



Okeah & 5 others v National Nurses Association of Kenya & another (Employment and Labour Relations Cause 2063 of 2015) [2024] KEELRC 1719 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1719 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2063 OF 2015**

AN MWAURE, J

JULY 4, 2024

BETWEEN

**BERNARD OKEAH 1ST CLAIMANT
KENNEDY OTIENO 2ND CLAIMANT
BERNARD RONO KIPROTICH 3RD CLAIMANT
PHOEBE WAITHIRA OMONDI 4TH CLAIMANT
BENSON MAINGI 5TH CLAIMANT
TERESIAH NJOKI KIRATU 6TH CLAIMANT**

AND

**THE NATIONAL NURSES ASSOCIATION OF KENYA 1ST RESPONDENT
BONIFACE WACHIRA (ALL SUED JOINTLY AS TRUSTEES OF THE
NATIONAL NURSES ASSOCIATION OF KENYA) 2ND RESPONDENT**

JUDGMENT

Introduction

1. The Claimants filed a Memorandum of Claim dated 19th November 2015.

Claimant's Case

2. The Claimants avers that they were employed by the 1st Respondent to offer different services as shown below:
3. The 1st Claimant was employed on 01/07/2013 as a Programs Assistant on a 3-year renewable contract at a monthly salary of Kshs 84,845 plus other benefits. As at April 2015, his monthly gross salary was Kshs 86,531.



4. The 2nd Claimant was employed on 01/08/2014 as a Programs Officer on a 3-year renewable contract at a net monthly salary of Kshs 60,000 plus other benefits. As at April 2015, his gross salary was Kshs 79,245.
5. The 3rd Claimant was employed on 11/01/2015 as an accountant on a 3-year renewable at a gross monthly salary of Kshs 75,000 plus other benefits. As at April 2015, his monthly gross salary was Kshs 79,245.
6. The 4th Claimant was employed on 02/03/2014 as a Finance & Administration Assistant on a 3-year renewable at a gross monthly salary of Kshs 40,000 plus other benefits. As at April 2015, his monthly gross salary was Kshs 50,388.
7. The 5th Claimant was employed on 01/10/2013 as a support staff on a 3-year renewable at a gross monthly salary of Kshs 28,528 plus other benefits. As at April 2015, his monthly gross salary was Kshs 29,190.
8. The 6th Claimant was employed on 04/02/2015 as a support staff on a 3-year renewable contract at a gross monthly salary of Kshs 20,000 plus other benefits. As at April 2015, his monthly gross salary was Kshs 22,815.
9. The Claimants aver that their contract of employment provided that neither party shall terminate the contract unless either party gives written notice or on payment of an equivalent salary in lieu of such notice.
10. The Claimants aver that they adhered to their employment contracts and staff policy, meeting their respective targets at work as expected and reasonably.
11. The Claimants aver that in violation of the law and their legitimate expectations, the 1st Respondent through its officials and without informing the 1st and 4th Respondent sent emails dated 28/05/2015 to the National Executive Council ordering the 1st and 4th Claimant to proceed on an indefinite compulsory leave with immediate effect without any formal explanation.
12. Further, vide a letter dated 04/009/2015 emailed to the 1st, 2nd, 4th and 5th Claimants sent them on immediate 3 week temporary leave without any explanation given.
13. The Claimants aver that prior to the aforesaid emails, they had been notified through a letter from the Registrar of Societies that there had been a change of officials for the 1st Respondent's National Executive Officials from 11/05/2015.
14. The Claimants aver that that since the change of office, the new officials have declined to pay their salaries and statutory deductions without justification. This was illegal and in breach of their respective contracts of employment.
15. The Claimants aver that pursuant to a ruling from Nairobi Judicial Review Application Misc. 144 of 2015 on 14/07/2015, the new officials were granted orders to withdraw 1 million shillings from the 1st Respondent's accounts for purposes of settling salary arrears and employees' salaries.
16. The Claimants aver that the 1st Respondent have continued to withdraw money from the Association's account and used the money for personal gains.
17. The Claimants aver that the 1st Respondent's conduct was aimed at constructively dismissing them from employment with a well calculated illegal intention to recruit other people to replace them from their current jobs.



