



**Musau v Shiv Dhruv Manufacturers Limited (Cause E519 of 2024)
[2025] KEELRC 2182 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2182 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E519 OF 2024**

**L NDOLO, J
JULY 24, 2025**

BETWEEN

DANIEL NZOMO MUSAU CLAIMANT

AND

SHIV DHRUV MANUFACTURERS LIMITED RESPONDENT

JUDGMENT

1. By his claim dated 9th July 2024, the Claimant seeks the following remedies:
 - a. A declaration that his dismissal was wrongful and unfair;
 - b. An order of reinstatement to his previous position;
 - c. Compensation equivalent to twelve months' salary;
 - d. Payment of unpaid salary balance in the sum of Kshs. 50,000;
 - e. Payment of 74 accrued leave days;
 - f. Severance pay totalling Kshs. 85,753.45
 - g. Payment of outstanding NSSF for a period of 8 months;
 - h. Payment of outstanding NHIF for the duration of employment;
 - i. Compensation for negligence resulting from hazardous working conditions;
 - j. General damages for pain, suffering and inconvenience by the Respondent;
 - k. Costs of the suit.
2. The Respondent denies the claim by a Response dated 30th September 2024.



3. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called two witnesses, Enos Oruko, the Production Supervisor; and Mbatha Kyalo, the General Manager. The parties also filed written submissions.

The Claimant's Case

4. The Claimant pleads that he commenced his employment with the Respondent on 1st October 2020 when he was engaged as an Electrician, initially on causal basis, which was converted to term contract, pursuant to Section 37 of the *Employment Act*.
5. According to the Claimant, he worked every day from 8.00 am to 5.00 pm, including weekends and public holidays, without overtime pay or additional compensation. He adds that he was not allowed to go on leave.
6. A medical report issued on 28th August 2023, recommended that the Claimant should work away from heat. The Claimant however accuses the Respondent of continuing to subject him to hazardous working conditions.
7. The Claimant was summarily dismissed on 6th March 2024. He terms the dismissal as wrongful and unfair.

The Respondent's Case

8. In its Response dated 30th September 2024, the Respondent denies the Claimant's averment that he commenced employment on 1st October 2020 or that his employment was converted from casual to term contract.
9. The Respondent further denies that the Claimant worked every day from 8.00 am to 5.00 pm, without overtime compensation.
10. The Respondent also denies that a medical report was issued on 28th August 2020, recommending that the Claimant should work away from heat, and that the Respondent continued to subject the Claimant to hazardous working conditions.
11. Additionally, the Respondent denies the averment that the Claimant was denied annual leave.
12. Finally, the Respondent denies that the Claimant was summarily dismissed on 6th March 2024.

Findings and Determination

13. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has proved a case of wrongful dismissal;
 - b. Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

14. In his claim for wrongful dismissal, the Claimant accuses the Respondent of ignoring a medical report dated 28th August 2023, which had recommended his redeployment away from heat. While admitting having received the medical report, the Respondent's witnesses were ambivalent regarding the action taken by the Respondent in that regard.
15. The Respondent's Production Supervisor, Evans Oruko testified that the Claimant was transferred from the Crusher Machine to Screen Printing. He was however hazy on the effective date of the



transfer. Moreover, there was no document evidencing any transfer as a response to the medical report dated 28th August 2023.

16. On his part, the Respondent's General Manager took the position that there was no heat at the Crusher Machine where the Claimant was assigned as at August 2023, when the medical report was received.
17. The Respondent's witnesses stated that the Claimant was summarily dismissed because he deserted duty. Desertion of duty is itself a serious offence that may lead to summary dismissal. The law is however clear that an employer alleging that an employee has deserted duty must demonstrate efforts made towards reaching out to the employee.
18. This position was affirmed in *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR where it was held that an employer asserting that an employee has deserted duty must demonstrate efforts made to establish the whereabouts of the employee. This Court reached a similar verdict in *Dickson Matingi v Db Schenker Limited* [2016] eKLR.
19. In the South African case of *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) the following distinction between desertion and unauthorised absence was made:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”
20. In its decision in *Felistas Acheha Ikatwa v Charles Peter Otieno* [2018] KEELRC 2491 (KLR) this Court stated 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.”
21. The Respondent did not adduce any evidence to show efforts made towards reaching out to the Claimant and the averment of desertion was therefore not proved.
22. Conversely, the Respondent's witnesses conceded that the Claimant was summarily dismissed, without an opportunity to defend himself, as required under Section 41 of the *Employment Act*, which provides as follows:
 1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
23. Flowing from the foregoing, I am satisfied that the Claimant has proved a case of wrongful dismissal against the Respondent.



Remedies

24. The Claimant asks for reinstatement as a premier remedy. However, in light of the time lapse post separation, reinstatement would not be an appropriate remedy. Instead, I award the Claimant six (6) months' salary in compensation.
25. In making this award, I have considered the Claimant's length of service and the finding that he did not contribute to the dismissal. I have also taken into account the Respondent's failure to avail the Claimant an opportunity to defend himself at the shop floor.
26. I further award the Claimant one (1) month's salary in lieu of notice.
27. In the absence of leave records showing that the Claimant had expended his leave days, the claim for leave pay succeeds and is allowed.
28. The claims for unpaid salary balance, severance pay, general damages and outstanding statutory dues were not proved and are disallowed.
29. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 6 months' salary in compensation.....Kshs. 53,610
 - b. 1 months' salary in lieu of notice.....8,935
 - c. Leave pay for 74 days (8,935/30*74).....22,040Total.....84,585
30. This amount will attract interest at court rates from the date of judgment until payment in full.
31. The Claimant will have the costs of the case.
32. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JULY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Akanga for the Claimant

Mburu for the Respondent

