



**Aketch v Capital City Limited (Cause 1932 of 2017)
[2024] KEELRC 232 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 232 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1932 OF 2017
JK GAKERI, J
FEBRUARY 14, 2024**

BETWEEN

JOHN WESONGA AKETCH CLAIMANT

AND

CAPITAL CITY LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 28th September, 2017 alleging unfair termination of employment.
2. It is the Claimant's case he was employed by the Respondent as a caretaker in September 2009 and served diligently until 28th April, 2017 when the Respondent terminated his employment unjustifiably.
3. The Claimant prays for;
 - i. Compensation for wrongful termination.
 - ii. Compensation for loss of employment.
 - iii. A declaration that termination of employment was unfair.
 - iv. A declaration that the Claimant was underpaid.
 - v. General damages for breach of the Claimant's rights.
 - vi. Certificate of service.
 - vii. Compensation for underpayment.
 - viii. Leave days for the period of employment.
 - ix. Costs.



- x. Aggravated and punitive damages.
- xi. Any other relief the court may deem just.

Respondent's case

4. By its Response and Counter-claim filed on 8th November, 2017, the Respondent denies having employed the Claimant as a caretaker in 2009 or terminated his employment.
5. It is the Respondent's case that it was routinely subjected to inspection by the Ministry of Labour and Social Protection and issued with a Certificate of Compliance and the last was undertaken on 28th March, 2017 while the Claimant was still an employee.
6. The Respondent admits that the Claimant was entitled to leave days for 2014 to 2017.

Counter-claim

7. It is the Respondent's case that Claimant disobeyed lawful orders of transfer of duty station, absconded duty and offered services to a 3rd party, M/s Variaka Ltd while in the Respondent's employment.
8. The Respondent admits that the Claimant was a general worker.
9. That the Claimant failed to follow-up a complaint he had lodged with the Labour Office.
10. The Respondent prays for salary in lieu of notice Kshs.11,135/=, costs incurred in defending the complaint at Industrial Area and Mavoko and costs of the suit.
11. On cross-examination, the Claimant admitted that he was employed as a general worker as well as that he reported the complaint to the Labour Officer at the Industrial Area but was sent to Mavoko and the employer did not appear for the hearing.
12. That he had not proceeded on leave for 3 months and did not receive the letter from the Labour Officer on 28th June, 2017 and did not appeal the decision.
13. It is the Claimant's evidence that he did not terminate his employment in December 2013 and was not arrested by the police for selling bhang and the salary was paid by the Manager.
14. That on 28th March, 2017, he received Kshs.8,000/= and on 30th April, 2017 he received Kshs.10,000/=.
15. The witness denied having worked for Variaka Ltd.
16. That his salary changed from Kshs.10,000/= before 2017 but could not recall the month.
17. The witness admitted that National Health Insurance Fund and National Social Security Fund dues were paid.
18. The Claimant testified that he was not paid in April 2017 yet he admitted receiving Kshs.10,000/=.

Respondent's evidence

19. On 22nd October, 2022 when the Claimant's case was closed, the Respondent's case was adjourned to enable the Respondent's counsel file a witness statement and the documents listed on its lists of documents dated 2nd November, 2017 which were not attached.



20. Mention was scheduled before the Deputy Registrar on 15th November, 2022 for a hearing date and hearing was scheduled for 28th March, 2023 when counsel for the Respondent informed the court that he was recuperating from an operation and hearing was adjourned to 29th May, 2023 when Mr. Wade holding brief for Mr. Karanja sought an adjournment on the premise that Mr. Karanja was indisposed. Mr. Kimani for the Claimant opposed the application.
21. The court adjourned the hearing for the last time and scheduled a hearing on 21st September, 2023 when hearing was rescheduled by the Deputy Registrar to 11th November, 2023 when the Respondent's counsel was absent.
22. The court closed the Respondent's case and gave directions on the filing of submissions.
23. The Respondent's counsel neither filed the witness statement nor the documents as directed on 27th October, 2022 and did not file submissions.

