



Moriasi & 6 others v Pozzolana Stones Limited (Employment and Labour Relations Cause 961 of 2016) [2024] KEELRC 360 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 360 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 961 OF 2016**

**AN MWAURE, J
FEBRUARY 22, 2024**

BETWEEN

**DANIEL KIBASO MORIASI 1ST CLAIMANT
JACKSON OMONDI OKOTH 2ND CLAIMANT
SIMON LOKITARI LOKWANYA 3RD CLAIMANT
VINCENT GESORE 4TH CLAIMANT
JOSHUA MULI MUTUA 5TH CLAIMANT
WYCLIFFE ISIGI KIBAGA 6TH CLAIMANT
WILLINGTON MALOBA 7TH CLAIMANT**

AND

POZZOLANA STONES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimants filed an Amended Statement of Claim dated 19th February 2020.

Claimants' Case

2. The Claimants aver that at all material times to this suit, they were the Respondent's employees.
3. The Claimants avers that on 5th June 2013, their union and the Respondent executed a Collective Bargain Agreement (CBA) which was registered on 29th January 2014 reviewing the terms of the Claimants' employment.



4. The Claimants aver that the Respondent refused to honour the terms of the CBA and refused to review the terms of employment as agreed but kept making minimal adjustments to the pay in disregard of the CBA.
5. The Claimants aver that sometimes in December 2014 and later on 5th January 2015, the Respondent demanded that they sign clearance certificates acknowledging the Respondents did not owe them any dues or in the alternative cease to be its employees.
6. The Claimants avers that they refused to sign the clearance certificate thus effectively dismissed from employment. They reported the matter to their union, Kenya Building, Construction, Timber and Furniture Employees Union which took it up with the Athi River District Labour Office and an agreement was reached that the Claimants be reinstated and they should not sign the clearance certificates.
7. The Claimants aver that they reported to work in February 2015, the Respondent acting in bad faith drew new contracts of employment with different terms of employment from the earlier contracts of employment to be signed by them before resuming work which the Claimants refused to sign due to its erroneous terms.
8. The Claimants aver that at the time of termination, the Respondent owed them dues as they were underpaid in 2013 and 2014 in breach of the CBA as laid down in their claim.

Respondent's Case

9. In opposition to the Claim, the Respondent filed its amended response and counterclaim dated 27th April 2022.
10. The Respondent avers that the Claimants were paid all their wages and statutory dues as provided by the law.
11. The Respondent avers that the Claimants are estopped from raising the claim of underpayment as they never raised the issue of underpayment when lodging the complaint with the Ministry of Labour, Social Security and Services and the union and from 2013, the Claimants continued receiving the salaries and did not raise any complaint.
12. The Respondent avers that the Claimants claim for underpayment is statute barred.
13. The Respondent avers that the issue of signing clearance certificates cannot be raised at this stage as it was dealt with at union level and agreed it be suspended which was done. It further denied that the clearance form provided that the Claimants sign the same or cease to be its employees.
14. The Respondent avers that having received their salaries and dues, the Claimants absconded duty and failed to resume work when others resumed.
15. The Respondent avers that the Claimants were availed all evidence against them and were given adequate and reasonable opportunity to answer to the same.
16. The Respondent avers that there was nothing onerous with the contract of employment the Claimants were required to sign; the Claimants collected the contracts and never returned the same or resumed work.
17. The Respondent avers that the Claimants never indicated to the Respondent that they had issues with any clause of the contract which could have been resolved at union level.



18. In its counter claim, the Respondent avers that the Claimants left employment without giving 2 months' notice or paying the salary in lieu of notice and therefore claims the same.
19. The Respondent avers that the Claimant unlawful actions of absconding duty and leaving employment without giving required notice caused it huge financial losses to the tune of Kshs 1,000,000 and therefore counterclaims for the losses and damages incurred.

Evidence in Court

Claimants

20. Wellington Maloba, one of the Claimants, appeared as the 1st witness (CW1) testified and adopted his witness statement and list of documents dated 23.05.2016 as his evidence in chief and exhibits number 1-8.
21. CW1 testified that the Respondent was his employer and in December 2014, the Respondent gave them clearance certificate that they were paid all their dues. There was a CBA then and the Respondent was paying union dues. The Respondent asked that they sign the certificate or they would be terminated.
22. CW1 testified that the Claimants refused to sign the document and were terminated on 05.01.2015 and were not allowed to enter the premises.
23. CW1 testified that the Claimants reported the matter to the union and they were to go back to work but they were told to sign a new contract, they refused and were terminated orally.
24. During cross-examination, CW1 testified that he has authority to give evidence on behalf of the other Claimants.
25. CW1 testified that the Claimants were employees of the Respondent and are members of the Union but there are no papers in court to prove this
26. CW1 testified that page 12 of the CBA states that the CBA was valid for 24 months effective to December 2014 hence in 2015, there was no CBA.
27. CW1 testified that in 2 years of the CBA they were not paid, they were permanent employees but have no appointment letters and they were not described as permanent employees. Further, there are no payslips in respect to the Claimants.
28. CW1 testified that the Claimants reported the matter to the Ministry of Labour and they entered into an agreement with the Respondent dated 16th February 2015. However, it did not state they refused to sign the clearance certificate of 2014.
29. CW1 testified that the labour office advised the Claimants to go back to the Union and neither the labour officer nor the Union gave them a letter.
30. CW1 testified that the Claimants did not abscond work but were chased away by Tom Kidewo, the manager.

