



Onyango v Jiang Xi Jing Tai Water Conservancy Electric Power Construction Kenya Limited (Cause E793 of 2023) [2025] KEELRC 61 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 61 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E793 OF 2023
SC RUTTO, J
JANUARY 17, 2025**

BETWEEN

EDWARD SANTOS ONYANGO CLAIMANT

AND

**JIANG XI JING TAI WATER CONSERVANCY ELECTRIC POWER
CONSTRUCTION KENYA LIMITED RESPONDENT**

JUDGMENT

1. It is common ground that the Claimant herein was employed by the Respondent as Deputy Site Agent vide a contract dated 24th August 2020. It is also not in dispute that the Claimant tendered his resignation from the Respondent's employment on 3rd July 2023. According to the Claimant, he issued the Respondent with a 30 days' notice and that during the said notice period, he continued working diligently at the Respondent's site until the notice period lapsed.
2. The Claimant contends that despite performing his obligations as per the contract of employment, the Respondent has retained his dues unjustifiably and wrongfully. To this end, his claim against the Respondent is for the sum of Kshs 813,461.54 being two months salary, accrued leave days and service pay. He further prays for the costs of the suit.
3. In response to the Claim, the Respondent filed a Memorandum of Response together with a Counterclaim. In the Memorandum of Response, the Respondent avers that the Claimant absconded duty without formal approval for leave and without permission from his supervisor from the first week of May 2023. The Respondent further states that the Claimant did so maliciously knowing very well that as Deputy Site Agent responsible for day-to-day activities, the smooth running of the project was hinged on his presence at the site.



4. The Respondent further avers that the Claimant returned to work on 21st June 2023 over one and a half months later without an explanation of his absence and worked for about two weeks before issuing a three days resignation notice via email on 3rd July 2023.
5. In the Respondent's view, it was consequential that failure by the Claimant to issue a 30 days' notice prior to termination of his contract was that it lawfully forfeited one month's salary in lieu of notice. The Respondent avers that this notwithstanding, the Claimant's other dues were remitted as at the time he absconded duty.
6. With respect to its Counterclaim, the Respondent avers that the Claimant breached the terms of his contract of employment by; absconding duty from the first week of May 2023 to 21st June 2023 without seeking leave from his supervisor; failure to issue 30 days before termination of employment; and acting perversely and in bad faith in his conduct prior to his resignation.
7. As a result of the foregoing, the Respondent has asked the Court to enter judgment against the Claimant as follows;
 - a. 12 months' salary as general damages for breach of the employment contract;
 - b. 30 days salary in lieu of termination notice;
 - c. Indemnity to the Respondent against any penalties that could arise due to the delay in project implementation occasioned by the Claimant's failure to hand over the site to the Site Agent;
 - d. Costs of the suit;
 - e. Any other relief by the court.
8. In his Reply to the Memorandum of Response and the Counterclaim, the Claimant has maintained that he issued 30 days' notice to the Respondent and continued working regardless of efforts to frustrate his working environment.
9. Putting the Respondent to strict proof, the Claimant has further denied breaching his employment contract. He avers that he went on emergency leave in the month of June 2023, was in constant communication with the management and was performing his duties throughout the said duration.
10. He further avers that he issued a resignation notice to the Respondent on 3rd July 2023 and continued to perform his duties until he was met with frustrations from the management which forced him not to report to work but to perform his duties virtually.
11. Terming the Respondent's Counterclaim frivolous, abuse of the court process, fraudulent, hopeless and vexatious, the Claimant has asked the court to dismiss the Counterclaim with costs.
12. The matter proceeded for hearing on 22nd October 2024 during which both parties called oral evidence.

Claimant's Case

13. The Claimant testified in support of his case and to start with, he adopted his witness statement as well as his list and bundle of documents to constitute his evidence in chief.
14. The Claimant testified that in July 2023, having due regard to the terms of his employment contract, he issued his resignation notice on 3rd July 2023 to the Respondent via email and continued to work diligently at the Respondent's site throughout the termination notice period of thirty (30) days until the aforementioned days lapsed.



