



**Okinyi v Mogas Kenya Limited (Cause 2066 of 2017)
[2024] KEELRC 319 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 319 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2066 OF 2017
JK GAKERI, J
FEBRUARY 22, 2024**

BETWEEN

ALVIN OPIYO OKINYI CLAIMANT

AND

MOGAS KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 16th October, 2017 alleging unlawful and summary dismissal and non-payment of terminal dues and accrued dues.
2. The Claimant avers that he was employed by the Respondent on 2nd December, 2015 as a driver at Kshs.15,000/= per month and other allowances.
3. It is the Claimant's case that in March 2016, he was involved in an accident and was treated at Machakos Level 5 Hospital from 20th March, 2016 to 31st March, 2016 and later admitted at the Kikuyu P.C.E.A Hospital.
4. That he was later referred to rehabilitation and was discharged after surgery on 3rd January, 2017.
5. The Claimant further avers that after the accident, he resumed work on light duties but in August he started experiencing leg pains and could not work and was not paid for October, November and December 2016 and January 2017.
6. The Claimant prays for;
 - a. A declaration that termination of the Claimant's employment was unlawful.
 - b. Kshs.215,769.23 comprising;
 - i. One month's salary in lieu of notice.



- ii. Compensation for unfair termination.
 - iii. Service gratuity for 1 year.
 - iv. Annual leave.
- c. Cost of the claim and interest.

Respondent's case

7. It is the Respondent's case that after the Claimant recovered, he was put on light duties before he was retired on medical grounds after the Respondent received a doctor's report to the effect that the Claimant could not continue working owing to the disability.
8. That the Claimant was paid for the duration he was out of work.
9. The Respondent denies having terminated the Claimant's employment and prays for dismissal of the suit with costs.

Claimant's evidence

10. On cross-examination, the Claimant confirmed that he had advised the Respondent in writing to deduct excess bills from his WIBA dues.
11. Strangely, the Claimant admitted having consulted Worksafe Afia Clinic but did not agree with the doctor's report.
12. It was his testimony that he left the hospital for the last time in February 2017 but had no discharge document.
13. He admitted that he was invited for a meeting.
14. That one Lilian had sent him a message around March 2017 informing him not to report to work until advised otherwise.
15. He denied having absconded duty.
16. The Claimant admitted that the Respondent remitted National Health Insurance Fund deductions and paid all his medical bills and his salary until June 2016.

Respondent's evidence

17. The Managing Director of the Respondent, Mr. Fregustus Musyoka confirmed on cross-examination that after hospitalization, the Claimant resumed duty in June 2016 and worked on and off for about 6 months, disappeared and did not report back.
18. The witness could not confirm whether the Claimant was paid after June 2016 as he had no document and the KRA Tax Deduction Card for 2016 showed that the salary was paid in June 2016, a fact he admitted in court.
19. That Dr. Mwaura's letter dated 26th January, 2018 had a typing error as it was written in January 2017 consistent with the Claimant's evidence of having visited the clinic in March 2017 as the letter confirms.
20. The witness confirmed that the Human Resource called the Claimant to no avail but had no proof and his written statement made no reference to any call.



21. RWI denied that the Claimant was turned away by the Human Resource in February 2017 or that the Claimant's employment was terminated.
22. On re-examination, RWI testified that the Claimant was paid for the entire duration he worked.
23. That the Claimant was still engaged by the Respondent in January 2017 and he deserted duty.

Claimant's submissions

24. The Claimant isolated three issues for determination; whether the Claimant absconded work or his employment was terminated by the Respondent, whether termination of the Claimant's employment was unfair and entitlement to the reliefs sought.
25. Counsel submitted that when the Claimant reported back to work in February 2017, he was told that he would be notified when to report but the Respondent did not do so and he was still in employment in March 2017 as evidenced by Dr Mwaura's letter to the Respondent, which RWI admitted was truthful. Similarly, the Respondent did not demonstrate the efforts expended to ascertain the Claimant's whereabouts to resume duty.
26. Reliance was made on the sentiments of the court in *Sitima v Jokali Handling Service Ltd* (2023) eKLR as well as *Matano v City Bookshop Ltd* (2022) eKLR to urge that the employer is required to show the reasonable efforts it made to reach out to the employee.
27. Counsel submitted that the Respondent terminated the Claimants employment as he did not desert the work place.
28. As to whether termination of the Claimant's employment was unfair, although the doctor indicated that the Claimant lacked physical capacity to work, the Respondent was still obligated to adhere to the law on termination of employment and in particular, in cases of the employees incapacity, section 41 of the *Employment Act*, 2007 as emphasized in *Gichuru v Package Insurance Brokers Ltd* (2021) eKLR.
29. Counsel urged that termination of the Claimant's employment was unfair.
30. On entitlement to the reliefs sought, counsel urged that the Claimant was entitled to the reliefs sought and invited the court to enter judgement in the Claimant's favour.
31. By 25th January, 2024 when the court retired to prepare this judgment, the Respondent had not filed submissions.

