



REPUBLIC OF KENYA



KENYA LAW
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**Gathura v Waithaka t/a Wamukoko Gas Supplier (Cause 23 of 2016)
[2025] KEELRC 1698 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1698 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 23 OF 2016
CN BAARI, J
JUNE 12, 2025**

BETWEEN

NICHOLAS KARURI GATHURA CLAIMANT

AND

**ALBERT GITAU WAITHAKA T/A WAMUKOKO GAS
SUPPLIER RESPONDENT**

JUDGMENT

1. The Claimant lodged this suit through a Memorandum of Claim dated 12th January, 2016 and filed on 13th January, 2016. He seeks the following reliefs:
 - i. One month salary in lieu of notice
 - ii. Salary for December, 2013 to May, 2014
 - iii. Leave days for 4 years and 5 months
 - iv. Service pay
 - v. 12 months' salary as compensation for unfair termination.
2. The Respondent entered appearance on 2nd February, 2016, and subsequently filed a Response to the Memorandum of Claim on 19th December, 2017.
3. Parties' attempt at mediation did not bear fruits, and the Mediator filed a mediation report indicating that parties did not reach a settlement.
4. The matter was first heard on 14th December, 2023, when the Claimant testified in support of his case. He adopted his witness statement and produced a bundle of documents filed in support of his case. The Claimant also presented one Dr. Moses Njuki Ngibuini to testify in the case.



5. The Respondent's case was heard on 12th March, 2025, when the Respondent testified in support of his case. He similarly adopted his statement, and produced a bundle of documents in support of his case.
6. Both parties filed submissions in the matter, and the submissions have been duly considered.

The Claimant's Case

7. The Claimant's case is that he was employed by the Respondent in January, 2010 and served until 30th May, 2014. He avers that while in the normal course of duty on 4th December, 2013, he sustained injuries caused by a gas explosion leading to his admission in hospital until 20th January, 2014. He states further that he continued with clinic follow ups until May, 2014.
8. It is the Claimant's case that he reported back to work on 29th May, 2015, when the Respondent unlawfully and without any justifiable cause terminated his services, and illegally withheld his salary and terminal dues.
9. The Claimant states that in failing to tabulate and pay him his terminal dues, the Respondent did not follow due process hence his termination was unlawful, unfair and inhumane.
10. The Claimant avers that considering the manner in which his services were terminated, the court should award him compensation for the unlawful and unfair termination equivalent to 12 months' salary.
11. The Claimant states that he was hospitalized for 2 months and that the employer/Respondent paid his medical bills. It is his case that the Respondent paid him daily, a sum of Kshs. 600/- or Kshs. 18,000 per month for doing daily sales and transportation of gas.
12. The Claimant avers that he was not paid salary in the two months that he spent in hospital. He further avers that he never took leave and NSSF deductions were not made.
13. On cross-exam, the Claimant told Court that the Respondent paid him in cash and had no written contract.
14. CW2, Dr. Moses Njuki Ngibuini told Court that he treated the Claimant and prepared a medical report which describes the nature of his injuries. It is his case that the Claimant sustained first degree burns on his right hand. He confirmed that the Claimant left hospital on 20th January, 2014.
15. CW2 further confirmed that he agreed with the Respondent on how the hospital bill was going to be paid. He told Court that the Respondent is the one who took the Claimant and one other person to his clinic and that he told him that they were his employees.
16. The Claimant prays that his claim be allowed.

The Respondent's Case

17. The Respondent states that the Claimant deserted duty without any reason or notice only to come back later demanding for payment of his duties. He avers that the Claimant having deserted duty, he cannot now come and claim compensation based on his own transgressions.
18. The Respondent's further case is that he ran a gas business and since his customers were located all around Nairobi County, he settled on a car truck for far off deliveries and carts for nearby deliveries of the gas supplies.



