



Chaworo v Benori Guard Services Limited (Employment and Labour Relations Cause 829 of 2017) [2024] KEELRC 278 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 278 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 829 OF 2017
AN MWAURE, J
FEBRUARY 13, 2024**

BETWEEN

JACKTON MUSOTSI CHAWORO CLAIMANT

AND

BENORI GUARD SERVICES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed an Amended Memorandum of Claim dated 14th November 2016.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent from 7th April 1994 as a Security Guard where he served diligently for 22 years up to 22nd April 2015.
3. The Claimant avers that he was suspended without notice in the year 2015 and was never allowed to resume work.
4. The Claimant avers that when he was granted leave, some umbrellas and six caps got lost at the Respondent's premises and when resumed work and inquired what happened no one could explain what transpired.
5. The Claimant avers that on 14th April 2015, he approached one of his colleagues and inquired the whereabouts of the umbrella, however, the colleague called the supervisor informing him that he was asking more about the umbrellas. The supervisor confronted him insisting he should explain why he was inquisitive about the lost items, which got lost in his absence anyway.
6. The Claimant avers that he was surprised by the supervisor's actions and called the Respondent's offices requesting for a meeting over the same matter but the Respondent did not even attempt to address



- the issue. Instead, the director of the Respondent placed blame on him and did not grant him an opportunity to explain himself and what he gathered about the issue.
7. The Claimant avers that the Director threatened him stating if he continued inquiring about the issue, he would pay his dues and dismiss him with immediate effect.
 8. The Claimant avers that he resumed work on 18th April 2015 but the supervisor did not come to work and on 20th April 2015, the manger summoned him and informed him not to work for the company again and to wait for his dues. He was informed there was termination letter and one of his colleagues was instructed to beat him if he ever reported back to work.
 9. The Claimant avers that he reported to work on 24th April 2015 as he had not been served any termination letter and his supervisor called KK Security guard nearby and told him to inform the Claimant to leave his place of work immediately.
 10. The Claimant avers that he went back to the Respondent offices on 25th April 2015 seeking more clarification but no one paid attention to his request.
 11. The Claimant avers that he was paid Kshs 6,743 per month yet his statutory minimum salary was supposed to be Kshs 10,954.
 12. The Claimant avers that he has sought third party reconciliation through the Ministry of Labour but it was ignored and despite his efforts to amicably solve the dispute, the Respondent failed to pay the Claimant.

Respondent's Case

13. In opposition to the Claim, the Respondent filed its statement of defence dated 5th November 2018.
14. The Respondent avers that the Claimant was hired as a casual on need basis at a daily wage and accepted to work on a daily wage of Kshs 485 all inclusive. At the time of his termination, the Claimant was an employee at Sameer Agriculture as a machine operator working at a daily wage of Kshs 586.
15. The Respondent avers that it had a timetable for workers for both day and night shift and at no time did an employee work continuously and the Claimant was put to strict proof. Employees were paid through their accounts and no claim was made for overtime and the allegation is unfounded.
16. The Respondent avers that the Claimant was engaged as a casual earning a daily wage and was assigned duties on need basis and when production was low, few workers were engaged hence his claim has no basis.
17. The Respondent avers that the Claimant's actions amounted to gross misconduct, breach of the company staff rules and regulations, the collective bargaining agreement and the Employment and it opted to summarily dismiss him.
18. The Respondent avers the Claimant stopped going to work and the Respondent did not force him.

Evidence in Court

19. The Claimant (CW1) produced his witness statement and bundle of documents dated 14th November 2016 as his evidence in chief and exhibits.
20. CW1 testified that he used to work for one of the clients called Shah as his security guard for about 10 years. He used to work for 12 hours from 6am to 6 pm and sometimes overtime.



