



**Njoroge v Tea Tot Hotel Limited (Cause 1462 of 2015)  
[2024] KEELRC 1730 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1730 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1462 OF 2015**

**JK GAKERI, J  
JULY 9, 2024**

**BETWEEN**

**IRUNGU NJOROGE ..... CLAIMANT**

**AND**

**TEA TOT HOTEL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim on 19<sup>th</sup> August, 2015 alleging unfair and unlawful termination of employment and non-payment of terminal dues by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent as a Waiter from 1<sup>st</sup> May, 1983 to 6<sup>th</sup> May, 2015 at Kshs.8,000/= per month.
3. That on 6<sup>th</sup> May, 2015, the Respondent through a letter unlawfully terminated his services summarily without notice notwithstanding his exemplary service for 32 years.
4. The Claimant prays for;
  - a. A declaration that termination of employment was wrongful, unlawful and unfair.
  - b. Sum of Kshs.2,707,036/= comprising;
    - i. Statutory gratuity
    - ii. Statutory annual leave
    - iii. Statutory holiday leave
    - iv. Statutory overtime pay
    - v. Statutory day off per week



- vi. One month's salary in lieu of notice
- vii. Salary for April 2015.
- c. Costs of this suit.
- d. Interest on (a), (b) and (c) above.
- e. Any other relief as the court may deem just.

### **Respondent's case**

5. In its response filed on 26<sup>th</sup> October, 2015, the Respondent avers that it employed the Claimant on 1<sup>st</sup> May, 1987 as opposed to 1<sup>st</sup> May, 1983.
6. It denies having dismissed the Claimant and avers that he left on his own volition on 30<sup>th</sup> April, 2015 by tendering a resignation letter dated 5<sup>th</sup> May, 2015 without notice. It denies owing the Claimant the sum claimed.
7. It is the Respondent's case that the Claimant was paid all his dues, proceeded on annual leave, paid twice for work during any holiday and overtime and took off-days.

PARA 8.

The Respondent prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

9. On cross-examination, the Claimant confirmed that he was chased from the workplace for refusing to sign for contractual employment. He denied having resigned by letter dated 5<sup>th</sup> May, 2015 but had no evidence to disprove the contents of the letter.
10. It was his testimony that his salary was initially Kshs.7,000/= but subsequently rose to Kshs.8,000/=.
11. The witness admitted that the Respondent was remitting National Social Security Fund and National Health Insurance Fund dues.
12. It was the Claimant's testimony that the only evidence he had to show that he was not paid was the employment card and used to sign on payment of salary.
13. The witness testified that the receipts availed by the Respondent were fake, but admitted that he had not stated so in his witness statement. That the statements filed by the Respondent were untrue.
14. The Claimant admitted that his written statement was silent on the amount not paid by the Respondent or any other prayer in the Memorandum of Claim and had no documentary evidence to establish any of the claims.
15. He testified that the signature on the receipts on record was not his but the receipt bore his name.
16. On re-examination, the witness testified that he was claiming overtime for the entire duration of employment and proceeded on leave for a few days and did not sign a resignation letter. That he used to pay for shortages and had not taken a loan from the Respondent and would sign for his salary.
17. The Respondent did not provide a witness despite being accommodated by the court on 4<sup>th</sup> October, 2023, 28<sup>th</sup> November, 2023 and 25<sup>th</sup> January, 2024.



18. However, it availed copies of documents which capture some of the occurrences at the Claimant's workplace.

### **Claimant's submissions**

19. Counsel identified no particular issue but submits on the Claimant's evidence and the prayers sought and urges that the Claimant had proved his case to required standard of proof.
20. Reliance was made on the decisions in Elizabeth Kioko v BeyeneHaire Warde & another [2018] eKLR and Gichuhi v Malster International [2022] KEELRC 3822 (KLR) to reinforce the submission.