19. It is his case that over and above the carts that he personally owned which were not enough due to the numerous orders that he had, he outsourced the services of other cart owners to assist him with the deliveries, and that one of the cart owners that he used was the Claimant herein.
20. The Respondent avers that for their services, he always made sure that he paid each cart owner beforehand since he never used their services daily, but only when the need arose.
21. He states that for the running of his business, he never had any employee since his wife and himself could take the orders, organize the required number of cylinders that he was supposed to deliver then either use his carts or, if need be, outsource those the service.
22. The Respondent further states that it came as a shock to him when, in the pleadings herein, he saw that the Claimant had stated that he was his employee. He avers that contrary to his allegation and as he has stated herein above, he never had any employee as the business was solely run by his wife and himself.
23. The Respondent states that sometime in 2013, he received a big order from one of his customers and had to outsource delivery services from the Claimant and one other cart owner nick named ' Rasta'. That the three of them loaded gas cylinders on the carts for delivery purposes and that as always, he ensured that he paid the two cart owners for their services.
24. The Respondent further states that while in the course of loading, his business premises was struck by lightning since it was raining and that three of them were struck and that the other cart owner (Rasta) and himself sustained minor injuries while the Claimant herein, sustained severe injuries. He states further that he ensured that the three of them received medical attention and he paid all the hospital bills for the three of them.
25. The Respondent states that he recalls that a police officer came to assess the situation on that day and ensured that they had gone to receive medical attention.
26. It is his position that he was therefore, in utter disbelief when he saw that the Claimant in his pleadings stated that there was a gas explosion which caused his injuries and states that that position is not true.
27. The Respondent states that he could not therefore, have terminated the Claimant's employment since he was not and has never been his employee. He avers that all the Claimant's allegations in his Memorandum of claim are also false and calls upon the Claimant to produce evidence before this Court to specifically prove his claim.
28. The Respondent states that he paid the Claimant all that was due to him, and that any other claim of compensation cannot be sustained.
29. The Respondent prays that in the interest of justice and fairness, the Claimant's claim be dismissed in its entirety with costs.

Analysis and Determination

30. I have considered the pleadings, the witnesses' testimonies and the Parties' written submissions. The issues that fall for determination are:-
 - i. Whether the Claimant was an employee of the Respondent
 - ii. Whether the Claimant was unfairly terminated.
 - iii. Whether the Claimant is entitled to the reliefs sought



Whether the Claimant was an employee of the Respondent

31. The Claimant's position is that he was an employee of the Respondent and that he was away from work between December, 2013 and May, 2014, owing to injuries sustained in a gas explosion while at work. He avers that the Respondent was aware of his injuries having taken him to hospital and even paid his medical bills. It is his assertion that when he finally recovered and resumed duty in May, 2014, the Respondent turned him away, and he then considered himself terminated and unfairly so.
32. The Respondent on his part stated that he never had any employees in the running of his gas business, and that he ran the same solely with his wife. It is his assertion that the Claimant operated a cart business and who would contract him when his own carts were fully in use, and that he paid the Claimant beforehand for any deliveries that he made on his behalf.
33. The Respondent further stated in his pleadings and on a no prejudice basis, that though the Claimant was his employee, he deserted duty, only to resurface and claim payment.
34. The Claimant's witness, Dr. Moses Njuki Ngibuini (CW2) told this Court that the Claimant was taken to hospital by the Respondent who informed him that he was his employee.
35. The Respondent seem in my view to have been saying that the Claimant was an independent contractor and not an employee. The Court in *Anthony Njuguna v Afri-Cina International Co. Limited & Another* [2022] KLR, relying in the case of *Ready-Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance, 1968 2 QB* made a distinction between a contract of service and contract for service as follows;

“A contract of service exists if these three conditions are fulfilled.

- i. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- ii. He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
- (iii) The other provisions of the contract are consistent with its being a contract of service.”

