



**Owaka v Midland Hauliers Limited (Cause 1948 of 2017)  
[2024] KEELRC 1783 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1783 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1948 OF 2017**

**JK GAKERI, J**

**JULY 9, 2024**

**BETWEEN**

**HEZEKIAH OTIENO OWAKA ..... CLAIMANT**

**AND**

**MIDLAND HAULIERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 29<sup>th</sup> September, 2017 alleging unlawful termination of employment by the Respondent.
2. The Claimant avers that he was employed by the Respondent as a tyre technician until 24<sup>th</sup> April, 2017 when he received a letter sending him on suspension for two weeks pending investigation into alleged loss of a major component of the Respondent's branding machine.
3. According to the Claimant, the component got spoilt when technicians from Silverstone Tyres were using the branding machine and the same was taken for repair by one Mr. Abu and Uni and the Claimant was not involved.
4. It is the Claimant's case that when he reported to work on 9<sup>th</sup> May, 2017, he was locked out the workplace by the Respondent without explanation and was not paid for the month of April 2019.
5. The Claimant prays for;
  - a. The sum of Kshs.320,000.00 comprising;
    - i. 12 months compensation
    - ii. Salary in lieu of notice.
    - iii. Unpaid salary for April, May and June 2017.



- b. Costs of this suit with interest at court rates from date of filing till payment in full.

### **Respondent's case**

6. In its Memorandum of response and Counter-claim, the Respondent admits that the Claimant was its employee as a Tyre Technician and was suspended on 24<sup>th</sup> April, 2017.
7. It is the Respondent's case that the branding machine was in possession of the Claimant as opposed to external technicians and a major component of the machine got lost while it was in the Claimant's custody.
8. That when he reported back, he refused to await clearance and left in protest and never returned and thus deserted the workplace.
9. It is the Respondent's case that the Claimant's salary for April was paid, May salary was due, but he did not work in June 2017.
10. By way of counter-claim, the Respondent prays for the sum of Kshs.70,000/= being the cost of acquisition of a new branding machine which it acquired.
11. It also prays for costs of the suit and such other or further relief as the court may deem just and fit.
12. The Claimant filed a Reply to the Respondent's Response and Counter-Claim reiterating the contents of the Memorandum of Claim and denies having deserted.

### **Claimant's evidence**

13. The Claimant testified that he was employed from 2010 at Kshs.20,000/= per month.
14. That when employees of Silverstone came to the Respondent's premises, they came with a branding machine which they used but it had a challenge and the Claimant directed them to Tread Setters for repairs. That they came back a week later but no branding was taking place.
15. It is the Claimant's case that when he was summoned to Mr. Jayesh's office, he was asked about the new branding machine but he told them that he had the old one and was unaware of the owner of the new one as it had only been used by employees of Silverstone.
16. The Claimant further testified that on the material day, he was summoned by the Human Resource Manager and given a suspension letter to report back on 9<sup>th</sup> May, 2017.
17. That when he returned, he was told that the investigation was on-going and would be recalled. That at the gate, the guard told him that he had been instructed to inform the Claimant that he should not report back. That the awaited call from the Respondent did not materialise.
18. The Respondent did not tender or avail any evidence the fact that it had been notified of the hearing and had filed a witness statement notwithstanding.

### **Claimant's submissions**

19. As to whether the Claimant's suit is merited, counsel for the Claimant submits that the termination of the Claimant's employment by the Respondent was unfair.
20. That by denying the Claimant opportunity to return to the workplace or invite him for disciplinary proceedings amounted to constructive dismissal.



21. Reliance was made on the sentiments of the Court of Appeal in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR.
22. Counsel urges that the Respondent tendered no evidence to rebut the Claimant's evidence and adduced no evidence to show that the Claimant deserted.
23. Reliance was placed on the decision in *Cherokewa Mrisha V Civicon Ltd* (2014) eKLR on the right to a fair hearing.
24. Counsel submits that the Respondent tendered no evidence of having paid the Claimant's salary for April 2017.
25. As regards the counter-claim, counsel submits that the same is for dismissal as it was not proved as ordained by the provisions of the [Evidence Act](#).
26. Reliance was made on *Janet Kaphiphe Ouma & another V Marie Stopes International (K) HCCC No. 68 of 2007* cited in *Isaac Katambani Iminyia V Firestone East Africa (1969) Ltd* (2015) eKLR to reinforce the submission.

### **Analysis and determination**

27. It is common ground that the Claimant was employed by the Respondent as a Tyre Technician at Kshs.20,000/= per month as at 24<sup>th</sup> April, 2017 when he was suspended for 2 weeks.
28. It is unclear as to when the Claimant was employed as he tendered no evidence to that effect.
29. Regrettably, the Claimant's written witness statement dated 11<sup>th</sup> September, 2017 makes no reference to the date, month or year of employment or duration of service.
30. Although in his oral evidence in court, the Claimant testified that he worked for the Respondent from 2010, he had no supportive evidence of that fact and did not indicate the year in his written statement.
31. The circumstances that culminated in the Claimant's alleged unfair termination of employment are also unclear.
32. In his written statement, the Claimant states that he was suspended for 2 weeks pending "investigation in alleged loss of a major component of the Respondent's branding machine". His claim states as much.
33. However, in his oral testimony, the Claimant denies that the Respondent had a new branding machine and confirmed the same to Mr. Jayesh on 24<sup>th</sup> April, 2017 who had asked him about the new branding machine.
34. The written statement would appear to confirm that the branding machine belonged to the Respondent contrary to the oral testimony.
35. Equally unclear is what transpired on 9<sup>th</sup> May, 2017, the date the Claimant was to report after the suspension.
36. In his written statement, claim and counsel's demand letter dated 9<sup>th</sup> June, 2017, the Claimant was locked out the work station without explanation.
37. However, in his oral testimony, the Claimant testified that when he returned, he was told that the investigation was incomplete and was asked to return home to await a call by the Respondent and as he was leaving, the guard told him that he had been instructed that he should not report back to the workplace.



