



Oduor v Board of Management Makongeni Secondary School (Cause 2136 of 2017) [2024] KEELRC 1855 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1855 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2136 OF 2017**

JK GAKERI, J

JULY 17, 2024

BETWEEN

GABRIEL WAFULA ODUOR CLAIMANT

AND

**BOARD OF MANAGEMENT MAKONGENI SECONDARY
SCHOOL RESPONDENT**

JUDGMENT

1. The Claimant commenced the instant suit on 24th October, 2017 alleging unlawful and unfair declaration of redundancy and or termination of employment and non-payment of terminal dues.
2. It is the Claimant's case that he was employed by the Respondent on 20th May, 2012 as a Security Guard and served diligently.
3. That on 14th April, 2014, he was summoned by Mr. Odhiambo, the Security Officer and ordered to report to the Principal's Office where the Principal, Mr. Bunyasi asked him to proceed on one month compulsory leave pending review of his terms of employment and in May, he was told to await recall and follow-ups yielded nothing until October 2014 when he was given a certificate of service backdated to 14th April, 2014 showing that he was no longer an employee of the Respondent.
4. The Claimant alleges that he was declared redundant unprocedurally.
5. The Claimant prays for;
 - a. A declaration that termination of employment was unlawful and unfair.
 - b. An order for the Respondent to pay Kshs.446,833/= comprising;
 - i. Salary in lieu of notice.
 - ii. Unpaid days worked in April 2014.



- iii. House allowance for the entire period.
 - iv. Severance pay.
 - v. Unpaid leave days.
 - vi. Unpaid off-days.
 - vii. Unpaid public holidays.
 - viii. Underpayment.
 - ix. Unpaid overtime.
 - x. 12 months compensation.
- c. Costs of this suit plus interest thereon.

Respondent's case

6. In its Reply to the Claimant's Memorandum of Claim dated 9th March, 2022, the Respondent admits that the Claimant was its employee effective 20th May, 2012 at Kshs.6,890/= per month.
7. It denies having allowed the Claimant to proceed on leave in April or May 2014.
8. The Respondent avers that any extra time worked was compensated and the school deducted and remitted National Social Security Fund dues.
9. It is the Respondent's case that in May 2012, the minimum wage rose to Kshs.8,580/= and at the time of his exit, the salary had risen to Kshs.9,090/= per month.
10. That the Claimant absconded duty in December 2013 and the Respondent had to look for him but did not report back until April 2014 when he disappeared again after 2 days.
11. That the Claimant was paid until March 2014 and another guard was employed to replace him.
12. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

13. On cross-examination, the Claimant confirmed that he signed the appointment letter but also alleged the signature was not his.
14. That he worked for 12 hours per day but had no evidence to prove it.
15. The witness admitted that the Respondent deducted National Social Security Fund and National Health Insurance Fund deductions and his salary did not include house allowance and had no off-day.
16. He denied having deserted the workplace.
17. The Claimant testified that on 25th December, 2013, his leg was injured at home, he proceeded to work but the Head of Security told him to go home but admitted that he had no evidence of the leave or having visited any health facility.
18. The Claimant admitted that the supervisor visited him at home and took a photograph of the injured leg.
19. That the supervisor did not tell him to go back to work.



20. The witness admitted that the Principal of the School did not give him permission to be on leave yet the school was the employer.
21. That he reported back on 4th March, 2014.
22. The witness confirmed that his employment was terminated but he had no evidence to show and was unaware of the replacement guard.
23. On re-examination, the Claimant testified that in April 2014, he was told that the number of employees was being reduced.

Respondent's evidence

24. RWI, Mr. Jacob Nderitu, the Principal of the school confirmed that off-duty days were compensated after they accumulated.
25. The witness was categorical that the Claimant's employment was not terminated and he was not given a termination letter.
26. That the Claimant stopped reporting to work in December 2013 without notice and the Head of Security was sent to ascertain his whereabouts and request him to return to the workplace but did not and was paid during his absence.
27. RWII, Mr. Godfrey Wafula confirmed that the Claimant left on 26th December, 2013 and did not return. That he accompanied the Head of Security to visit the Claimant at home.
28. RIII, Mr. Joel Odhiambo testified that the Claimant left in December 2013 and he found him seated in his house and promised to return to the work place but did not until April 2014 saying he had a fever and an injured leg and resumed duty.
29. The witness confirmed that he proceeded upcountry but after 3 days he was told that the Claimant was not reporting to work and had to return to Nairobi to resume duty.
30. The witness confirmed that he did not look for the Claimant thereafter.