18. The Claimants aver that they have on several occasions formally requested the new officials through a letter dated 09/09/2015 to pay their outstanding salaries but the 1st Respondent declined to comply.

Respondents' Case

19. In opposition to the Memorandum of Claim, the Respondents filed a Memorandum of Response dated 10th June 2016.
20. The Respondents aver that the Claimants made a demand to the 1st Respondent under the 1st Respondent's letter head which was disrespectful, wrong and illegal.
21. The Respondents aver that the Claimants were guilty of gross misconduct wherein they refused to collect their salaries claiming they do not recognise the 1st Respondent's officials.
22. The Respondents aver that the Claimants were aware that as of 11/05/015 the current officials of the 1st Respondent were validly in office. However, they stated that they do not recognize the officials, and this is a gross misconduct and is a demonstration of disrespect which is not tolerable. This conduct automatically denies the Claimants the reliefs claimed.
23. The Respondents aver that the Claimants individually or collectively engaged in a constant or continued refusal to obey direct or implied orders reasonable in nature, given by the 1st Respondent officials and went further to engage the officials in an inappropriate confrontation claiming that they did not recognize them or purporting to have expelled them through their letters.
24. The Respondents aver that the Claimants stole and/or disappeared with computers and other items belonging to the 1st Respondent. This was reported at Kenyatta National Hospital Police post through OB.NO 15/7/9/2015 and the same is still undergoing investigation and awaiting disciplinary proceedings commenced by a committee formed to deal with the Claimants disciplinary issues. The Claimants have however refused to come and attend the proceedings despite letters being sent to them inviting them to attend the same .
25. The Respondents aver that on 21/05/2015, the 2nd and 4th Claimants together with a former official, Violet Wafula purported to issue expulsion letters to the validly elected officials despite the fact that they had no court order staying the election of the officials and in any case the stay was declined by court in Judicial Review No. 144 of 2015.
26. The Respondents aver that the 1st Respondent runs programmes concerning nurses, accounting issues and hospitality among others. When the Claimants refused to report to work claiming they do not recognise the office bearers, this crippled the operations since no one was performing critical duties important to the functioning of the 1st Respondent and so the services were not being offered.
27. The Respondents aver that immediately the Claimants failed to report to duty, the 1st Respondent recruited new staff who were offering services in similar positions.
28. The Respondents aver that the Claimants conduct amounted to insubordination contrary to the employment laws and rules and is totally unacceptable.

Evidence in Court

29. The 1st Claimant (CW1) testified and stated that by a letter of authority dated 19/09/2023, he has been authorised by the other Claimants to represent them in these proceedings.



30. CW1 testified that the 1st Respondent sent them on a 3 week temporary leave as it claimed it was being reorganised, however, they were never recalled back to work.
31. CW1 testified that they saw letters sent to partners asking them not to transact with the Claimants and no explanation was offered to them why they were not to deal with their partners.
32. CW1 testified that the Claimants tried to go back to work but two of the Claimants (Benson Maingi and Teresia Kiraitu) were forcefully evicted from the premises. Despite writing a protest letter and asking their payment in September 2015 they were never paid.
33. CW1 testified that the Claimants were never called for any disciplinary hearing and they were not paid their dues leading to the institution of this suit.
34. CW1 testified that the Claimants are claiming gratuity as most of them were at the tail end of their contract and they are claiming their unpaid leave days.
35. During cross examination, CW1 testified that the Claimants sought the court's indulgence to amend the claim and vide a ruling dated 20/02/2020 they were given 30 days to amend the same. However, they did not get to know about the ruling until 30 days were over and the claim proceeds as it is.
36. CW1 testified that the Claimants were sent on temporary leave vide a letter dated 4/9/2015. The same ordered them to proceed on leave awaiting transition.
37. CW1 testified that the letter dated 8th June 2015 which sought to expel the new officials from the 1st Respondent was signed by the 4th Claimant as the administrator of the National Executive as these persons were not officials of the organisation at the time.
38. CW1 testified that he was invited to the meeting on June 2015 but the meeting did not take place, the Claimants reported to work but there was no meeting.
39. CW1 testified that the letters inviting the Claimants for the disciplinary hearing scheduled for 11/11/2015 were never served on them and they never received any email communication hence they did not attend the meeting.
40. CW1 testified that there were no written instructions or minutes authorising the 2nd and 4th Claimants to write the letters purporting to expel the new officials from the organisation and to stop subscription of the new officials.