38. At this juncture, it is unclear to the court whether the Claimant actually reported on 9<sup>th</sup> May, 2017 or who he talked to and what he was told.
39. Unfortunately, the Claimant's testimony lacks specificity on this issue.
40. If he had been advised to report back by the Respondent's Human Resource Administration Department which gave him the suspension letter, that was the only office he could report to which he appears to have done as evidenced by the oral testimony.
41. From the evidence on record, it is unclear to the court as to when he was locked out of the Respondent's premises and by whom or on whose instructions.
42. The issues for determination are;
- i. Whether termination of the Claimant's employment was unfair or he absconded duty.
  - ii. Whether the Claimant is entitled to the reliefs sought.
43. Before delving into the forgoing issues, it is essential to underscore the fact that even in an undefended suit, the Claimant is required to prove that he was an employee of the Respondent and that his termination from employment was unfair as held in *Monica Kanini Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR cited in *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR.
44. (See also *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR).
45. In this case, the Respondent admits that the Claimant was its employee and alleges that the Claimant deserted the workplace.
46. As regards the first issue, both the provisions of the *Employment Act*, 2007 and judicial authority are unambiguous that for a termination of employment to pass muster, it must be shown that the employer had a valid and fair reason to terminate the employee's employment and did so in accordance with a fair procedure.
47. As observed by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, for a termination of employment to pass the fairness test, it must be proved that there was a substantive justification for the termination and the process was procedural fairness.
48. According to the Claimant's written statement, he was locked out of his work station by the Respondent when he reported on 9<sup>th</sup> May, 2017. His oral evidence adduced in court is however different as he was told to go back home as investigation was still on-going.
49. It is unclear on who gave the instructions bearing in mind that the Claimant received a suspension letter from the Manager Human Resource.
50. The Claimant's explanation lacks consistency and the account is thus a doubtful as a basis for the finding of an unfair termination of the Claimant's employment.
51. Did the Claimant abscond or desert his post as alleged by the Respondent?
52. According to Black's Law Dictionary (10<sup>th</sup> Edition), desertion is defined as;
- “The wilful and unjustified abandonment of a person's duties or obligations.”



53. (See also *Seabolo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* on the distinction between absence without leave and desertion).
54. In paragraph 6 of the Respondent's Memorandum of Response, dated 16<sup>th</sup> March, 2018, the Respondent avers that it is the Claimant who absconded and failed to report back to work.
55. Since the Respondent did not avail evidence to substantiate the allegation, which is repeated in the Respondent's witness statement, the allegation remains unproven.
56. Desertion of the workplace is a serious administrative offence and can justify termination of employment if proved.
57. The emerging jurisprudence of this court is that where an employer relies on the defence of desertion or absconding duty, it is incumbent upon such employer to demonstrate the reasonable steps it took to contact the employee to resume duty or make the employee aware that disciplinary action was being considered on account of the desertion.
58. The foregoing is fortified by the sentiments of 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.”
59. In the instant case, the Respondent tendered no evidence of the action it took to ascertain the whereabouts of the Claimant to resume duty and no notice to show cause was issued. (See also *Boniface Francis Mwangi V B.O.M Iyego Secondary School (2019) eKLR*, *Simon Mbithi Mbane V Inter Security Services Ltd (2018) eKLR*, *Joseph Nzioka V Smart Coatings Ltd (2017) eKLR* and *Julius Kyalo Malonza V Ruth Osoto t/a Eraeva Catering Services (2021) eKLR* among others).
60. From the foregoing, it is discernible that the Respondent has failed to demonstrate that the Claimant deserted the workplace or was taken through a fair termination process.
61. In the circumstances, it is the finding of the court that termination of the Claimant's employment by the Respondent was unfair.
62. As regards the reliefs sought, the court proceeds as follows;
- a. One month's salary in lieu of notice, Kshs.20,000/=
63. Having failed to prove that it accorded the Claimant sufficient notice, the Claimant is awarded Kshs.20,000.00 as pay in lieu of notice.
- b. Unpaid salary for April, May and June 2017
64. Although the Respondent avers that it paid the salary for April 2017, it adduced no proof of payment.
65. The Claimant is awarded Kshs.20,000/= being salary for April, if unpaid.
66. With regard to the salary for May 2017, the Claimant adduced no evidence of having worked for the Respondent after 9<sup>th</sup> May, 2017.
67. The claim for salary for May 2017 is unsustainable. However, the Claimant is awarded salary for 9 days of the month of May 2017, Kshs.5,806.45.



68. The claim for salary for June 2017 lacks a factual basis and is dismissed.
- c. 12 months compensation
69. Having found that termination of the Claimant's employment by the Respondent was unfair for want of a substantive justification and procedural fairness, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*, 2007.
70. The court has considered that the Claimant contributed to the termination of employment, did not appeal the dismissal or express his wish to remain in the employment of the Respondent and adduced no evidence as to duration he had worked for the Respondent.
71. In the circumstances, the equivalent of two (2) months gross salary is fair.
72. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Salary in lieu of notice Kshs.20,000.00.
- b. Salary for April 2017, if unpaid, Kshs.20,000.00.
- c. Salary for 9 days of May 2017 Kshs.5,806.45.
- d. Equivalent of 2 months gross salary Kshs.40,000.00.
- Total Kshs.85,806.45**
73. In the circumstances of this case, 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**



DRAFT

***JUDGMENT Nairobi ELRC Cause No. 1948 of 2017 Page 9 of 9***

