



**Mbuvi & another v Board of Management AIC Nunguni Secondary School
(Cause 1167 of 2017) [2024] KEELRC 147 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1167 OF 2017
L NDOLO, J
FEBRUARY 8, 2024**

BETWEEN

JOSEPH MUSAU MBUVI 1ST CLAIMANT

DAVID MAWEU KITHIMA 2ND CLAIMANT

AND

**BOARD OF MANAGEMENT AIC NUNGUNI SECONDARY
SCHOOL RESPONDENT**

JUDGMENT

1. Joseph Musau Mbuvi and David Maweu Kithima, the Claimants in this case, were Board of Management employees working as security guards at AIC Nunguni Secondary School.
2. The Claimants were suspended on 2nd April 2015, following allegations of theft at the School. They were arrested and charged at Kilungu Law Courts but were acquitted of all charges.
3. Their complaint in this claim is that they sought reinstatement back to work but the Respondent declined to reinstate them. They therefore accuse the Respondent of terminating their employment unlawfully and unfairly.
4. The claim is documented by a Statement of Claim dated 21st June 2017 and filed in court on 22nd June 2017. The Respondent initially filed a Response dated 19th July 2017, through the firm of Muumbi & Company Advocates.
5. Subsequently, the Attorney General entered appearance and filed a 2nd Response which includes a Counterclaim on behalf of the Respondent. The Claimants filed a Reply to Response and Counterclaim dated 10th July 2021.
6. The matter went to full trial where the Claimants testified on their own behalf, with the Respondent calling its Principal, Francis Mutua Muteti. The parties also filed written submissions.



The Claimants' Case

7. The Claimants state that they were employed by the Respondent on diverse dates in 2004 and 2009. They worked until 2nd April 2015, when they were verbally suspended on suspicion of theft. They were arrested and were subsequently charged at Kilungu Law Courts in Criminal Case No 185 of 2015: Republic v Joseph Musau Mbuvi & David Maweu Kithima.
8. The Claimants were later acquitted of the criminal charges upon which they sought to be reinstated back to work but the Respondent failed to respond.
9. The Claimants aver that their suspension was unlawful and contrary to their terms and conditions of service. They cite the following particulars of unlawfulness and/or illegality on the part of the Respondent:
 - a. Suspension without pay which constituted an unfair labour practice;
 - b. Indefinite suspension which amounts to constructive termination;
 - c. Failure to grant the Claimants a hearing;
 - d. Sacking the Claimants without lawful cause and/or due process;
 - e. Acting in bad faith in dismissing the Claimants from employment;
 - f. Failing to follow the rules of natural justice;
 - g. Being unreasonable and unfair in the circumstances.
10. The Claimants thus seek a declaration that their indefinite suspension on 2nd April 2015 was unfair, illegal and unlawful and amounts to constructive termination. The Claimants therefore claim the following:

1st Claimant: Joseph Musau Mbuvi

- a. 3 months' pay in lieu of notice.....Kshs 34,500
- b. 12 months' salary in compensation.....138,000
- c. Leave pay.....55,730
- d. Service pay.....34,500
- e. Rest days.....130,333
- f. Overtime.....268,333
- g. Public holidays.....101,200

2nd Claimant: David Maweu Kithima

- a. 3 months' pay in lieu of notice.....Kshs 34,500
- b. 12 months' salary in compensation.....138,000
- c. Leave pay.....92,884
- d. Service pay.....57,500
- e. Rest days.....184,000



- f. Overtime.....289,799
- g. Public holidays.....168,666

11. The Claimants also ask for certificates of service, costs of the case and interest.

The Respondent's Case

- 12. In its 1st Response dated 19th July 2017, the Respondent states that the 1st and 2nd Claimants were employed on 1st January 2009 and 1st December 2004 respectively.
- 13. The Respondent denies suspending the Claimants or terminating their employment.
- 14. The Respondent states that the Claimants were arrested and arraigned in court for failure to prevent a felony. They were charged in Criminal Case No 185 of 2015.
- 15. According to the Respondent, the Claimants were released on bail but did not report back to work. The Respondent asserts that the Claimants absented themselves from work for more than 14 days, resulting to desertion of duty.
- 16. The Respondent claims to have written to the Claimants to explain why they had deserted duty. The Respondent adds that the Claimants were invited to defend themselves on 15th July 2017 but did not turn up.
- 17. The Respondent maintains that the Claimants are still under disciplinary process and no decision has been made on their case.
- 18. The Respondent also claims that the Claimants have reached retirement age and cannot therefore be reinstated.
- 19. In its 2nd Response dated 5th March 2020, the Respondent reiterates its 1st Response and adds that the Claimants were arrested on 2nd April 2015 on allegations of theft of an alternator of the school bus registration number KCA 632F.
- 20. The Respondent claims to have made efforts to get the Claimants to resume duty but they absconded for more than a year without permission.
- 21. The Respondent avers that the Board of Management summoned the Claimants to appear before it but they failed to present themselves. The Respondent relies on letters dated 15th July 2017 and 29th July 2017, which did not elicit any response from the Claimants.
- 22. By way of Counterclaim, the Respondent claims Kshs 34,500 being pay in lieu of notice, from the Claimants.