Respondent's Case

41. The Respondent's witness, Collins Otieno Ajwang stated he is a nurse and the national chairman of the 1st Respondent. He was elected as vice chairman of the 1st Respondent in 2015.
42. RW1 adopted his witness statement dated 3/10/2023 as his evidence in chief.
43. RW1 testified that when they were elected the officials called the secretarial staff for a meeting on 6/6/2015 at Pan Africa Hotel as they could not meet in the offices due to hostility.
44. RW1 testified that the staff were sent letters and SMS, however, the Claimants did not attend the meeting but others attended and were paid their salaries.
45. RW1 testified that after failing to attend the meeting, on 8/6/2015, Phoebe Omondi wrote to the officials that she did not accept the new officials. They continued writing letters which they had no authority to write.



46. During cross examination, RW1 testified that the Claimants failed to exhaust internal mechanisms and they could not pay their salaries as they blocked them and they could not even get their files. They do not have their bank details to date even if they wish to pay them their salaries and dues.
47. RW1 testified that the Claimants were invited for disciplinary hearing by postal address and were also served via email but there is no evidence in court.
48. RW1 testified that the Claimants were sent on 3-week compulsory leave and they were called for a disciplinary hearing after the 1st Respondent's AGM held in October. They were invited for the hearing in November but they never came.
49. RW1 testified they have no problem paying the salary arrears, however the Claimants stole from the organisation and a complaint was lodged at KNH Police Station on 15/7/2015.
50. RW1 testified that the police are still investigating hence none have been arrested and no suit has been filed.

Claimants' Submissions

51. The Claimants submitted that their claim on salary and related benefits for the period between May 2015 to November 2015 is undisputed. The Claimants dropped their claim for unlawful termination for the reason that the memorandum of claim was not amended
52. The Claimants submitted that since it is undisputed that by 20/11/2015 when the case was filed, the Claimants were still employees of the 1st Respondent as they had not been issued any letter of termination. Therefore, they are entitled to the 7-month salary arrears accumulated from May 2015 to November 2015.
53. The Claimants submitted that the 1st and 5th Claimants had worked for the 1st Respondent for two full years whereas the 2nd and 4th Claimants had worked for one full year and they are entitled to payment of gratuity as computed in the claim.

Respondents' Submissions

54. The Respondents submitted that the Claimant cannot be entitled to the salaries as they terminated their contract of employment by their own conduct by deserting their work place and duties contrary to their employment agreements.
55. The Respondents submitted that the 1st Claimant admitted in his testimony that the Claimants deserted work from May 2015 and they never showed any intention of returning to work; they vanished and never returned.
56. The Respondents submitted that the Claimants deserted employment wilfully and despite substantive efforts by the Respondent to reach out to them to collect their salaries and work a way forward it has been in futility. Therefore, the Claimants are not entitled to any compensation.
57. The Respondents submitted that the Claimants witness admitted to their acts of insubordination and it is evident the Respondents did not breach any of their obligations towards the Claimants but that it was their gross misconduct that led to the institution of this suit and the same ought to be dismissed.
58. The Respondents submitted that gratuity is a special damage which must be specifically pleaded and strictly proven by way of cogent evidence during hearing.



59. The Respondents submitted that gratuity was a separate claim that ought to be specifically sought and not left to be implied from another claim. The Claimants contention that the same be inferred, implied and/or presumed in the claim as related statutory benefits is irrelevant and must be rejected.

Analysis and Determination

60. Having considered the pleadings, affidavits, submissions and evidence on record, the issues for the Court's determination are:
- a. Whether the Claimants were constructively dismissed from employment or they deserted employment.,
 - b. Whether claimants are entitled to 7 months salary arrears.