Findings and determination

32. It is common ground that the Claimant was employed by the Respondent effective 2nd January, 2016 as a Driver and Office Assistant at a monthly salary of Kshs.15,000/=, lunch allowance as per company policy, transport allowance of Kshs.270/= per day and airtime of Kshs.1,000/= per month.
33. The contract of employment provided for a 6 month probationary period and confirmation after appraisal and after probation, the employment was terminable by one (1) month's notice or pay in lieu of notice.
34. It is also not in contest that sometime in March 2016, the Claimant was involved in an accident along the Nairobi- Mombasa road, near Sultan Hamud and generally remained on treatment working on an on and off basis until the parties separated in February or March 2017.
35. The issues that commend themselves for determination are;



- i. Whether the Claimant deserted duty of his employment was terminated by the Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.
36. As regards the first issue, the Claimant testified and submitted that his employment was terminated by the Respondent in February 2017 when he reported to the office after receiving a message from one Lilian and was told not to report to work until further notice and on re-examination. He denied having absconded his duties and in any case the Respondent had not tendered evidence of the alleged desertion.
37. The Respondent on the other hand contended that the Claimant left without notice and thus deserted the work place although RWI could not explain when the desertion took place. He denied that the Claimant was turned away by the Human Resource in February 2017.
38. According to *Black's Law Dictionary*, (10 Edition) 2010, desertion means;
“The wilful and unjustified abandonment of a person’s duties or obligations”.
39. In the often cited sentiments of the South African Court in *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court sought to distinguish absconding duties from unauthorised absence from duty in the following terms;
“... 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.”
40. In *Titus Delax Opiyi Were v Creative Consolidated Systems Ltd* (2020) eKLR, Linnet Ndolo J. stated that;
“Desertion is a serious administrative offence that places the deserting employee within the storm of summary dismissal.”
41. The law on the defence of desertion by the employer is well settled.
42. As held in legions of decisions such as *Sarafina Wanyonyi v Lessos Veterinary Suppliers Ltd* (2016) eKLR, *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* (2015) eKLR, *Dickson Matingi v Db Schenker Ltd* (2016) eKLR and *Felistas Acheba Ikatwa v Charles Peter Orieno* (2018) eKLR, desertion, analogous to any other defence must be proved by the employer by demonstrating the efforts made to contact the deserting employee to resume duty.
43. In the *Felistas Acheba Ikatwa's case* (*Supra*), the 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.”
44. The court is in agreement with these sentiments.
45. In the instant suit, although RWI testified that the Claimant absconded his duties and the Human Resource tried to reach out to him, he availed no evidence as to who made the attempts and when and what the Respondent did thereafter for purposes of closure of the relationship it had with the Claimant.



46. In sum, the Respondent failed to establish that the Claimant absconded his duties.
47. Even if the Claimant deserted his work place, he was still entitled to procedural fairness as by law required.
48. In *Judith Atieno Owuor v Sameer Agriculture and Livestock Ltd* (2020) eKLR, Onyango J. stated as follows;
- “Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this court it accorded the Claimant a fair hearing prior to her termination.”
49. Even though, Dr. Mwaura had notified the Respondent that the Claimant had a residual degree of permanent disability of 20% and would not be in a position to engage in commercial driving as a profession, and arguably the Respondent could discharge the Claimant on medical grounds, it still had to take him through the required process, including subjecting him to another examination by a doctor so as to compare the opinions of the medical professionals for decision making.
50. It requires no emphasis that for a termination of employment to pass muster, it must be proved that the employer had a substantive justification or valid and fair reason for the termination and conducted it in accordance with a fair procedure.
51. Substantive justification and procedural fairness are the cornerstones of a fair termination of employment under the provisions of the *Employment Act*, 2007.
52. (See *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR among others.)
53. In the instant case, the Respondent has not demonstrated that it complied with the provisions of the *Employment Act*, 2007.

Whether the Claimant is entitled to the reliefs sought;

(a) Declaration

54. Having found that the Respondent has failed to prove that termination of the Claimant’s employment was fair, a declaration to that effect is merited.

(b) (i) Salary in lieu of notice Kshs.15,000.00

55. The Claimant is entitled to one (1) month’s salary in lieu of notice by virtue of the provisions of section 36 of the *Employment Act*, 2007 and is awarded the sum of Kshs.15,000.00.

(ii) Service Gratuity for 1 year Kshs.8,653.38

56. As the Letter of Appointment signed by the Claimant on 2nd January, 2016 has no provision for service gratuity, the same is not awardable as it is not a statutory entitlement.
57. The reason for this is that service gratuity is neither service pay nor severance pay payable under the provisions of Section 35(5) and 40(1)(g) of the *Employment Act*, 2007 respectively.

The prayer is dismissed for want of proof.



(iii) 12 months compensation

58. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
59. In determining the quantum of compensation, the court has taken into consideration the following factors; The Claimant was an employee of the Respondent for about 1 year and 2 months, a fairly short time. The Claimant did not appeal the termination or express his wish to continue in the Respondent's employment. The Claimant did not contribute to the termination of employment. The Claimant was involved in an accident during probation and the Respondent paid his medical bills.
60. In the circumstance, the court is satisfied that the equivalent of 4 months' salary is fair, Kshs.60,000/=.

(iv) Annual leave Kshs.12,115.38

61. Neither the Claimant's written undated statement filed on 16th October, 2017 nor the one dated 18th May, 2022 make reference to outstanding leave days.
- The prayer is declined.
62. Strangely, although the Claimant testified that he was only paid up to June 2016, he did not sue for any outstanding salary or avail evidence of having demanded it.
63. More significantly, the Respondent's witness testified that the Claimant was paid for the entire duration he worked.
64. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the sum of Kshs.75,000/=.
65. Interest shall accrue from the date hereof till payment in full.
66. The Respondent shall pay the Claimant's costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2024

DR. JACOB GAKERI

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 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.

DR. JACOB GAKERI

JUDGE