### **Respondent's submissions**

21. Counsel for the Respondent relies on the Respondent's documentary evidence to urge that although the Claimant relied on his written statement, it had no supportive evidence and was claiming special damages that require proof.
22. That although the Claimant denied that the signature on the resignation letter was his, it resembled the one on the witness statement and he could not remember how many leave days were outstanding.
23. Counsel urges that the Claimant resigned from employment and has not proved that he was unfairly terminated from employment.
24. Reliance was made on Cause No. 1213 of 2016, Joseph Muinde Nzuki v T. Tot Hotel and Kenya Union of Commercial Food & Allied Workers v Fralet Agencies [2023] KEELRC 2208 (KLR) to urge the court to consider the Respondent's pleadings and documents and dismiss the Claimant's case with costs.

### **Analysis and determination**

25. It is common ground that the Claimant was an employee of the Respondent from sometime in the 1980s to early May 2015 when the employment relationship ended.
26. The parties relied on opposing positions on how the separation took place.
27. While the Claimant alleges that he was summarily dismissed on 6<sup>th</sup> May, 2015, documents availed by the Respondent show that the Claimant resigned from employment on 5<sup>th</sup> May, 2015 and the resignation was accepted on 6<sup>th</sup> May, 2015.
28. The issues for determination are;
- i. Whether termination of the Claimant's employment was unfair and unlawful or he resigned from employment.
  - ii. Whether the Claimant is entitled to the reliefs sought.
29. As regards separation, parties as miles apart, as the Claimant alleges unfair termination while the Respondent cites voluntary resignation by letter dated 5<sup>th</sup> May, 2015.
30. Under the provisions of the [Employment Act](#), 2007, for a termination of employment to pass the fairness test, it must be proved that;
- i. the employer had a valid and fair reason to terminate the employee's employment.
  - ii. the reason(s) related to the employee's conduct, capacity or compatibility or operational requirements of the employer and



- iii. the employer used a fair procedure in the termination of employment.
31. Put in the alternative, as held by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, it must be proved that the employer had a substantive justification to terminate the employment and conducted it in accordance with a fair procedure. (See also *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR).
32. In the instant case, the Claimant testified that he was chased from the workplace because he declined to sign for contractual employment. Noteworthy, the Claimant's undated statement makes no reference to his being chased away from the place of work. Neither the written statement nor the oral testimony state who in fact chased him away, when and what he did after that.
33. The written statement as the Claimant admitted on cross-examination comprises 7 sentences only.
34. If the alleged chasing away was true, who presented the contractual employment document and what were its terms and why did he refuse to sign it?
35. In his demand letter dated 22<sup>nd</sup> May, 2015, the Claimant admits that his employment was terminated vide letter dated 6<sup>th</sup> May, 2015 but did not avail a copy of the letter to court. From the Claimant's contradictory account of the events of 6<sup>th</sup> May, 2015, the dearth of facts on what transpired on that date is palpable.
36. Puzzlingly, the written statement was recorded in August 2015, 3 months after the alleged termination of employment when the Claimant's memory was still intact but makes no reference to the letter of termination nor the allegation of being chased away by an unidentified person.
37. In *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* [2020] eKLR, Maureen Onyango J. stated as follows;
- “In the case of *Monica Kanini Mutua v Al- Arafat Shopping Centre and another* [2018] eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
38. It is trite law that he who alleges is obligated to establish the allegations as ordained by the provisions of Section 107 of the *Evidence Act*.
39. Similarly, under Section 47(5) of the Employment, Act, 2007;
- For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
40. In *Kirugi & another v Kabiya & another* [1987] KLR 347, the Court of Appeal stated as follows;
- “The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”



41. The foregoing is further fortified by the sentiments of Abuodha J. in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* [2018] eKLR, where he stated;

“ This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings which are not backed by any evidence and expect the court to find in his or her favour.”

42. (See also *Gichinga Kibutha v Caroline Nduku* [2018] eKLR and *Jackson K. Tuitoek V Stephen Tangus Salienyi & 2 others* [2013] eKLR).

43. As adverted to elsewhere in this judgment, although the Respondent did not adduce oral evidence, it availed copies of letters which would appear to discount the Claimant’s contradictory evidence on how the parties separated on 6<sup>th</sup> May, 2015. A resignation letter dated 5<sup>th</sup> May, 2015 allegedly written by the Claimant was received by the Respondent on the same date according to the Respondent’s stamp of even date which the Claimant did not contest. He only contested the signature. The resignation is effective 30<sup>th</sup> April, 2015. Also availed is a copy of acceptance of the resignation dated 6<sup>th</sup> May, 2015 addressed to one Irungu.