36. The Claimant contends that he was in the service of the Respondent at a daily payment of Kshs.600 or Kshs.18,000 per month from January, 2010 to May, 2014. This arrangement initially seem to have been a casual employment, except that the Claimant's claim that he served the Respondent from January, 2010 to May, 2014, no longer fits within the legal definition of casual labour. The *Employment Act* defines a casual employee to mean:-

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”

37. In the case of *Obonyo v Britam Life Assurance Co (K) Ltd* [2023] eKLR, the Court citing an appeal filed in Hong Kong stated thus:-

“The court indicated that to establish whether a person was an employee, it was necessary to consider the extent of the respondent's control over how the claimant performed his work; whether the claimant had a fixed salary or whether it fluctuated; whether the claimant was an



integral part of the organisation or business; whether the respondent had the obligation to provide the claimant with work or he had to look for own business and clients; whether the respondent had an obligation to provide the claimant with an office or equipment; payment of tax and the traditional structure of the trade,”

38. None of the parties herein produced documentary evidence to prove their side of the case. It was simply the Claimant’s word against the Respondent’s. The Respondent in my view did not sufficiently controvert the Claimant’s evidence that he was his employee. He did not deny paying him salary and had in fact admitted in his response to the claim that the Claimant deserted duty.
39. The Claimant’s witness CW2 also confirmed to Court that the Respondent had indicated to him that the Claimant was his employee.
40. In the case of *Mbuthia Macharia v Annah Mutua Ndwiga & Another* [2017] eKLR, the Court of Appeal observed:-

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”
41. In light of the foregoing, the Court concludes that the Claimant has on a balance of probability proved that he was an employee of the Respondent.

Whether the Claimant was unfairly terminated

42. The Claimant’s position is that he was unfairly terminated from the service of the Respondent. It is his position that when he resumed duty after nursing his injuries, the Respondent terminated his services. Again, just like there was no written employment letter, there was similarly no written termination letter.
43. The Respondent on one side states that the Claimant deserted duty while on the other, he asserts that he was never at all an employee.
44. It is not disputed that the Respondent was aware of the Claimant’s injuries having personally taken him to hospital and even paid his medical bills. For the Respondent to simply claim that the Claimant deserted duty without showing that he made a follow up as to prove that he had recovered from his injuries earlier than May, 2014, is untenable.
45. Further, it is now settled that before an employer can claim that an employee has deserted duty, she/ he must prove that he made effort to reach out to the employee. In *William Gituma v RAA Limited* [2020] eKLR it was held that it is not enough for an employer to say an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts.
46. In the instant case, the Respondent did not take initiative to contact the Claimant even when he was aware of his situation. Further, the Respondent did not issue the Claimant with a show cause letter on account of the alleged desertion in compliance with Sections 41 of the *Employment Act, 2007*.
47. I therefore, find the Claimant’s termination unlawful and unfair.



Whether the Claimant deserves the remedies sought

48. The Claimant seeks payment of one month salary in lieu of notice, salary for December, 2013 to May, 2014, leave days for 4 years and 5 months, Service pay and 12 months' salary as compensation for the unfair termination.
49. The Claimant's position is that on termination of his employment the Respondent did not pay him his terminal dues. The Respondent did not at all rebut this claim other than arguing that the Claimant deserted or was not an employee, and did thus not deserve the payments.
50. The Claimant was not given notice nor paid in lieu of the notice. The claim for notice thus succeeds.
51. The Respondent did not contest the claim for leave and being the legal custodian of employee records, the Court is left no option but to allow the claim.
52. On the claim for compensation, the Court has found the Claimant's termination unfair which then entitles him to an award of compensation in accordance with Sections 49 and 50 of the Employment Act.
53. Much as the Respondent was under legal obligation to follow up on the whereabouts of the Claimant, the Claimant did not as the holder of the job update his employer on the progress of his recovery, leading the Respondent to assume desertion.
54. The Claimant in my view did contribute to his own termination and for this reason, I deem an award of three months salary sufficient compensation for the unfair termination.
55. In whole, I grant the following reliefs:-
 - i. That the Claimant's termination is unfair
 - ii. One month's salary in lieu of notice at Kshs. 18,000/-
 - iii. Three months salary as compensation for the unfair termination at Kshs. 54,000/-
 - iv. Payment on account of accrued leave for the year 2010 – 2014 at Kshs. 79,500/-
 - v. The Respondent shall bear costs of the suit.
56. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

C. N. BAARI

JUDGE

Appearance:

Ms. Kamau h/b for Mr. Kariuki Njiru for the Claimant

Mr. Musa h/b for Mr. Kidi for the Respondent

Ms. Esther S- C/A