Claimant's submissions

24. In his submissions, counsel for the Claimant attempted to fill the gaps in his case by setting out the respective amounts prayed for by the Claimant under the particular prayers such as leave, service pay, compensation and general damages among others.
25. It is unclear to the court as to how he arrived at the Claimant's salary of Kshs.21,213.00. Suffice to state that it is trite that submissions are neither pleadings nor evidence and have been characterised as a "marketing language".
26. Counsel submitted on whether termination of the Claimant's employment was unfair, whether the Claimant was a lawful employee of the Respondent and entitlement to terminal dues.
27. As regards employment, counsel submitted that the Claimant was an employee of the Respondent interviewed by Lugha Agha, an allegation that was not canvassed in evidence and he was not an employee of Vakaria Ltd.
28. As to whether the Claimant had committed any misconduct, counsel submitted that he had not and had discharged his duties in accordance with the terms of the contract.
29. On termination of employment, counsel urged that the Claimant had proved that the Respondent terminated his employment unfairly.
30. Counsel relied on the sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) on the requirements of a fair termination of employment.
31. Reliance was also made on the provisions of Section 45 of the *Employment Act*, 2007 and the decisions in *National Bank of Kenya V Samuel Nguru Mutonya* (2019) eKLR as well as *Kenfreight (EA) Ltd V Benson K. Nguti* (2016) eKLR to urge that termination of the Claimant's employment was without a valid reason and thus wrongful.
32. As regards pay in lieu of notice, counsel submitted that the Respondent terminated the Claimant's employment *vide* letter dated 5th June, 2017 without according him the requisite notice and did not compute his terminal dues and the Claimant was entitled to pay in lieu of notice and another 2 months in damages.
33. As regards terminal dues, counsel submitted that the Claimant was entitled to statutory dues as ordained by law.



34. Counsel urged the court to allow the Claimant's claim.

Respondent's submissions

35. The Respondent did not file submissions.

Findings and determination

36. The issues for determination are;

- i. Whether the Claimant was an employee of the Respondent.
- ii. Whether the Claimant deserted or his employment was unfairly terminated by the Respondent.
- iii. Whether the Claimant is entitled to the reliefs sought.

37. Although the Respondent raised no issue, it is elemental to dispose of the issues raised by the Claimant.

38. As to whether the Claimant was an employee of the Respondent, parties pleaded opposing and similar positions as well.

39. Although paragraphs 2 and 7 of the Respondent's Statement of Defence and Counter-claim deny that the Claimant was an employee of the Respondent, the last sentence of paragraph 7 is explicit that in March 2017, the Claimant was still an employee.

40. Secondly, paragraph 8 of the Defence states that the Claimant is entitled to leave days for the period April 2014 to March 2017.

41. Third, in paragraph 13 of the Counter-claim, the Respondent accuses the Claimant of disobeying lawful orders of transfer of duty station and absconding of duty and working for Variaka Ltd.

42. Fourth, paragraph 14 of the Counter-claim is a clear admission of the position of the Claimant as an employee of the Respondent.

43. Fifth, the Respondent admits in paragraph 16 that the Labour Office found that the Claimant was owed 63 leave days.

44. Finally, the foundation of the Respondent's Counter-claim is the Claimant's failure to give the requisite notice when he allegedly absconded duty, a direct admission that the Claimant was indeed its employee.

45. Even though the Respondent did not file a witness statement or avail a witness, the admissions in its response and Counter-claim are sufficient evidence that the Claimant was its employee.

46. It is trite that admission of facts on the pleadings whether express or implied are admissible. (See the sentiments of the Court of Appeal in *Herta Elizabeth Charlotte Nazari V Herta Elizabeth Charlotte Nazari* (1984) eKLR).

47. As to whether there was desertion or termination of employment, parties have taken opposing positions with the Respondent maintaining that the Claimant absconded duty.

48. The Claimant alleges unfair termination of employment.

49. On termination of employment, the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination to pass the fairness test, it must be demonstrated that the employer had a valid and fair reason for the termination and conducted it in accordance with fair procedure.



