



**Kundu v China Jiangxi International Kenya Limited (Cause 767 of 2018)  
[2024] KEELRC 317 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 317 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 767 OF 2018  
MN NDUMA, J  
FEBRUARY 15, 2024**

**BETWEEN**

**JAMES BARASA KUNDU ..... CLAIMANT**

**AND**

**CHINA JIANGXI INTERNATIONAL KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 21<sup>st</sup> March 2018 against the respondent seeking declaration that the termination of his employment was unlawful and unfair and that the claimant be awarded general damages and payment of terminal benefits set out in the statement of claim, interest of the decretal amount and costs of the suit.
2. The claimant adopted a witness statement he recorded dated 20<sup>th</sup> February 2018 as his evidence in chief. The claimant (CW1), stated that he was employed by the respondent on 9<sup>th</sup> July 2016 as a Mason at a daily wage of Ksh. 571.00/-That he was not issued with a contract of employment.
3. That the claimant served diligently and with loyalty until the 3<sup>rd</sup> October 2017 when he was summarily dismissed without notice, notice to show cause or a disciplinary hearing. That the claimant had shortly delayed to respond to a call by his supervisor while at work and the supervisor became angry and ordered the claimant to leave the work place and never come back again.
4. That the supervisor refused to listen to the explanation by the claimant that he had suffered an injury hence the slow response to the call. The claimant has not obtained alternative work to date.
5. The claimant said he was not paid any terminal benefits upon dismissal. That he was not granted annual leave at all, was not paid in lieu of notice and was not compensated for the loss of employment. That the dismissal was unlawful and unfair and that he be awarded as prayed.



6. Under cross examination, the claimant reiterated his narrative that he was unceremoniously sent away from work by the supervisor without notice, hearing or any payment. That he was still unemployed. That he reported to the Labour department who wrote to the respondent but they did not heed the demand by labour to pay the claimant terminal benefits.
7. The claimant said that medical documents showed he was injured at the time. That his NSSF dues were paid after some time. That he had no letter of termination, he was simply chased away. Claimant denied that he had fought with a colleague the day he left work or that he had come to work late.
8. The claimant prays to be awarded as prayed
9. Rw1 Rickie Ogola testified for the respondent and adopted a witness statement dated 27<sup>th</sup> February 2019 as his evidence in chief. Rw1 said that he was a safety officer of the respondent at Konza project where the claimant worked as a casual. That on 3<sup>rd</sup> October 2017 he was at work as usual when he was informed that one employee had assaulted another employee, a Chinese foreman.
10. That Rw1 went to the scene of the incident and the foreman reported the assault to him. That before he could engage the claimant, he took off from the scene and has not come back to work since then. That the claimant was not summarily dismissed from work as alleged or at all.
11. Rw1 said the claimant worked on part time basis and was paid daily depending on the days worked. That the claimant was not entitled to annual leave as a casual. That the suit lack merit and it be dismissed as prayed by the respondent.
12. The parties filed written submissions which the court has carefully considered together with the evidence adduced by the claimant and Rw1. The issues for determination are: -
  - a. whether the claimant was summarily dismissed from work unlawfully or the claimant absconded work upon assaulting a foreman.
  - b. whether the claimant is entitled to the reliefs sought.
13. In terms of Section 107 and 108 of the Evidence Act Cap 80 laws of Kenya, read with section 47(5) of the Employment Act 2007, the claimant has the onus of first adducing sufficient and credible evidence to show that he was unceremoniously chased away from work by a named supervisor on the material day. The burden of rebuttal then shifts to the respondent to demonstrate that the claimant was not actually chased away from work but he absconded duty.
14. The court has noted that the claimant did not in the statement of claim, in the witness statement and in his oral testimony before court name the supervisor who chased him from work on the 3<sup>rd</sup> October 2017.
15. RW1 on the contrary gave a credible account of how he had received a report that the claimant had assaulted his Chinese foreman and that upon visiting the scene, the Chinese foreman confirmed that the claimant had assaulted him and the claimant at that point run out of the premises and did not return to work again.
16. Under cross examination, Rw1 stated that the assault was not reported to the police since the claimant did not return to work.  
  
RW1 suggested that the injury suffered by the claimant resulted from the assault the claimant inflicted on his supervisor and that the claimant had not reported the said injury prior. The court found this explanation more credible than the version told by the claimant.



17. The court upon a careful evaluation of the facts of the case has concluded that the claimant was not summarily dismissed from work but had absconded work upon assaulting his foreman. The claim for unlawful and unfair dismissal lacks merit and is dismissed.
18. Accordingly, the claim for award of damages and compensation for the alleged unlawful dismissal is dismissed.

#### **Terminal benefits**

19. Although the claimant was initially employed as a casual, he had served the respondent for a period of more than one year. Accordingly, the claimant is entitled to grant of at least 21 working days as annual leave. Rw1 conceded that the claimant was not granted annual leave as he was regarded as a casual. Accordingly, the court awards the claimant 30 days' salary in lieu of untaken leave days.
20. In the final analysis Judgment is entered in favour of the claimant against the respondent for the sum of Ksh. 17,130 with interest at court rates from date of filing suit till payment in full. Each party to bear their own costs of the suit.

**DATED AT NAIROBI THE 15TH DAY OF FEBRUARY 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

**Appearance:**

**Mr. Kagunda for claimant**

**Mr. Jomo for respondent**

**Mr. Ekale, court assistant**