Respondent

31. The Respondent's witness (RW1) Tom Kidewo, testified that he is an employee of the Respondent and is familiar with the case.



32. RW1 relied on his witness statements dated 3rd October 2022 and 13th July 2016 as his evidence in chief and list of documents dated 13th July 2016 as his exhibits no. 1 and supplementary list of documents pages 1-51 as his exhibit no 2.
33. During cross examination, RW1 testified that the Claimants were general workers but there are no documents to prove the same.
34. RW1 testified that the Respondent's had an agreement with the union and the employees did not come under any category of their CBA.
35. RW1 testified that there was an agreement dated 16th February 2015 which agreed to reinstate the Claimants to their positions without victimization and he signed the document.
36. RW1 testified that there is a certificate of clearance which was the main issue but the Claimants refused to sign it. It was not the document dated 16th February 2015 which the parties agreed to shelve.
37. RW1 testified that the Claimants were paid all their dues, leave days, service pay and salary.
38. RW1 testified that after the agreement with the union, the Claimants never signed the certificate and they did not come back to work.
39. RW1 testified that the Respondents never issued warning letters to the Claimant as they were not available. Further, the Respondent never sent them NTSC and did not invite them for disciplinary hearing
40. RW1 testified there were differences in payments depending on the period served but there is no evidence in this court.
41. During re-examination, RW1 testified that CBA was from 1.1.2013 and remained in force for 24 months, it was effective until the end of January 2015. The Respondent issued its employees contract letters in 2015 when the CBA ended.
42. RW1 testified that the Claimants were not working for the Respondent when the union reported a trade dispute- wrongful dismissal to the Ministry of Labour vide letters dated 16.03.2015 and 18.02.2015.
43. RW1 testified that there was an exception of the 90-day suspension period being whether the matter was undergoing investigation. There was no court order stopping the internal investigation.
44. The Respondent produced its 2nd witness, Kennedy Osodo (RW2) who testified that he works as a general worker for the Respondent. He produced his witness statement dated 03.10.2022 as his evidence in chief.
45. During cross examination, RW2 testified that he does not possess any document to show he worked for the Respondent.
46. RW2 testified that the employees used to sign clearance certificate at the end of every year, however, the clearance certificate is not in court.
47. RW2 testified that that they signed a contract in 2015, but before there was a union which came in 2013, employees used to get a contract every year and they used to sign it in December.
48. RW2 testified that they used to be paid per work which was paid monthly.



Claimants' Submissions

49. The Claimants submitted that they were underpaid in 2013 and 2014 as the Respondent failed to comply with the CBA. The CBA provided for house allowance at Kshs 4,000 and basic pay applicable under paragraph 9 and 31. The Claimants were to be paid as based on their job categories.
50. The Claimants submitted that the Respondent's contention that they were general workers and did not fall in any category under the CBA is absurd; the Respondent cannot admit to have signed the CBA and at the same time allege that it did not involve any of its employees or the Claimants.
51. The Claimants submitted that the Respondent's claim that the Claimants were general workers and did not hold position they claim to have held is not supported in evidence. Further, why would the union intervene on their behalf and the Respondent participate in such a process if they were never part of the CBA signed on 5th June 2013.
52. The Claimant submitted that they were terminated from employment by the Respondent because they refused to sign the clearance certificates and a new contract which had different terms from the terms they were working under. This effectively stopped them from claiming unpaid dues from the Respondent.
53. The Claimant submitted that the evidence on record confirms that the Claimants were terminated from employment. The agreement dated 16th February 2023 in which it was agreed that all the named employees be reinstated to their former positions and the document they were to sign be shelved.
54. The Claimant submitted that the aforesaid agreement and the fact that the Respondent paid salaries to the Claimants is proof they were terminated.
55. The Claimant submitted that an employee can only be terminated by notice or payment in lieu thereof as such the Claimants could only be terminated by at least one months' notice of termination.
56. The Claimant submitted that they were unfairly and unlawfully terminated from employment and are entitled to the reliefs sought in the amended statement of claim.