44. Noteworthy, to the naked eye, the signature appended on the letter dated 5<sup>th</sup> May, 2015 is similar to the one on the Claimant’s undated witness statement as well as those on the Respondent’s petty cash vouchers dated 2012 and 2013 as well as the payroll.

45. The Claimant testified that the receipts were fake but was quick to admit that he had not stated so in his written statement or anywhere else.

46. Based on the Claimant’s evidence on what transpired on 6<sup>th</sup> May, 2015 as regards the separation, it is not discernible whether the alleged termination of employment was oral or was in writing or how it took place. The court is left wondering whether the Claimant was chased away for refusing to sign a contract or resigned as evidenced by the letters on record.

47. Evidently, the Claimant’s evidence lacks consistency which diminishes its probative value.

48. From the evidence on record, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that his employment was unfairly, wrongfully or unlawfully terminated by the Respondent on 6<sup>th</sup> May, 2015 or on any other date.

49. Having found as above, the issue whether the Claimant resigned is of no moment and falls by the way side.

Whether the Claimant is entitled to the reliefs sought

#### **a. Declaration**

50. Having found that the Claimant has failed to prove that his employment was unfairly, wrongfully or unlawfully terminated by the Respondent, the prayer for a declaration is unmerited as is the entitlement to compensatory damages and it is accordingly dismissed.

51. The Claimant’s prayers from (b) to (h) relate to special damages yet the Claimant tendered no evidence to prove any of them. It is trite law that special damages must be specifically pleaded and proved.



### **b. Statutory gratuity**

52. The Claimant tendered no evidence as to what this prayer entails and how the figure of Kshs.512,000/= was arrived at.
53. The court is unaware of a relief by the name statutory gratuity.
54. In the absence of relevant particulars, the claim is declined.

### **c. Annual leave benefits**

55. Assuming that the Claimant is praying for outstanding leave days, neither the witness statement nor the oral evidence adduced in court make reference to the number of days and when they accrued.
56. On cross-examination, the Claimant stated that he did not proceed on leave, while on re-examination he testified that he would seek permission to proceed on leave for a few days but did not specify how many days nor the outstanding leave days.
57. It is unclear to the court how the sum of Kshs.179,424/= was arrived at.
58. The claim lacks particulars and is dismissed.

### **d. Holiday leave**

59. Neither the Claimant's written statement nor his oral evidence advert to holiday leave and what it entailed, let alone how many days are claimed or how the sum of Kshs.187,968.00 was arrived at.
60. The claim lacks particulars and is declined.

### **e. Overtime payment**

61. Regrettably, neither the Claimant's written statement nor his oral evidence adduced in court make reference to the fact that the Claimant worked overtime on any day and how many hours had not been paid for. He led no evidence of his day at the work place, namely reporting and exit times.
62. How for instance was the sum of Kshs.934,400/= arrived at.
63. The claim lacks supportive evidence and is dismissed.

### **f. Day off per week**

64. Once again, the Claimant tendered no scintilla of evidence on his work week let alone how many off days had not been taken and when they accrued.
65. How for instance, was the amount of Kshs.877,244/= arrived at? How many days does it relate to and why did he not proceed on day off?
66. The claim lacks relevant supportive evidence and fails.

### **g. One month's salary in lieu of notice**

67. Having found that the Claimant has failed to prove that his employment was unfairly terminated, the prayer for salary in lieu of notice is unsustainable and it is accordingly dismissed.



#### **h. Salary for the month of April 2015**

68. The Claimant tendered no evidence that he was not paid for the month of April 2015.
69. Neither the written witness statement nor the oral testimony mentioned that the salary for April 2015 was outstanding.
- The prayer is declined.
70. Finally, this is a classical case where the Claimant threw figures to the court without supportive evidence and divinely or otherwise expected the court to adopt the figures as awards, something the court has no mandate to do.
71. Flowing from the foregoing, it is discernible that the Claimant's suit is for dismissal and it is accordingly dismissed.
72. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<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**



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