21. CW1 testified that on the date of his termination he was unwell and had been given a day off by Shah, however, when he came back he found some items were lost and he was beaten and chased away.
22. CW1 testified that he was asked to wait for his supervisor, Steve, who told him never to come back to work even though the client wanted him to continue working.
23. CW1 testified that he was beaten by Jeremiah, one of the Respondent's supervisors at Shah's residence and was told not to ask about the lost items.
24. CW1 testified that he had no house allowance, did not go on leave and was not paid his dues.
25. During cross examination, CW1 testified that he had no letter of appointment and was employed by Bennon and director Osongo.
26. CW1 testified that he was employed in 1992 and not 2005, although the certificate of incorporation shows the company was registered on 18.11.2002.
27. CW1 testified that he used to be paid Kshs 3,500 and not Kshs 8,000 and he never received any payslip.
28. CW1 testified that he never received the notice to show cause and summary dismissal letter dated 15.4.2015 and 23.4.2015 and he only saw them in court.

Respondent

29. The Respondent's witness (RW1), Fanny Kerubo relied on her witness statement dated 3.12.2021 as her evidence on chief.
30. RW1 testified that the Respondent has never operated with a different name and the Claimant was employed as a casual worker.
31. RW1 testified that the Claimant was dismissed because of desertion but no effort was made to reach him or his family.
32. RW1 testified that the NTSC dated 15.4.2015 did not have a postal address as he did not give them one but he came to the office to pick it. He had many lawyers hence they did not know where to send it.
33. RW1 testified that the Claimant never signed the summary dismissal letter dated 23.04.2015. further, there is no minutes to show the Claimant was put under disciplinary notice.

Claimant's Submissions

34. The Claimant submitted that the Respondent did not prove any substantive reason for the termination. No past indiscipline on the Claimant's part has been demonstrated wherefore any theft allegations, absenteeism investigation report, was unfounded. The allegation that the Claimant absconded work also not proven. The Respondent was expected to do more than just a NTSC and a summary dismissal letter for their office file, if at all the Claimant had absconded.
35. The Claimant submitted that the Respondent was expected to demonstrate that it took efforts to trace the missing/absconding employee which never occurred herein hence the defence of absconding was not established to this required standard. He relied on Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd [2020] eKLR.
36. The Claimant submitted that he is entitled to one month's salary in lieu of notice as no notice of an impending termination was shown to have been issued.



37. The Claimant submitted that under the wage order (2015), the minimum wage was Kshs. 12,221.10 and no record was produced to show whether housing allowance was ever paid. Section 31(1) of the Employment Act that an employer must provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. Reliance was made on *Abigael Jepkosgei Yator & another vs China Hanan International Co. Ltd* [2018] eKLR.
38. It was submitted for the Claimant that no leave records or public holidays worked or not worked were availed despite section 74 of the Act placing this obligation upon the Respondent. Therefore, the court should award leave for the admitted 10 years.
39. The Claimant submitted that statutory dues of a retirement benefit scheme as well as a hospital insurance was owing and service pay payable in lieu as these were not paid by the Respondent, as admitted that the Claimant was considered a casual employee. Therefore, the Claimant is entitled to service pay as prayed.
40. The Claimant submitted that the 12 hours straight whether in a day or night shift and the Respondent did not produce any records as anticipated under Section 74 of the Act and they being the custodians of the same. The Court is left with only the Claimant's version of what occurred and he therefore urges the court to proceed to award him overtime for the extra four hours worked.
41. The Claimant submitted that he was only paid Kshs. 3,500.00, before deductions from losses, between the year 2010 and the year 2015. The Respondent availed no pay slip or other payment proof to disprove this. He was paid in cash as they regarded the Claimant as a casual employee and would not and did not give him a pay slip. The Respondent therefore owes him the balance as the minimum wage as any employer is legally obligated to pay an employee during the period set in the gazette notice.