61. The claimants were sent on 3 months compulsory leave to allow time for transition as per the respondent's letter dated 4th September 2015. The claimants aver that since that date they were not recalled back to work and their letter sending them on compulsory leave was not withdrawn. They therefore claim they were terminated by the respondents without following the due procedure.

62. The law regarding termination of employment is mandatory that the employer must give a valid reason for terminating an employee. Section 45(1) of the *employment act* provide

“No employer shall terminate the employment of an employee unfairly.

Section 43(1) of the *employment act* as well provide as hereunder:-

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

63. The letter by the respondent ordering claimants to proceed on compulsory leave did not allude to any gross misconduct or give any reasons for sending them on leave. Indeed the letter states that they were to go on leave pending completion of ongoing transition. It further apologised to them for any inconvenience.

64. The court noted the letters sent to the claimant's dated 3rd November 2015 invited them for a disciplinary hearing on 11th November 2015. The respondents offered no reason for the invite to the disciplinary hearing to enable the claimant to well prepare their defence. Failure to give an employee valid and verifiable reasons for consideration of termination of employment is against the aforesaid sections 43 and 45 of the *employment act* among others.

65. Section 41(1) for the *employment act* further provides that the employee must be given a chance to explain themselves in the presence of a fellow employee of his choice or in the presence of a union member. The letter inviting the claimants for disciplinary hearing did not set out to the claimants the charges against them. The claimants were also not given an opportunity to take their witness.

66. This fell short of the mandatory test set out in the often cited case of *Walter Ogal Onuro vs Teachers Service Commission Cause No 955 of 2021* where it was held:

“for termination to pass the fairness test it ought to be shown that there was not only substantive justification but also procedural fairness.”



67. Further, the claimants aver they did not even receive those letters inviting them for the disciplinary hearing. That is a route the court will not pursue because it cannot know if indeed the claimants received the said letters or not. And even if they received them the letters do not comply with the mandatory requirements of law as earlier stated since no grounds were given for inviting the claimants for the disciplinary hearing and neither were they given an option to call a witness of their choice.
68. The respondent on the other hand claimed the claimants absconded duty and despite attempting to call them to collect their salaries or to resolve their issues they did not do so.
69. Cases of desertion are grave and according to section 44(a) of *Employment Act* can amount to gross misconduct leading to summary dismissal. However, as in numerous authorities relating to desertion it is not sufficient for an employer to claim desertion. Rather he must show the employee left his employment with no intention to go back and that the employer made efforts to communicate with the employee about the desertion.
70. In this case save for the letter inviting the claimants for disciplinary hearing there was no other proof that the respondents attempted to engage the claimants on their desertion. The respondent should also have warned the claimants there they were considering terminating them on the basis of their desertion.
71. In the case of *Boniface Karagana vs Protective Custody Limited Cause 243 of 2017* the court held:
- “the claimant was accused of desertion and whereas this is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal the respondent failed to produce any evidence that the claimant deserted duty. It was only averred in the respondents defence which removed were mere allegations as the correspondence alluded to by the respondent demonstrating the absence of intention to resume work was not produced in evidence.”
- The court held that the burden of proof that the employee deserted employment was on the employer.
72. The court having critically studied these pleadings and submissions and all the exhibits finds the claimants have proved a case against the respondents for the prayer for the unpaid salary as set hereunder.
73. In any event the respondents in their evidence in court admitted they owed the claimants unpaid salaries which they could have settled had they availed themselves to collect the same.
74. So they are entitled to the foregoing:-
1. 1st claimant Bernard Okeah at 86,000/-x 7= Kshs 605,717/-
 2. 2nd claimant Kennedy Otieno 79,245= Kshs 554,715/-
 3. 3rd claimant Bernard R. Kiprotich 79,245= Kshs 554,715/-
 4. Phoebe Waithera (4th claimant) kshs 50,388 = kshs 352,702/-
 5. 5th claimant Benson Maingi kshs 29,190= 204,330/-
 6. 6th claimant Teresiah Njoki kshs 22,815= 159,705/-
- Costs are also awarded to the claimants and interest at court rates from date of judgment till final payment
- Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

