. The Claimant avers that he served diligently and dutifully and his salary rose to Kshs.7,200/= per month.
4. That on 5<sup>th</sup> June, 2016, he reported on duty at 6.00 pm. Shortly afterwards, his supervisor came and informed him to leave owing to reduced work. There was no more work for him and would be recalled but was not, though he obeyed the instructions.
5. The Claimant further avers that he was neither given a letter of termination nor paid terminal dues.
6. It is the Claimant's case that on payment of the 1<sup>st</sup> salary, the employer deducted Kshs.3,000/= as uniform charges and it was not refunded and had contributed Kshs.8,000/= to the Sacco, which was not refunded on separation.
7. That he was not paid house allowance.
8. The Claimant prays for;



- i. A declaration that termination of his employment was unlawful and unfair.
- ii. Days worked in February 2016 Kshs.1,628.00
- iii. Pay in lieu of notice Kshs.12,221.10
- iv. Pay in lieu of leave Kshs.39,483.55
- v. Pay in lieu of rest days Kshs.97,760.00
- vi. Pay in lieu of public holiday Kshs.18,801.60
- vii. Underpayment of wages Kshs.136,279.14
- viii. Service pay Kshs.28,202.40
- ix. House allowance Kshs.87,991.92
- x. 12 months compensation Kshs.146,653.20
- xi. Uniform reimbursement Kshs.3,000.00
- xii. Sacco reimbursement Kshs.9,000.00
- xiii. Certificate of service.
- xiv. Costs of the suit and interest.
- xv. Any other relief the court deems fit and just to grant.

#### **Respondent's case**

9. The Respondent admits having employed the Claimant as alleged save for the salary alleged.
10. It is the Respondent's case that the Claimant failed to report to the workplace on 6<sup>th</sup> March, 2016 and did not return the uniform.
11. In other words, the Claimant abandoned the workplace and could not be reached on the phone.
12. It denies owing the Claimant any dues.
13. In its Counter-claim, the Respondent asserts that since the Claimant absconded, it was entitled to one (1) month's salary in lieu of notice.
14. It prays for dismissal of the Claimant's suit, declaration that the Claimant's desertion was unlawful, one month's salary and costs of the Counter-claim.
15. In his Reply to the Respondent's response, the Claimant denies having absconded duty or absented himself from work on 6<sup>th</sup> March, 2016 and reiterates the contents of the Memorandum of Claim and prays for the striking out of the Respondent's response and Counter-claim.

#### **Claimant's evidence**

16. On cross-examination, the Claimant confirmed that he was employed in July 2012 and earned Kshs.7,200/= per month.
17. CWI admitted that he had no evidence of the deduction of Kshs.3,000/= as uniform allowance and often signed entry and exit times at the workplace.



18. That he had no evidence of membership of the SACCO or deposit.
19. Finally, the Claimant confirmed that he surrendered the uniform and completed the exit form and was paid via the phone and the bank.

### **Respondent's evidence**

20. RWI, Mr. Mathew Wekesa testified that the Claimant was employed as Casual Guard until 6<sup>th</sup> March, 2016 when he deserted the workplace.

### **Claimant's submissions**

21. As to whether termination of the Claimant's employment was unfair, the Claimant's counsel cited the decision in *Matesho V Newton* (2022) KEELRC 1554 to urge that the Respondent had not complied with the provisions of Sections 41 and 43 of the *Employment Act*, 2007.
22. Reliance was made on the holding in *Onesmus Kinyua Magoiya V Prudential Life Assurance Co. Kenya* (2022) eKLR and *Geeta Joshi V Pandya Memorial Hospital* (2019) eKLR to urge that the Claimant is entitled to 12 months compensation and damages for breach of his human rights.
23. As regards the reliefs sought, counsel submits that the Claimant is entitled to the reliefs as pleaded.
24. The Respondent did not file submissions.

### **Analysis and determination**

25. It is common ground that the Claimant was an employee of the Respondent from July 2012 to 5<sup>th</sup> March, 2016. It is however uncertain as to what transpired on 6<sup>th</sup> March, 2016 as parties have provided conflicting testimonies. While the Claimant alleges that he reported to work but the supervisor told him to go back home and await recall, the Respondent maintains that he deserted the workplace.
26. The issues for determination are;
  - i. Whether the Claimant's employment was unfairly terminated or deserted the workplace.
  - ii. Whether the Claimant is entitled to the reliefs sought.
27. On the 1<sup>st</sup> issue, while the Claimant argues that his employment was unfairly and unlawfully terminated by the Respondent, the Respondent on the other hand contends that the Claimant deserted the workplace on 6<sup>th</sup> March, 2016 and did not return and was not reachable on his mobile phone.
28. The Claimant's testimony is that the supervisor instructed him to go home on 5<sup>th</sup> March, 2016 and await recall which never materialised.

### **Whether the Claimant deserted the workplace**

29. Black's Law Dictionary (10<sup>th</sup> Edition) defines desertion as;

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



30. Similarly, in the South African case of *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court sought to distinguish desertion from unauthorized absence from duty as follows:

“ . . . desertion is distinguishable from absence without leave, in that the 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”.

31. Puzzlingly, although the Respondent maintains that the Claimant absconded, it did not adduce evidence of what it did to ascertain the Claimant’s whereabouts to resume duty.