15. The Claimant averred that he even ensured the successful presidential commissioning on 19th July, 2023 until 21st July, 2023. That thereafter, he faced frustrations from the management of the Respondent which forced him to perform his duties virtually from 21st July, 2023 until the notice period lapsed.
16. That despite performing his obligations as per the Contract of Employment, the Respondent has retained his dues unjustifiably and wrongfully.
17. According to the Claimant, he did not abscond duty or act in bad faith prior to his resignation. It was his contention that if at all that was the case, his employment contract allowed the Respondent to terminate his employment summarily. He averred that the foregoing action was not taken by the Respondent and as such, he has termed any allegations of any omissions during the period of his employment false.
18. The Claimant further denied hampering the Respondent's operations by leaving with crucial documents. He averred that he was not the custodian of the Respondent's documents as they were kept by the Secretary of the Respondent while the financial documents were with the accountant.
19. He further denied hindering the Respondent's operations which consequently made it unable to receive payments from the project without an Interim Payment Certificate No. 16 (IPC 16).
20. According to the Claimant, for an IPC to be issued, there are certain requirements that must be met and that includes performance of a project work worth not less than Kshs 10,000,000/=, which the Respondent had not met and therefore, there was no way that the IPC Certificate No. 16 was to be issued.
21. That on several occasions, he advised the management of the Respondent of the need to accelerate the progress of physical works at the site to enable the completion of the IPC 16 but the Respondent did not adhere to his counsel.

Respondent's Case

22. The Respondent called oral evidence through Ms. Tabitha Okaya who testified as RW1. She identified herself as an official of the Respondent company and an engineer by profession. Equally, she adopted her witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
23. It was the testimony of RW1 that both parties maintained a cordial relationship for the two years and eight months during which the employment of the Claimant subsisted, with both parties adhering to their duties and obligations as stipulated under the employment contract.
24. RW1 stated that the relationship turned sour sometime in the beginning of May 2023 when the Claimant unlawfully absconded duty without formal approval for leave and without seeking permission from the supervisor.
25. That further, the Claimant did not afford the Respondent an opportunity to source for a temporary replacement before proceeding for the said leave.
26. In RW1's view, the Claimant did this maliciously, with the full knowledge that his role as a Deputy Site Agent was so pivotal to the timely execution of the project and that his unanticipated absence would stall the smooth running of activities at the construction site.
27. This notwithstanding, the Claimant continued absenting himself from work for over six weeks and only returned to work on 21st June 2023, without any explanation for his absence, and worked for



about two weeks before issuing a three days' resignation notice via email on 3rd July 2023 stating that it would be effective from 7th July 2023.

28. It came to the Respondent's attention that the Claimant had in fact, secured another employment opportunity in a neighbouring country, which informed the urgency of his resignation notice, in blatant disregard to the significance of timely execution of the project in which he was a deputy site agent, and the terms of his employment contract regarding issuance of a termination notice.
29. According to RW1, the Claimant is not entitled to two months' unpaid salary as claimed as there is no justification to demand unpaid salary for months not worked, where he was, in fact, drawing salary elsewhere.
30. She averred that all other outstanding dues owed to the Claimant, including leave days not taken, were duly compensated at the time of the Claimant's breach of the employment contract.
31. RW1 further averred that the Respondent is entitled to compensation from the Claimant for his breach of the terms of the employment contract in relation to his absconding of duty.
32. RW1 further stated that the Claimant further breached the employment contract by failing to issue 30 days' notice before termination of employment as provided under Clause 5 of the Employment Contract and acting perversely and in bad faith prior to resignation.
33. That further, the Claimant absconded the site with crucial material belonging to the Respondent including but not limited to IPC Certificate no. 16 thereby impeding payment which was due sometime in June, consequently hampering the Respondent's operations as it has been unable to receive payments from the project without the very IPC.
34. That the Respondent made several attempts to persuade the Claimant to hand over log-in credentials to the site email address, and all other documents relating to the site, including but not limited to subcontract agreements, local purchase orders, invoices and delivery notes and other supplier's particulars, but the same have been in vain as he neglected, refused and/or ignored, thus occasioned delays in the completion of the project.
35. That the Claimant has also refused and/or neglected to properly hand over the site to the site agent as well as the newly appointed engineer who replaced him. That the refusal has since frustrated the Respondent's operations to the point of grinding the whole project to a halt.