Claimant's submissions

31. On termination of employment, the Claimant submits that it was unfair as the provisions of the [Employment Act, 2007](#) were not complied with.
32. Reliance was made on Pius Machafu Isindu V Lavington Security Guards (2017) eKLR to reinforce the submission.
33. Counsel for the Claimant urges that the Respondent did not produce attendance record of the Claimant, demonstrate efforts made to trace the Claimant or issue a notice to show cause to the Department of Labour.
34. Reliance was made on the sentiments of the court in Evans Ochieng Oluoch V Njimia Pharmaceuticals Ltd (2016) eKLR as well as Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd (2020) eKLR among others.
35. As regards the prayers sought, counsel submits that the Claimant is entitled to all of them as prayed.
36. Sentiments of the court in Rajab Barasa & 4 others V Kenya Meat Commission (2016) eKLR and Fancy Jeruto Cherop 7 another V Hotel Cathay Ltd (2018) were cited to buttress the prayer for unpaid



leave as were those of Radido J. in *Alphonse Maghanga Mwachanya V Operations 680 Ltd* (2013) eKLR on compensation.

Respondent's submissions

37. Counsel submits that the Claimant did not discharge the burden of proof under Section 47(5) of the *Employment Act*, 2007.
38. Reliance was made on the sentiments of the court in *Daniel Gachanja Githaiga V Credit Reference Bureau Africa Ltd & 2 others* (2020) eKLR, *Mbuthia Macharia V Annah Mutua & another* (2017) eKLR, *Daniel Mueke V Bhogas Auto World* (2014) eKLR, *Julius Kyalo Malonza V Ruth Osolo t/a Eraeva Catering Services* (2021) eKLR to reinforce the submission.
39. Counsel urges that the alleged termination of the Claimant's employment is not supported by any evidence as there was no redundancy and the Claimant absconded duty.
40. Reliance was made on the sentiments of the court in *Boniface Francis Mwangi V B.O.M Iyego Secondary School* (2019) eKLR and *Simon Mbithi Mbane V Inter Security Services Ltd* (2018) eKLR to urge that there was no unfair termination of the Claimant's employment.
41. That the Claimant's prolonged absence from the workplace amounted to gross misconduct.
42. Concerning the reliefs sought, counsel urges that the Claimant's salary was consolidated and cites *Charity Wambui Muriuki V M/s Total Security Surveillance Ltd* (2017) eKLR.
43. According to counsel, the claim for pay in lieu of notice is misconceived and other claims lack the requisite particulars as held in *Mutie V KB Sanghani & Sons* (2023) KEELRC 594 (KLR).

Analysis and determination

44. Whereas it is common ground that the Claimant was an employee of the Respondent effective 20th May, 2012, it is unclear as to when the two separated as the Respondent tendered no evidence and the Claimant is unsure of whether his employment was terminated or he was declared redundant and when. In effect the Claimant has not availed any scintilla of evidence on when, he and the Respondent separated and how.
45. The foregoing is reinforced by inter alia a copy of 'To whom it may concern' dated 14th April, 2014 which the Claimant availed as evidence having received it from the Respondent on an undisclosed date.
46. According to the Claimant, the date of the notice was backdated to April 2014 yet it was issued in October.
47. The Claimant did not tender evidence to show that indeed the document was issued in October, and even if it was when in the month of October?
48. This is essential because the Claimant tendered no verifiable evidence of having reported to the Respondent's premises after 4th April, 2014 when he was allegedly verbally directed to proceed on compulsory leave for one month.
49. It is not only the date of the alleged termination that the Claimant could not recall, he could also not recall how the separation took place and what he did.
50. In the demand letter dated 20th February, 2017, the Claimant's counsel states that on 14th April, 2016, the Respondent's Principal, Mr. Bunyasi verbally informed the Claimant that he had been declared redundant and his services were no longer required.