Respondent's Submissions

42. The Respondent submitted that the company was incorporated on 18th November 2002 and therefore could not have employed the Claimant on 7th April 1994.
43. The Respondent submitted that it produced exhibit 3 showing the Claimant absconded duty. The Claimant was issued with a notice to show cause dated 15.04.2015 and was invited for a disciplinary hearing on 22.04.2015 which the Claimant did not attend; as a consequence, he was lawfully terminated vide a letter dated 23.04.2015.
44. The Respondent submitted that the Claimant was given an opportunity to defend himself which he did not, therefore the Respondent complied with the substantive and procedural procedure under Section 41 of the Employment Act.
45. The Respondent submitted that the Claimant was lawfully dismissed and is not entitled to notice pay in lieu.
46. The Respondent submitted that in the absence of a letter of employment and leave records claimant is therefore entitled to 13 months leave. The claim for leave can only be sustained for six years being based on contract and can only recover six months leave.
47. The Respondent submitted that public holidays are not payable because the Claimant was earning a monthly salary and based on the Respondent's attendance register, there is no indication that the Claimant worked on public holidays.
48. The Respondent submitted that claimant was entitled to service pay at the rate of Kshs 6,743 x 13 x $\frac{1}{2}$ = 43,829.50.



49. The Respondent submitted that the Claimant agreed to work at Kshs 6,743 and parties bound by their contract and the claim for underpayment does not lie.

Analysis and Determination

50. The main issue for determination is whether the Claimant's employment was wrongfully and unfairly summarily dismissed.
51. The Claimant avers that he was wrongfully dismissed on the ground that he was involved in the loss of several umbrellas and caps at a client's premises although he was away on sick leave.
52. The Claimant submitted that the Respondent lacked a substantive justification and failed to adhere to the procedural requirements before dismissing his employment.
53. On the other hand, the Respondent denied that the Claimant was dismissed because of the loss but avers that the Claimant was never chased away but absconded work without valid reason leading to his summary dismissal.
54. In *Simon Mbithi Mbane v Inter Security Services Limited* [2018] eKLR, Abuodha J. stated that
- “an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.
55. Similarly, in *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR the court stated that: -
- “dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties”
56. RW1 testified that the Claimant deserted his duties, however, the Respondent did not make any effort to reach the Claimant or his family to ascertain his whereabouts or reasons why he was not reporting to work.
57. Further, the Respondent issued him with a NTSC dated 15.4.2015 and summary dismissal letter dated 23.4.2015. However, the said letters did not have the Claimant's postal address and the RW1 testified that the Claimant was to pick the letters from the Respondent's offices. However, the Claimant testified that he only saw the said letters in court.
58. Therefore, absconding duty ground does not arise as the Respondent failed to follow up on the Claimant and properly serve him with the NTSC. This court finds that the ground for abscondment of duty is not established and claimant was dismissed without a valid reason. The court is persuaded by the cited cases including *Joseph Naioka vs Smart coatings limited supra*.
59. The second issue for determination is whether the Claimant's dismissal was procedurally fair. Section 41 of the *Employment Act* 2007 states 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.”

60. RW1 in her testimony stated that the Claimant deserted his employment and further the NTSC was not delivered to him to inform him of the Respondent’s intention to summarily dismiss him if he does not have a valid reason.

61. Therefore, the Claimant was denied a fair hearing and chance for him to defend himself as per Section 41 of the Employment Act. The Claimant’s dismissal was thus procedurally unfair.

62. Having established the dismissal was not substantively justified and was unprocedural, this court finds that the dismissal of the Claimant’s employment was wrongful and unfair.

63. The final issue for determination is whether the Claimant is entitled to the reliefs sought and the court holds that where respondent dismissed claimant unfairly the respondent must compensate.

The following reliefs are awarded.