Respondent's Submissions

57. The Respondent submitted that it is not in dispute that the Respondent entered into a CBA with Kenya Building, Construction, Timber and Furniture Employees Union. The CBA came to effect on 01.01.2013 and remained in force for 24 months, expiring on 31.12.2014.
58. The Respondent submitted that none of the Claimants has stated that they were members of the union and no evidence was produced to prove that the Claimants were members of the union.
59. The Respondent submitted that the Claimants did not call any witness from the union to prove that they were its members, therefore, the court has no way to ascertain the Claimants are members of the union. The Respondent submits that it is trite law that he who alleges must prove as in the case of *Mohamed Guyo Boru v Richard Mwilaria Aritho* [2022] eKLR.
60. The Respondent submitted that the entire CBA does not contain the names of the Claimants, page 14 of the CBA has a table entitled 'minimum basic salary exclusive of housing allowance'; the names of the Claimants are not listed therein.
61. The Respondent submitted that despite the Claimants alleging to possess certain qualifications, they did not provide any proof to the court. The Claimants did not produce contracts of employment to show the positions they held hence they cannot allege they were hired as skilled labourers. It was



- incumbent for the Claimants to prove they possessed the alleged skills and that they had been hired for the same.
62. The Respondent submitted that the 1st Claimant alleged he was an electrician and the 2nd Claimant a panel beater but they did not show any certificate in training as a mechanic. Further, the Respondent testified that it was outsourcing its motor vehicle repairs from an external garage.
 63. The Respondent submitted that the 3rd Claimant alleged he worked as a night watchman but RW1 testified that he was not a night watchman but a general worker who would be assigned different duties when they arose.
 64. The Respondent submitted that the 4th and 7th Claimants alleged they were hired as machine operators; however, they did not produce any document to show that they were trained to operate any machine. RW1 testified that there were 3 permanent employees who operate the wheel loader and the crushing machine.
 65. The Respondent submitted that the 5th and 6th Claimants allege to work as tyre repairer and unskilled mechanic, however, this was disputed by the Respondent. The Respondent states that these services were outsourced from another garage. Further, it is unlikely that the Respondent would permanently employ a tyre repairer when its business is of selling stones.
 66. The Respondent submitted that RW1 was categorical that none of the Claimants was qualified into any of the job categories. The Claimant failed to adduce evidence to the contrary, therefore, the Claimants have failed to prove underpayments under the CBA as the salary scales did not apply to them.
 67. The Respondent submitted that the Claimants did not sign the CBA and there is no evidence from the union that the CBA covered them. Although the union wrote to the Respondent urging it to comply with the CBA, there is no evidence how the CBA applied to the Claimants.
 68. The Respondent submitted that there is no evidence that the union complained about underpayment.
 69. The Respondent submitted that the Claimants have not presented any document or evidence to show that their employment was terminated in December 2014 as alleged. The Respondent introduced new contracts of service to guide the employment relations upon expiry of the CBA; the Claimants refused to sign a certificate to confirm receipt of the December 2014 salary which was routine at the close of the year, they were not terminated.
 70. The Respondent submitted that the alleged termination in 2014 was dealt with by the labour officer and an agreement was arrived at on 16.02.2015 whereby the document was shelved. Therefore, the issue was settled by agreement and cannot be revived in these proceedings.
 71. The Respondent submitted that parties agreed that the Claimants should be reinstated to their former positions. The Claimants admit they refused to sign the clearance certificate and according to them they were effectively dismissed, this was wrongly interpreted as failure to sign did not imply that they had been dismissed.
 72. The Respondent submitted that there is no evidence of oral or written termination and none of the Claimants alleged to have been chased away by the Respondent, it was an insinuation.
 73. The Respondent submitted that RW1 testified that after the settlement, the Claimants refused to resume their duties. The other employees- signed the new contracts of engagement in 2015 without resistance and later on in 2016 and 2017. As such, the contracts of service were not meant to victimize anyone but to create terms of service when the CBA had expired.



74. The Respondent submitted that there was no termination of employment but the Claimants run away from work or absconded duty.
75. The Respondent submitted that the Claimants have failed to prove on a balance of probability that they were underpaid under the CBA or that their employment was illegally or unfairly terminated. As such, the relief of unpaid dues cannot be sustained. Similarly, there cannot be compensation for unlawful or unfair termination there is no remedy known as general damages for unlawful/ unfair termination of employment under section 49 of the *Employment Act*.
76. The Respondent submitted that under sections 35 (I) (c) & 36 of the *Employment Act*, the Claimants should have given the Respondent one month notice or paid one-month salary in lieu of notice. The Claimants failed to do so, therefore, they should pay for the same. Similarly, the Respondent suffered loss of income when the Claimants absconded duty, hence, the counterclaim should succeed.

Analysis and Determination

77. The issues raised for this court's determination are:
 - a. Whether the Claimants were unlawfully/unfairly terminated from their employment.
 - b. Whether the Claimants were members of the union
 - c. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimants were unlawfully/ unfairly terminated from their employment.