51. Assuming that the date is misrepresented and ought to have been 14th April, 2014, the allegation of having been declared redundant on 14th April, 2014 contradicts the Claimant's witness statement which is explicit that the Principal directed him to proceed on one month's leave as his employment status was being reviewed.
52. The demand letter makes no reference to a termination of employment in October 2014 or at any other time other than 14th April, 2014.
53. Was the Claimant directed to proceed on leave or was informed that he had been declared redundant?
54. The Respondent maintains that it did not terminate the Claimant's employment but he absconded duty.
55. From the foregoing, the issues for determination are;
 - i. Whether the instant suit is statute barred.
Depending on the answer to (i) above;
 - ii. Whether termination of the Claimant's employment was unlawful or he deserted the workplace.
 - iii. Whether the Claimant is entitled to the reliefs sought.
56. As regards the 1st issue, the homeport is the evidence on record.
57. According to the Claimant's written statement on 14th April, 2014, he was summoned to the Principal's office and directed to proceed on one month's leave and did so and in May, he was told the same thing and the story repeated itself until on an unknown date in October 2014 when he insisted on a letter of confirmation and was given the "To whom it may concern" backdated to April 2014.
58. Notably, the Claimant could not recall the actual date of the notice assuming it was backdated.
59. Secondly, he did not indicate the date on which it was received and did not contest its contents.
60. The document is clear that the Claimant;

". . . was an employee of Makongeni Secondary School from May 2012 to April 2014".
61. Since the Claimant admitted that after he injured his leg on 25th December, 2013 and reported to work on 26th December, 2013 and did not return until 4th April, 2014 and was being paid, what could have been his status from 14th April, 2014 to October 2014 if his evidence is credible?
62. The Claimant did not contest any of the dates on his demand letter which is reticent on what transpired after 14th April, 2014 or another date of termination of employment.
63. The Respondent's evidence on the other that is that after the Claimant left in December 2013, his whereabouts was unknown until it was ascertained that he was in his house, a fact the Claimant admitted.
64. It is the Respondent's evidence that the Claimant reported to the workplace sometime in April 2014, was allowed to resume duty but left after 2 days as his supervisor, Mr. Joel Odhiambo confirmed on cross-examination.
65. According to RWII and RWII, who were the Claimant's colleagues at the work place, the Claimant did not report to the workplace again after the 2 days in April 2014.



66. From the evidence on record, it is discernible that the Claimant did not visit the Respondent's workplace after April 2014 and the alleged backdating of the 'To whom it may concern' dated 14th April, 2014 and the alleged termination of employment in October 2014 lacks supportive evidence.
67. Loss of employment is tormenting and disorienting as it heralds an era of trepidation in a person's life and is unlikely to be forgotten for many years. The Claimant could not remember when it took place or what he did.
68. The fact that neither the Memorandum of Claim dated 23rd October, 2017 nor the witness statement of even date has the date of termination is telling as the instant suit was filed on 24th October, 2017 more than 3 years after the events of 14th April, 2014.
69. A possible inference to be drawn is that there was no termination of employment in October 2014 and the omission of the non-existent date was intended to mislead the court to assume that it took place towards the end of October to render this suit sustainable in the face of Section 90 of the Employment Act, 2007.
70. Section 90 of the Act provides;

Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof.
71. As adverted to elsewhere in this judgement, the Claimant is unsure as to when his employment came to an end.
72. According to the demand letter, it was on 14th April, 2014 (assuming the date was misrepresented as 2016 is not captured anywhere else in this Claimant's case).
73. Similarly, according to his written statement, it happened on an unknown date in October 2014.
74. Perhaps, what exposes the Claimant's allegations of having been an employee until October 2014 is the claim itself.
75. He had only prayed for the 14 days worked in April 2014 and nothing more.
76. Could the Claimant have remained an employee without a salary till October 2014, ostensibly awaiting "termination of employment".
77. The totality of the evidence on record is that the Claimant's employment ended in April 2014 and attempts to lengthen the relationship to October 2014 in attempt to bring the suit within the 3 year rule and was not successful.
78. From the foregoing, it is the finding of the court that the Claimant's employment with the Respondent ended in April 2014.
79. It is trite law that limitation of time implicates the court's jurisdiction to hear and determine the suit before it.
80. Having found that the Claimant's suit is statute barred, the court is obligated to down its tools as "jurisdiction is everything" as eloquently captured by Nyarangi JA in Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1989) eKLR.