Submissions

36. It was submitted on behalf of the Claimant that the Respondent did not adduce evidence that he absconded duty. He further submitted that there having been no disciplinary action commenced against him for any alleged abscondment of duty, the only viable inference that the Court can make and conclude is that there was no abscondment of duty as alleged by the Respondent. He urged the Court to hold as much.
37. The Claimant further submitted that vide the email dated 7th August 2023, the Respondent acknowledged that he continued working even as at 7th August 2023, which was 30 days after the date of issuance of the termination notice.
38. He further posited that the Respondent did not accept the resignation until the 7th of August 2023, where in acknowledgement, sought that he properly hands over. In the Claimant's view, this clearly shows that he served the thirty-day notice as per the contract. To this end, the Claimant urged the Court to find that he did not breach the contract of employment between himself and the Respondent.



39. Referencing the case of Luka Mbuvi vs Economic Industries Limited (2020) eKLR, the Claimant submitted that Section 74(f) of the *Employment Act* obligates an employer to keep records of each employee's leave entitlement, days taken and days due. That there being no record by the Respondent that he took leave during the two years of work, he is entitled to the leave period stipulated in law.
40. With respect to the Respondent's claim for compensation for 12 months for breach of contract, the Claimant posited that as per Section 49 of the *Employment Act*, the said remedy is only available when there is a finding by the Court of either wrongful dismissal and unfair termination. He contended that no such provision exists for any alleged breach of contract by the Employee. In the Claimant's view, to seek to apply this provision for any alleged breach of contract by an employee is inviting the Court to misapply the law. In support of this argument, the Claimant placed reliance on the case of SC Petition No. E008 of 2023 Kenya Ports Authority-KPA vs Joseph Makau Munyao & 4 Others.
41. On its part, the Respondent submitted that the Claimant was in breach of Article 5.1 of the contract and the law allows forfeiture of one month's salary from an employee who resigns without giving notice. To buttress this position, the Respondent placed reliance on the case of Irene Jillani Mwamuye v Red Court Hotel t/a Boma Hotel [2021] eKLR.
42. To this end, the Respondent maintained that the Claimant is not entitled to the two months' salary pay. The Court was urged to dismiss this prayer.
43. The Respondent stated in further submissions that the handover is a crucial process for the continuity and flow of work. Referencing the cases of Janes Awinja Enock vs Premium Cleaning & Pests Control Limited (2020) eKLR and James Chutha Gatherer vs Nation Media Group Limited (2013) eKLR, the Respondent urged the Court to dismiss the Claimant's prayer for leave days maintaining that the Claimant should formally hand over to the Manager and the said Leave days' pay will be remitted to him.
44. The Respondent further posited that the Claimant's contract of employment does not have a provision for service pay hence for that reason, the prayer for service pay fails. In support of this position, the Respondent cited the case of Bamburi Cement Limited vs William Kilonzi (2016) eKLR.
45. The Respondent stated in further submission that Sections 35 read with Section 36 of the *Employment Act*, 2007, expressly provides for the instances where employees are not entitled to service pay. According to the Respondent, the Claimant was a registered member of the National Social Security Fund hence falls under the category that is expressly excluded by the aforesaid sections.
46. The Respondent further argued that the Claimant absconded duty and gave three days' notice contrary to the Employment Contract. That as such, it suffered loss from breach of the employment contract by not receiving payment. Accordingly, the Respondent thus urged that the counterclaim be allowed and damages for breach of employment contract awarded.