50. Put in the alternative, the employer must prove that the termination was substantively justifiable and procedurally fair as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission (Supra)* and by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (1917) eKLR.
51. In the Statement of Claim, the Claimant states that he was unlawfully dismissed from employment for no apparent reason on or about 28th April, 2017 with immediate effect and the Respondent acted in haste without exhausting the available dispute resolution mechanisms.
52. Puzzling, neither the written statement of the Claimant dated 18th August, 2017 nor the oral testimony make reference to a termination of employment on or about 28th April, 2017.
53. Indeed, the written statement recorded less than 4 months after the alleged dismissal is reticent on the alleged termination of employment.
54. Similarly, in his oral evidence adduced in court, the Claimant is silent on how, by whom and when the termination of employment took place, including what he did after the alleged termination.
55. The Claimant merely stated that he could not recall terminating his employment relationship with the Respondent.
56. Section 47(5) of the *Employment Act*, 2007 provides 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.
57. (See *Nicholus Korir Kipkemoi V Hatari Security Guards Ltd* (2013) eKLR).
58. Similarly, Section 107 of the *Evidence Act* provides;
 1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
59. Section 109 provides that;

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.
60. (See *Kirugi & another V Kabiya & 3 others* (1987) KLR 347).
61. Judicial authority is consistent the employee must adduce *prima facie* evidence of the alleged termination of employment and the employer bears the burden of justifying the termination of employment. In the instant suit, the Claimant tendered no *prima facie* evidence necessitating the employer's rebuttal.
62. As adverted to elsewhere in this judgement, the Claimant adduced no evidence to demonstrate the circumstances in which the alleged termination of employment by the Respondent took place.
63. In sum, it is the finding of the court that the Claimant has failed to prove that his employment was terminated by the Respondent whether unfairly or otherwise.



64. As to whether the Claimant deserted the work place, it is common ground that desertion is the wilful and unjustified abandonment of a person's duties or obligations. (See *Black's Law Dictionary (10th Edition)*).
65. It is a callously or treacherously abandon and is a serious administrative offence, if it is shown to have taken place and the sanction may be termination of employment.
66. It is a unilateral act of the employee but it does not per se terminate the employment contract. The decision is that of the employer. (See *James Okeyo V Maskant Flower Ltd* (2015) eKLR and *Dickson Nyasi Mubaso V Milano Electronics Ltd* (2021) eKLR).
67. In order to sustain the defence of desertion, the law requires the employee to demonstrate the reasonable steps taken to contact the employee to resume duty.
68. The employer must also issue a notice to show cause to the deserting employee informing the employee that termination of employment on the ground of desertion was being considered.
69. From the documents on record, it is evident that the Claimant reported the dispute to the Labour Officer on 2nd May, 2017 demanding salary for April 2017, notice accrued, leave and other legal entitlements.
70. In its response dated 9th May, 2017, the Respondent informed the Claimant, through the Labour Officer, Industrial Area that the matter had been reported to the Mavoko County Office under whose jurisdiction it fell.
71. The Respondent reported that efforts to reach out to the Claimant by phone had been unsuccessful.
72. The Mavoko Sub-County Office scheduled a meeting on 7th June, 2017.
73. There is no record as to what transpired at the meeting.
74. Another exhibit provided by the Claimant is a letter from Karanja Otunga & Associates dated 5th June, 2017 to the Claimant under the reference "Self-Termination of Services at Capital City Ltd."
75. The letter makes reference to a decision by the Respondent to transfer the Claimant to a new site towards the end of March 2017 and alleges that the Claimant refused to move to the new site and absconded duty after receipt of the salary for March 2017.
76. It also accuses the Claimant of offering services to Variaka Ltd, an allegation the Claimant denied on cross-examination.
77. The counsel demands one (1) month's notice from the Claimant.
78. Strangely, the Claimant did not respond to the letter to deny the allegations and state the facts as they were, if different.
79. Counsel threatened to sue the Claimant.
80. The Claimant filed the instant suit 3 months later.
81. The last exhibit on the Claimant's list is the National Social Security Fund (NSSF) statement dated 16th May, 2017.
82. The statement shows that the Claimant's deductions had been paid upto March 2017.