81. The foregoing finding notwithstanding, would the Claimant have succeeded if the court found that the suit was filed within 3 years?
82. While the Claimant alleges that he was declared redundant by word of mouth, the Respondent maintains that the Claimant deserted the workplace or was absent from duty without permission or lawful cause.
83. It is common ground that the Claimant did not render services from sometime in December 2013 to sometime in April 2014.
84. The Claimant alleged that he injured his leg and his supervisor told him to go home presumably to recuperate, evidence the Respondent discounts as according to it the Claimant stopped reporting to work without communicating with anyone and they looked for him. RWII and RWIII confirmed that efforts were made to ascertain the Claimant's whereabouts and RWIII found him in his house and on request promised to report to work, but did not do so until April 2014.
85. In the court's view, it sounds illogical for the Respondent to look for the Claimant to resume duty if it had given him permission to recuperate.
86. RWIII, the Claimant's supervisor never admitted having given the Claimant a carte blanche to stay at home nor had the Principal of the school to whom all employees of the Respondent were accountable.
87. Puzzlingly, although the Claimant alleged that he had an injured leg, he did not avail evidence of having visited a medical institution for treatment or consultation. RWII confirmed on cross-examination that the Claimant had no injury or wound on 25th December, 2013 and left on the morning of 26th December, 2013.
88. The alleged injury was thus unproven.
89. The evidence on record reveals that the Claimant left the workplace on 26th December, 2013 and did not return until, he was looked for and even then waited until April 2014 and left after 2 days never to be seen again.
90. Unfortunately, for the Claimant, the court found the evidence of his supervisor and colleague (RWII) reliable. The Claimant also admitted that the supervisor visited his house and did not testify that he reported to work thereafter.
91. As aptly captured by Ndolo J. in *Evans Ochieng Oluoch V Njimia Pharmaceutical Ltd (Supra)*, cited by the Claimant's counsel,

“. . . Desertion amounts to gross misconduct and renders an employee liable to summary dismissal. However, like all cases of misconduct, it must be proved. It is not enough for an employer to simply state that an employee has deserted duty”.
92. The law requires the employer to demonstrate the reasonable attempts made to contact the employee to resume duty or a notice to show cause that termination of employment on account of desertion is being considered was issued.
93. See *Felistas Acheha Ikatwa V Charles Peter Otieno (2018) eKLR*, *Boniface Francis Mwangi V B.O.M Iyego Secondary School (Supra)*, *Simon Mbithi Mbane V Inter Security Services Ltd (Supra)*.
94. In the instant case, the Respondent adduced evidence to show that after the Claimant failed to report to work, RWIII was sent to look for him and found him in his house and requested him to report to work and he came back in April only to disappear after 2 days.



95. The Respondent ought to have issued a notice to show cause and proceeded to terminate the Claimant's employment.
96. The fundamental question is whether the Respondent had proved desertion by the Claimant.
97. In the court's view, having ascertained the Claimant's whereabouts and intimated to him to resume duty, the Respondent has demonstrated that the Claimant absconded duty and had no further obligation to continue pursuing him as he had by conduct demonstrated his disinterest to work.
98. The Respondent's efforts to trace the Claimant were reasonable.
99. In sum, it is the finding of the court that the Respondent has demonstrated that the Claimant deserted the workplace.
100. As to whether the Claimant has proved unlawful or unfair termination of employment, the Claimant's evidence is unclear as to what transpired on 14th April, 2014 as the Claimant's documents refer to verbal declaration of redundancy by the Principal on the one hand and being sent on one (1) month's leave.
101. The Claimant's evidence as to what transpired on 14th April, 2014 remains contradictory and of nominal probative value, if any.
102. Section 47(5) of the *Employment Act*, 2007 requires the employee to prove that an unfair termination or wrongful dismissal has taken place.
103. Case law is consistent that the employee must demonstrate a prima facie case of termination of employment or wrongful dismissal.
104. In disposing off this issue, the court is guided by the sentiments of the court in Daniel Mueke V Phogas Auto World (Supra) as follows;

“By leaving the workstation and not returning, the Claimant repudiated his employment contract. He was in breach of contract. The Claimant abandoned work.

The Claimant has not discharged the very low threshold placed upon an employee in a complaint of unfair termination by Section 47(5) of the *Employment Act*, 2007.

It is not necessary therefore to embark on an inquiry as to whether the Respondent complied with Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007. The question as to whether there was unfair termination of services is therefore not necessary”.
105. Having failed to demonstrate the circumstances in which his employment was terminated on 14th April, 2014 or at any other time, it is the finding of the court that the Claimant has failed to discharge the burden of proof under Section 47(5) of the *Employment Act*, 2007.
106. Having found that the instant suit is statute barred and having further found that the Claimant absconded duty, the court is satisfied that the issue of reliefs does not arise.
107. Consequently, the Claimant's suit dated 23rd October, 2017 and filed on 24th October, 2017 is hereby struck out on account of being statute barred.
108. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH 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