Analysis and Determination

47. Flowing from the pleadings filed by both parties, the evidentiary material on record and the rival submissions, it is evident that the Court is being called to determine the following issues: -
 - i. Whether the Claimant is entitled to the reliefs sought;
 - ii. Whether the Counterclaim by the Respondent is justified;



Reliefs by the Claimant

Unpaid salary

48. The Claimant has sought to be paid the sum of Kshs 300,000/= being salary for two months. According to the Claimant, he worked diligently for the Respondent upon issuing his notice of resignation up to the end of the notice period. That it was only on 21st July 2023 that he started working virtually as he faced frustrations from the management of the Respondent.
49. Disputing the Claimant's assertions, the Respondent avers that the Claimant absconded duty on the first week of May 2023 and returned on 21st June 2023, only to hand in his resignation notice two weeks later.
50. The Claimant has denied the claims by the Respondent that he absconded duty. In this regard, he states that he went on an emergency leave in June 2023 and during the said period, he was in constant communication with the Respondent.
51. It is notable that the Respondent's assertions that the Claimant absconded duty have not been supported by any evidence. For instance, the Respondent did not produce work attendance records for the period in question to confirm its assertions that indeed, the Claimant was absent from work without any authority.
52. As a matter of fact, the Respondent has not told the court what measures it took against the Claimant upon noting his absence from work. I find it rather odd and implausible that the Claimant absconded duty for one and a half months without authority only to resurface and carry on with his work without the Respondent putting him on notice regarding his absence from work.
53. On this issue, I agree with the sentiments expressed by the Court (Radido J) in the case of *Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme* [2015] eKLR, where it was held that: -

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

(24) In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”
54. During cross-examination, RW1 stated that the Site Manager who was answerable to the Respondent maintains the time sheets at the Site. Therefore, this confirms that the Respondent was in a position to indeed prove that the Claimant had absconded duty for one and a half months. Be that as it may, it failed to do so.
55. Further cross-examined, RW1 admitted that there is no evidence on record to prove that the Claimant absconded work as alleged.
56. In addition to the foregoing RW1 admitted during cross-examination that the Claimant was not paid salary for the month of May and June 2023.
57. What can be deduced from the foregoing is that there is no evidence that the Claimant absconded duty as alleged and that he was paid his salary for the months of May and June 2023.



58. Accordingly, it is this Court's finding that the Claimant is entitled to unpaid salary for two months as pleaded.

Accrued leave pay

59. The Claimant has sought against the Respondent the sum of Kshs 363,462/= being accrued leave pay. In support of his claim, the Claimant exhibited a copy of tabulations with respect to his claim. It is worth noting that the Respondent did not dispute the tabulations exhibited by the Claimant. If anything, RW1 testified during cross-examination that the Claimant's tabulations are correct.
60. Further to the foregoing, the Respondent was required under Section 74(1) (f) of the Employment Act to maintain the employees' leave records. From the record, the Respondent did not exhibit the Claimant's leave records to counter the tabulations by the Claimant.
61. In view of the foregoing, the Court presumes that the tabulations exhibited by the Claimant are accurate.
62. It is also apparent from the record that the Respondent's only contention is that the Claimant had not handed over to the site agent and the newly appointed engineer who had taken over his responsibilities. This is confirmed by an email dated 7th August 2023, in which RW1 informed the Claimant that "Rest assured, once the handover is completed, we will promptly process payment of your salaries and services owed."
63. The Claimant on his part stated that at the end of his notice period, he left without being requested to hand over anything. He maintained that all the documents or materials needed were and are still with the Respondent.
64. It is noteworthy that in the email of 7th August 2023, save for requesting the Claimant to be present at the site for a handover, the Respondent did not disclose to the Claimant what aspects of his work he needed to hand over for instance the IPC Certificate No.16 which only came up in the course of these proceedings.
65. It is therefore not fair for the Respondent to withhold the Claimant's dues without clearly advising him of what he was specifically required to hand over.
66. In the circumstances, the Court returns that the Claimant is entitled to payment of accrued leave in the sum of Kshs 363,462/=.