Findings and Determination

- 23. There are three (3) issues for determination in this case:
 - a. Whether the Claimants have proved a case of unlawful termination of employment;
 - b. Whether the Claimants are entitled to the remedies sought;
 - c. Whether the Respondent has established a proper Counterclaim against the Claimants.



Unlawful Termination?

24. The Respondent's defence to the Claimants' claim is that the Claimants themselves deserted duty. I must at the very outset, state that desertion is not the same as unauthorised absence from duty. The distinction was well laid out in the South African decision in *Seablo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) 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. On the other hand.....an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”
25. Further, desertion is not a self-evident defence meaning that it is not enough for an employer to simply state that an employee has deserted duty. This becomes even more critical where an employee is arrested and arraigned in court on allegations of a crime committed at the work place, as in the present case.
26. The Respondent's case is that the Claimants failed to report back to work after being released on bond and at the end of the criminal case. It is not in contest that the Claimants were arrested and arraigned in court following a theft incident at the School. It is also obvious that the Claimants' arrest was upon a complaint by the Respondent. The Respondent cannot therefore feign ignorance regarding developments in the criminal case against the Claimants.
27. Emerging jurisprudence is to the effect that an employer alleging desertion against an employee, must show efforts made towards reaching out to the deserting employee, so as to put them on notice that termination of their employment, on account of desertion is being considered.
28. In *Godfrey Anjere v Unique Suppliers Limited* [2013] eKLR it was held that:
- “in a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse.”
29. From the record, the Respondent only sought to make contact with the Claimants after the demand letter from the Claimants' Advocate and again after the claim was filed in court. This kneejerk reaction is not what is contemplated by the requirement for due notice to a deserting employee.
30. The Respondent appears to have made the decision to simply sit out the Claimants' woes in the hope that the employment relationship would fizzle out with time. This may explain the Respondent's averment in its Response that the Claimants have reached retirement age.
31. In the ultimate, I find and hold that the Respondent failed to establish that the Claimants had indeed deserted duty. The converse is that the Claimants' assertion that the Respondent terminated their employment without justifiable cause and in violation of due process remains unassailed.



Remedies

32. Pursuant to the foregoing findings, I award the 1st Claimant, Joseph Musau Mbuvi nine (9) months' salary and to the 2nd Claimant, David Maweu Kithima twelve (12) months' salary, in compensation for unlawful and unfair termination of employment.
33. In arriving at these awards, I have considered the Claimants' respective periods of service and the Respondent's unlawful conduct in bringing the employment relationship to an end.
34. I further award each Claimant one (1) month's salary in lieu of notice.
35. The Claimants told the Court that they took their annual leave. The claim for leave pay is therefore without basis and is disallowed.
36. The Claimants also testified that the Respondent remitted their National Social Security Fund (NSSF) dues. The claim for service pay is consequently also disallowed.
37. No evidence was adduced to support the claims for rest days, overtime and public holidays, which therefore fail and are dismissed.

The Respondent's Counterclaim

38. The Respondent's Counterclaim is based on an allegation that the Claimants deserted duty, which allegation was not proved before the Court.
39. The Counterclaim therefore fails is dismissed.

Final Orders

40. Finally, I enter judgment in favour of the Claimants as follows:

1st Claimant: Joseph Musau Mbuvi

- a. 9 months' salary in compensation.....Kshs 103,500
- b. 1 month's salary in lieu of notice.....11,500
- Total.....115,000

2nd Claimant: David Maweu Kithima

- a. 12 months' salary in compensation.....Kshs.138,000
- b. 1 month's salary in lieu of notice.....11,500
- Total.....149,500

41. These amounts will attract interest at court rates from the date of judgment until payment in full.
42. The Claimants are also entitled to certificates of service plus costs of the case.
43. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024

LINNET NDOLO



JUDGE

Appearance:

Ms. Kyalo for the Claimant

Ms. Chesinya for the Respondent