32. The allegation that the Claimant did not provide a reason for his absence and was unreachable is unverifiable and is not proof that the Claimant deserted the workplace.

33. The emerging jurisprudence of this court is that where an employer uses desertion as a defense, it is incumbent on it to demonstrate the steps it took to contact the employee on the desertion and urge him or her to resume duty or face disciplinary action.

34. The foregoing is exemplified by the sentiments of Maureen Onyango J. in *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR as follows;

“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.”

35. See also *Richard Maingi V Wells Fargo Ltd* (2017) eKLR, *Chispine 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 Mbithi Mbane V Inter Security Services Ltd* (2018) eKLR and *Nyabiba V Apak Co. Ltd* (2023) KEELRC 672 (KLR) among others.

36. In the instant case, the Respondent has not provided any evidence to demonstrate the reasonable steps it took to contact the Claimant. It availed no evidence of the alleged call(s) to the Claimant.

37. Who for instance called the Claimant, when and to which telephone number was the call made?

38. Relatedly, the Respondent must have had the Claimant’s postal address, contacts of his next of kin among other ways of passing information to him which are verifiable.

39. A notice to show cause, to the Claimant’s last known address would have shown that the Claimant had indeed deserted.

40. Flowing from the foregoing, it is the finding of the court that the material on record is insufficient for the court to find that the Claimant absconded duty.

41. On termination of employment in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, Ndolo J. held thus;

“ . . . For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”



42. Similarly, under Section 45 of the *Employment Act*, 2007, for a termination of employment to pass muster, the employer is required to demonstrate that it had a valid and fair reason to terminate the employee's employment and conducted the termination in accordance with a fair procedure.
43. In this case, the Claimant maintains that he was advised by his supervisor to leave owing to reduction of work and the Respondent did not avail any controverting evidence or otherwise demonstrate how the separation took place.
44. Based on the evidence on record, it is the finding of the court that the Respondent has failed to prove that termination of the Claimant's employment was substantively justifiable and procedurally fair.
- Whether the Claimant is entitled to the reliefs sought;
- i. Declaration
45. Having found that the Respondent has failed to prove that termination of the Claimant's employment was fair, a declaration that it was unfair is merited.
- ii. Days worked in February Kshs.1,628.16
46. It is common ground that the Claimant worked for at least 5 days in February 2016.
47. The Respondent adduced no evidence of having paid for the 5 days and the same is awarded Kshs.1,628.16.
- iii. Salary in lieu of notice Kshs.12,221.10
48. The Claimant testified that he was earning Kshs.7,200/= as at the date of termination and the sum of Kshs.12,221.10 is unexplained.
49. Having found that the termination of employment was unfair, the Claimant is awarded salary in lieu of notice as the provisions of Section 36 of the *Employment Act* were not complied with and no notice was given, Kshs.8,280/=.
- iv. Pay in lieu of leave, rest days and public holidays
50. The three claims lack the requisite particulars in terms of number of leave days and when they accrued, number of rest days and when they accrued and the specific public holidays during which the Claimant worked.
51. The claims are unsustainable and are accordingly dismissed for want of proof.
- v. Underpayment of wages
52. Neither the Claimant's written statement nor the oral testimony adduced in court allege that he was underpaid or under what law or what his salary ought to have been.
53. This is a claim for special damages which must be specifically pleaded and strictly proved.

**The claim lacks relevant particulars.**

54. How for instance was the sum of Kshs.136,279.14 arrived at.
- The claim is declined.
- vi. Severance pay



55. The Claimant tendered no evidence to prove that he was declared redundant and was not paid severance pay under Section 40(1)(g) of the Employment Act, 2007.

The claim is unsustainable and is declined.

vii. House allowance

56. From the evidence on record, it is clear that the Respondent was not paying the Claimant a housing allowance or providing a house nor did it adduce evidence that his salary was consolidated.

57. Section 31(1) of the Employment Act, 2007 obligates the employer to provide housing at its own expense, or pay a house allowance to enable the employee obtain reasonable accommodation.

58. Housing is one of the statutory rights of the employee and must be provided by the employer.

59. As a consequence, the Claimant is awarded housing allowance for 3 years at 15%, Kshs.38,880.00.

viii. 12 months compensation

60. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation under Section 49(1)(c) of the Employment Act, 2007.

61. In determining the level of compensation, the court has taken into consideration that the Claimant served the Respondent diligently from July 2012 to March 2016, 3 years and 7 months which is a fairly short time. The Claimant did not contribute to the termination of employment. The Claimant did not express his wish to remain in the employment of the Respondent or appeal the Respondent's decision.

62. In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair, Kshs.24,840/=.

ix. Uniform reimbursement

63. This claim was not proven as the Claimant tendered no evidence of the alleged deduction or return of the uniform.

The claim is declined.

x. SACCO contribution reimbursement

64. The Claimant adduced no evidence of the alleged deductions, including when the deductions were made.

65. In addition, the Claimant tendered no evidence of membership of the alleged SACCO.

66. The claim lacks supportive evidence and is declined.

xi. Certificate of service

67. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.

68. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;

a. Declaration that termination of employment was unfair.

b. 5 days salary in February 2016 Kshs.1,628.16.

c. Salary in lieu of notice Kshs.8,280.00.

d. House allowance Kshs.38,880.00.

e. Equivalent of 3 months gross salary Kshs.24,840.00.



Total Kshs.73,628.16

f. Certificate of service.

69. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

