



**Muthini & 8 others v Touch Down Tours Limited (Cause 2209 of 2017)  
[2024] KEELRC 105 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 105 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2209 OF 2017  
JK GAKERI, J  
FEBRUARY 1, 2024**

**BETWEEN**

- PATRICK MUOKA MUTHINI ..... 1<sup>ST</sup> CLAIMANT**
- MATHIAS KYALO MWANIKI ..... 2<sup>ND</sup> CLAIMANT**
- GIDEON MUSILI MASUE ..... 3<sup>RD</sup> CLAIMANT**
- BENARD MUSYOKA MUTINDA ..... 4<sup>TH</sup> CLAIMANT**
- MORRIS MUEMA WANZOVI ..... 5<sup>TH</sup> CLAIMANT**
- CHRISTOPHER KIOKO NDAMBUKI ..... 6<sup>TH</sup> CLAIMANT**
- FREDRICK MUTINDA MUTANGILI ..... 7<sup>TH</sup> CLAIMANT**
- JOSEPH MUANGE MAKAU ..... 8<sup>TH</sup> CLAIMANT**
- FREDRICK MWAMBILI KASYOKA ..... 9<sup>TH</sup> CLAIMANT**

**AND**

**TOUCH DOWN TOURS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimants commenced this suit by a Memorandum of Claim filed on 7<sup>th</sup> November, 2017 alleging unfair/unlawful termination of employment and non-payment of terminal dues.
2. The Claimants allege that they were employed as follows;
  - 1<sup>st</sup> Patrick Muoka January 2009 - Transport Manager at Kshs.40,000.00 per month.
  - 2<sup>nd</sup> Mathias Kyalo 13<sup>th</sup> October, 2015 Driver at Kshs.20,000.00
  - 3<sup>rd</sup> Gideon Musili 4<sup>th</sup> April, 2015 Excavator Machine Operator at Kshs.25,000.00.



4<sup>th</sup> Bernard Musyoka 6<sup>th</sup> January, 2016 Driver at Kshs.20,000.00.

5<sup>th</sup> Morris Muema 15<sup>th</sup> December, 2015 Driver at Kshs.20,000.00.

6<sup>th</sup> Christopher Kioko 10<sup>th</sup> September, 2015 Driver at Kshs.20,000.00.

7<sup>th</sup> Fredrick Mutinda 26<sup>th</sup> August, 2015 Driver at Kshs.20,000.00.

8<sup>th</sup> Joseph Muange 16<sup>th</sup> October, 2016 Driver at Kshs.20,000.00.

9<sup>th</sup> Fredrick Mwambili 4<sup>th</sup> February, 2016 Driver at Kshs.20,000.00.

3. The 1<sup>st</sup> Claimant stated that on 19<sup>th</sup> July, 2017, the drivers came to his office to enquire about the salaries for June which had not been paid and he consulted the Managing Director, Mr. Justus Kituva who directed that the drivers be requested to resume duty without any promise of payment but the drivers were adamant.
4. The 1<sup>st</sup> Claimant returned to the Managing Director's office who allegedly informed him that he had been dismissed for colluding with the drivers.
5. It is his case that the dismissal was unfair and had not been paid house allowance.
6. The 2<sup>nd</sup> Claimant testified that the Managing Director met the drivers in the Transport Manager's office and informed them of the dismissal from employment.
7. The Claimants pray for;
  - a. A declaration that the dismissal from employment was unfair and unlawful.
  - b. An order for the Respondent to pay the Claimants terminal dues as follows;
    1. 1<sup>st</sup> Claimant Kshs.2,115,000/=
    2. 2<sup>nd</sup> Claimant Kshs.438,606/=
    3. 3<sup>rd</sup> Claimant Kshs.486,750/=
    4. 4<sup>th</sup> Claimant Kshs.422,998/=
    5. 5<sup>th</sup> Claimant Kshs.372,666/=
    6. 6<sup>th</sup> Claimant Kshs.363,998/=
    7. 7<sup>th</sup> Claimant Kshs.485,333/=
    8. 8<sup>th</sup> Claimant Kshs.589,447/=
    9. 9<sup>th</sup> Claimant Kshs.395,332/=Comprising pay in lieu of notice, leave for 1 year, pro rata leave, off-days, unpaid public holidays service, gratuity, house allowance and compensatory damages.
  - c. Interest on the amount claimed.
  - d. Costs of this suit plus interest.