Service pay

67. Under this head, the Claimant seeks to be paid service pay in the sum of Ksh150,000/=. It is evident from the Claimant's email dated 4th August 2023 that he was a registered member of the National Social Security Fund. Therefore, this places him within the ambit of the exclusions under Section 35(6) of the Employment Act. As such, his claim for service pay is declined.

Counterclaim?

68. In the Counterclaim, the Respondent has cited the Claimant for breach of contract. One of the issues raised by the Respondent is the Claimant's failure to issue a notice of 30 days prior to his resignation.
69. On this issue, the Respondent contends that the Claimant issued a three days' notice prior to his resignation contrary to the 30 days' notice stipulated under his Contract of Employment. On his part,



the Claimant maintains that he issued a 30 days' notice and that he continued to serve the Respondent diligently throughout the notice period.

70. Both parties exhibited a copy of the Claimant's notice of resignation dated 3rd July 2023 which reads in part;

“Dear Mr. Gan,

I am writing to inform you of my decision to resign from my position as the Deputy Site Agent of Kericho Water Project for your esteemed company Jiangxi Jingtai Water Conservancy & Electric Power Construction Kenya Ltd. My last day of employment will be 07/07/2023...”

71. As can be discerned from the email above, the Claimant issued the Respondent with a notice period of three days as opposed to 30 days. This therefore contradicts his assertions that he issued the Respondent with a 30 days' notice.

72. Further, the Claimant did not produce evidence to confirm his assertions that he worked for the Respondent beyond 7th July 2023 or extended his notice period. He confirmed as much during cross-examination.

73. Revisiting the Claimant's Contract of Employment, it is apparent that under Clause 5, either party could terminate the contract by giving the other party 30 days written notice or paying salary equivalent to 30 days in lieu of such notice.

74. It is therefore apparent that the Claimant was required to issue the Respondent with a notice period of 30 days and in lieu thereof, pay salary equivalent to the notice period.

75. As such, the notice communicated in the Claimant's email of 3rd July 2023 cannot by any stretch of imagination be said to have been notice in compliance with clause 5 of his contract of employment.

76. This being the case, the Respondent is entitled to recover from the Claimant, salary equivalent to the notice period being one month.

77. To this end, the Respondent's Counterclaim against the Claimant succeeds to the extent of Kshs 150,000.00.

78. With respect to the claim for indemnity against penalties that could arise due to the delay in project implementation occasioned by the Claimant's failure to hand over the site to the site agent, the same is declined for being speculative and for want of evidence.

Orders

79. It is against this background that the Court makes the following final orders;

- a. The Claimant is awarded the sum of Kshs 300,000.00 being unpaid salary for two (2) months.
- b. The Claimant is awarded the sum of Kshs 363,462.00 being accrued leave.
- c. The Respondent's Counterclaim succeeds to the extent of Kshs 150,000.00 which is equivalent to one (1) month's salary.
- d. The sum in (c) above will be set off against the Claimant's total award of Kshs 663,462.00, hence the final award due to the Claimant stands at Kshs 513,462.00.



- e. The final award, shall attract interest at court rates from the date of Judgment until payment in full.
- f. Each party shall bear its own costs in view of the fact that the Claim has been allowed and the Counterclaim has partially succeeded.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For Claimant Ms. Nyambura instructed by Mr. Onyango

For the Respondent Mr. Thuo instructed by Mr. Eredi

Court assistant Millicent

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 had 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.

STELLA RUTTO

JUDGE