78. The Claimants contend that they were terminated from employment by the Respondent because they refused to sign the clearance certificates and further refusing to sign a new contract which had different terms from which they were working under before.
79. To prove the termination, the Claimants relied on the agreement between the union and the Respondent which led to the consensus that the employees named therein be reinstated to their former positions and the documents that they were to sign be shelved.
80. Contrast, the Respondent submitted that the Claimants' employment was not terminated but they absconded duties upon refusal to sign the aforementioned documents.
81. It is trite law that for a termination of employment to be deemed fair, the employer must prove that it had a valid and fair reason to do so and the termination must have been conducted in accordance with fair procedure. This is well laid down under Section 45 of the *Employment Act* which states:
 - “(1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove: -
 - (a) That the reason for the termination is valid;
 - (b) That the reason for the termination is a fair reason:
 - Related to the employees conduct, capacity or compatibility; or
 - Based on the operational requirements of the employer; and



-That the employment was terminated in accordance with fair procedure.”

82. The Respondent deny that they terminated the Claimants employment and that the Claimants absconded duty as they never resumed work upon refusal to sign the new contract and clearance certificate.

83. Section 47(5) of the Employment Act stipulates that: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

84. In Paul Mwakio v Reliable Freight Services Ltd [2022] eKLR the Court held:

“Under Section 44(4) (a) of the Employment Act 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Respondent did not demonstrate that it commenced any disciplinary action against the Claimant under Section 41 of the Employment Act after he allegedly failed to report on duty. No attendance registers were produced to show that, indeed, the Claimant absconded duty or absented himself from work at any given time.

85. It was held in the case of Richard Kiplimo Koech –vs- Yuko Supermarket Ltd [2015] eKLR that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the Employment Act obtain. The Court stated as follows:-

“Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to Section 41 of the Employment Act, 2007, a hearing is necessary.

And in my view, it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or efforts to reach the employee and seek any explanation to excuse itself from the application of Section 41 of the Employment Act, 2007. A prudent employer such as the Respondent will invariably keep contact details of its employees.”

The respondent’s defence is that the claimants refused to sign the contract issued to them after the agreement with the union and the Ministry of Labour as per agreement dated 16th February 2016 and thereafter absconded from duty.

86. The contract given to one of the claimants Daniel Moriasi dated 17th February 2015 provides they were offered contracts only of 11 months. It is not clear what terms they had before. But the respondent avers that once they received this contract they absconded duty. The issue of abscondment has already been discussed and the court has established that the respondent did not follow the right procedure in terminating the claimants and if they deserted work they should have been taken through the mandated disciplinary process provided in section 41 of the employment act.

87. The respondent claim the claimants forged their contracts and they undertook to report the same to the police and to raise the issue during the hearing. There is no evidence the contracts were forged. In



any event, the respondent's defence is that the claimants absconded their employment and the court has dealt with that substantially.

88. In view of the foregoing, the Respondent has failed to prove that the Claimants absconded duty as no evidence or records were produced before court to ascertain this allegation. Therefore, the Claimants employment was terminated unlawfully and unfairly.

Whether The Claimants Were Members Of The Union

89. The Respondent has been adamant that the Claimants are not members of the union, however, it did not produce to court any evidence to the contrary such as list of its unionised employees to confirm the Claimants are not members of the union.
90. Further, it beats logic that the Union would represent the Claimants and correspond with the Respondent in respect to the dispute between it and the Claimants if they are not its members.
91. The Respondent did not produce any witness from the Union to clarify whether the Claimants were indeed not Members of the Union. As Section 107 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
92. Accordingly, this court finds that the Claimants Were Members of the Union and therefore the terms of the CBA were applicable to them
93. Having established the above, the Claimants are entitled to the underpayment for the years 2013 and 2014 as prayed in the claimant's claim in paragraph 10 which in total 7(seven) claimants are entitled to Kshs 1,428,223/-.
94. All the 7(seven) claimants are also awarded 3 months equivalent of their salary for unlawful termination as per their enhanced salary at the time of termination.

- 1 Daniel Kibaso Moriasi 18934x3=Kshs 56,805
- 2 Jackson Omondi Okoth Kshs 56,805
- 3 Simon Lokitari Lokwanya 16834x3=Kshs 50,502
- 4 Vincent Gesore 28326x3=Kshs 84,878
- 5 Joshua Muli Mutua Kshs 49,665
- 6 Wycliffe Isigi Kibaga 18935x3=Kshs 56,805
- 7 Willington Maloba 28326x3=Kshs 84,978

95. Costs are also awarded to the claimants and interest at court rates from the date of judgment till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

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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.

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ANNA NGIBUINI MWAURE
JUDGE