One Month’s Salary in lieu of Notice

64. Section 35 of the Employment Act provides for termination notice: -

“A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

- (a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;
- (b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or
- (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”

65. Whereas, Section 36 of the Employment Act deals with payment in lieu of notice as follows:

“Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”

66. The Claimant was unfairly dismissed without notice or payment in lieu of notice, hence he is entitled to this relief and so is awarded kshs 10,954/- as per respective regulation and wages amendment order

b. Salary for wrongful dismissal

67. The Claimant avers that he was employed by the Respondent on 7th April 1994 as a Security Guard, however, this was denied by the Respondent who maintain that he was employed as a casual worker in



2005. Further, the Respondent company was registered in 2002 making it impossible for the Claimant to have been employed before its existence.
68. The Respondent produced in court its certificate of incorporation to ascertain the time frame, the court agrees with its time frame that the Claimant worked for it from 2005 to 2015 which amount to 10 years as a casual employee.
69. The Claimant worked for nearly 10 years under casual terms, the said terms under Section 37 of the Employment Act are eligible to be converted into a term contract.
70. The Claimant is allowed the prayer for compensation for unfair termination at equivalent of 10 months' salary which amounts to kshs 109,540/-.

c. House Allowance at 15% and underpayment

71. Section 31 of the Employment Act provides that: -
- “An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”
72. The Respondent submitted that the Claimant agreed to work at Kshs 6743 and therefore he is bound by their contract. However, the Respondent has not produced in court the said contract to confirm the said agreed terms. The Claimant on the other hand avers that he was paid a monthly salary of Kshs 3500 however he was never given a pay slip.
73. In *Irungu Githae v Mutheka Farmers' Co-operative Society Limited* [2019] eKLR the court held that: -
- “Section 48 of the Labour Institutions Act 2007 provides that the minimum rates of remuneration established in a Wages Order constitute a term of employment of any employee to whom the Wages Order applies. If the contract of employment provides for payments lower than the minimum rates as in this case, the minimum rates under the Wages Order substitute the inferior terms. Under the law, any employer paying below the minimum wage commits an offence.”
74. The Claimant avers that he used to work from 6am to 6pm, hence he was a day watchman. The years underpaid were 2005 to 2015, where the basic minimum monthly wages (exclusive housing allowance) as per the respective Regulation of Wages (General)(Amendment) Order 2004, 2006, 2010,2011, 2012, 2013 and 2015 were pegged as follows:
- 2011- Kshs 7,586, 2012 – Kshs 8,579.80, 2013 Kshs 9,780.75 and 2015 Kshs 10,954.
75. In view of the foregoing, the Claimant is entitled to these reliefs:-
- a. Housing Allowance – 118,303.20
 - b. Underpayment $-(835 \times 12 + (2296 \times 12) \times 4 + 3243 \times 12 + 4086 \times 12 + 5079.80 \times 12 + (6280.75 \times 12) \times 2 + 7454 \times 4) = \text{Kshs. } 374,318.60$
 - d) Overtime, public holidays and leave days
76. The Claimant testified that he worked for 12 hours from 6am to 6 pm and further he was never allowed leave days or days off during public holidays.



77. The Respondent did not produce any records to controvert these claims. The law prescribes that the employer shall keep all employment records and therefore should present them to prove the aforementioned claims, in the absence of these records this court has no choice but to grant the relief as prayed but as relates to leave days for 6 year. As for public holidays however and overtime it would be very difficult to ascertain the same after passage of so many years later. So he is granted leave pay of kshs 65,724/-.

e) Service pay

78. As submitted by the Claimant service pay is due to an employee who has not enjoyed the benefit of statutory deductions covered under Section 35 (5) and (6) of the Employment Act which states:-

“An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.”

79. The Claimant having been assumed as a casual worker, these payments were never deducted and/or remitted therefore he is entitled to the relief as sought and the same is awarded at kshs 71,201/- (10,954x13x ½).

80. Claimant is not entitled to severance pay as he was not declared redundant.

81. Respondent will pay a total award of kshs 750,040/80 plus costs and interest at court rates from date of judgment till full payment made up as follows.

a. Pay in lieu of notice Kshs 10,954/-.

b. Compensation for unlawful termination for 10 months kshs 109,540/-

c. House allowance kshs 118,303/20

d. Underpayment kshs 374,318/60

e. Leave days kshs 65,724/-

f. Service pay kshs 71,201

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH 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