83. The Respondent's letter dated 5th June, 2017 by its counsel and the letter by Lucy Agha dated 9th May, 2017 are in the court's view sufficient evidence of the reasonable efforts made by the Respondent in its endeavour to have the Claimant resume duty and putting him on notice that he was no longer an employee of the Respondent.
84. Had the Claimant responded, he would have demonstrated that he had indeed not absconded duty, but did not bother.
85. The court is satisfied that based on the evidence on record, it is decipherable that the Claimant deserted the work place.

Reliefs

86. As regards the reliefs sought, the court proceeds as follows;

a. Declaration

87. Having found that the Claimant has failed to prove on a preponderance of probabilities that the Respondent terminated his employment unfairly, the declaration sought is unmerited and is declined.

b. Salary for April 2017

88. From the evidence on record, it is discernible that the Claimant did not render services in April 2017 and/or was paid as he admitted having received Kshs.10,000/= on 30th April, 2017 and had previously received Kshs.8,000/= on 28th March, 2017.

The prayer for salary for April 2017 is declined.

c. Service pay

89. The Claimant admitted that the Respondent paid NHIF and NSSF deductions and additionally provided a copy of his NSSF statement dated 16th May, 2017 for 1999 to 2017 which reveals that he was a member of the Fund No. 098178911.

90. Section 35(6)(d) of the *Employment Act*, 2007 disqualifies members of the NSSF from service pay.
The prayer is dismissed.

d. Gratuity

91. The Claimant adduced no evidence of entitlement to gratuity, which is typically a contractual undertaking of the employer or under the CBA and is paid gratuitously.

The prayer lacks merit and is declined.

e. Certificate of service

92. The Claimant is entitled to certificate of service by dint of Section 51 of the *Employment Act*, 2007.



f. Although the Claimant adduced no evidence as to how much his salary was, evidence on record show that it was Kshs.11,135/= as at the date of separation. The Claimant gave contradictory evidence as to when it was raised from Kshs.10,000/=.

93. Although the Claimant pleaded that he was employed as a caretaker on cross-examination, he admitted that he was employed as a general worker and adduced no evidence of having been employed as a caretaker.

94. Under the *Regulation of Wages (General) (Amendment) Order* 2013 effective 1st May, 2013, the monthly salary of a general worker at Mavoko was Kshs.9,780.95 + 15% house allowance of Kshs.1,467.14, Total Kshs.11,248.09.

95. Evidently, the Claimant was underpaid and a declaration to that effect is merited.

96. Accordingly, the Claimant is awarded underpayment for 3 years as follows;

97. Under the relevant *Regulation of Wages Order* 2015, the gross salary of a general worker at Mavoko was Kshs.9,780.95 + 15% house allowance Kshs.1,467.14 = 11,248.09 – 10,000/= 1,248.09 x 12 = 14,977.08.

98. Under the *Regulation of Wages Order* 2015, the monthly salary of a general worker was Kshs.10,954.70 + 15% house allowance Kshs.1,643.21 = 12,597.91 – 11,135 = 1,462.91 x 24 months = 35,109.84.

The Claimant is awarded Kshs.50,086.92/= for underpayment.

g. General damages for breach of Claimant's rights in paragraph 12

99. The matters listed under paragraph 12 of the claim relate to the alleged unfair termination of employment which the court found unproven.

The prayer is dismissed.

h. Pay in lieu of untaken leave days

100. The Claimant admitted that 63 days leave were owing and having accrued, the same are awarded.

i. Aggravated or exemplary damages

101. The Claimant adduced no evidence of entitlement to this prayer and it is dismissed.

Counter-claim

102. The Respondent prayed for one (1) month salary in lieu of notice in light of the Claimant's desertion and having found that the Claimant indeed absconded duty, the prayer is merited.

The Respondent is awarded the sum of Kshs.11,135/=.

103. In the end, both parties are entitled to the reliefs sought as herein below.

Claimant

- a. Declaration that the Claimant was underpaid by the Respondent.
- b. Kshs.50,086.92/= for underpayment.
- c. 63 leave days.



d. Certificate of service to be issued within 30 days.

Respondent

a. Kshs.11,135/=

104. In the circumstances, it is only fair that parties shall bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH 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