### **Respondent's case**

8. It is the Respondent's case in 2017 it faced financial challenged owing to the General Election and struggled to raise salaries for January, February, March, April and May 2017 and was overwhelmed by June and the Claimants were aware of the challenges.
9. That the salary for June was delayed and the Claimants enquired about it.
10. That the 1<sup>st</sup> Claimant incited the others against the Respondent but pleaded with the drivers to await payment but they absconded duty and no termination letters were issued and could not be taken through the relevant procedures owing to their unavailability.
11. It is the Respondent's case that working hours were 8 am to 5.00 pm and all the Claimants proceeded on leave with pay, National Social Security Fund dues were paid and they did not work on public holidays and the salaries were inclusive of house allowance.
12. The Respondent prays for dismissal of the suit with costs.

### **Claimant's evidence**

13. CWI, Mr. Mathias Kyalo confirmed that he had no documentary evidence of the employment relationship but had weighbridge receipts and salary was paid via Mpesa but had no record.
14. CWII, Mr. Patrick Muoko also confirmed that he had no evidence of employment by the Respondent in 2009. That he was paid through the bank but it collapsed and was later paid via Mpesa but had no statement.
15. That he had no evidence of the salary alleged and worked on public holidays and did not abscond duty.
16. That the Respondent was neither paying National Health Insurance Fund nor National Social Security Fund.

### **Respondent's evidence**

17. RWI, Mr. Justus Kituva, on cross-examination confirmed that the Respondent was facing financial challenges and he talked to the Claimants but had neither evidence of the challenges not the alleged communication.
18. It was his testimony that although the 1<sup>st</sup> Claimant allegedly incited other employees, he did not issue a notice to show cause or subject them to a hearing as they deserted on 10<sup>th</sup> June, 2017 and they were casual employees and attempts to reach them were unsuccessful, but provided no evidence of the calls made.
19. That he issued no letter for the alleged desertion and did not report to the Labour Officer.
20. That he paid the employees per day via Mpesa and no overtime was due.
21. On re-examination, the witness testified that he engaged the Claimants on a day to day basis and paid them at the end of the week and they did not visit the office for their dues until they filed the instant suit.
22. RWI testified that the Claimants used to collect materials from a quarry and were not engaged on public holidays as the recipients were not working on such days.
23. Strangely, the witness testified that he recognized the 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Claimants and the rest were not in his daily payroll which he did not provide for perusal by the court.



### **Claimant's submission**

24. Counsel for the Claimants argued that the Respondent's response adverted to redundancy and desertion which were characterized as contradictory.
25. Counsel cited the decision in *Mariita V Leading Locks & Access Systems (2022) eKLR* on the principles governing the defence of desertion, such as absence for at least 7 days, efforts made to trace the employee and notice to the Labour Officer, and a notice to show cause and dismissal on account of the desertion.
26. Counsel submitted that both substantive and procedural fairness must be upheld as held in *Boniface Musyoka Kyambo V DPL Festive Ltd (2021) eKLR* and *Emmanuel Mambo Oduory V One Acre Fund (2020) eKLR*.
27. Counsel urged that in the instant case, the defence of desertion was hollow as the Respondent did not avail evidence in support of the averment.
28. There was no evidence of the alleged efforts to trace the Claimants.
29. According to counsel, the Claimants had proved their case of summary dismissal as no notice of termination was given.

### **Respondent's submissions**

30. By the time the court retired to prepare this judgement, the Respondent had not filed submissions.

### **Findings and determination**

31. The issues for determination are:
  - i. Whether the Claimants were causal employees or permanent.
  - ii. Whether termination of the Claimants' employment was unfair or they absconded duty.
  - iii. Whether the Claimants are entitled to the reliefs prayed for.
32. As to the nature of employment, parties have advanced contrasting positions with the Respondent testifying that the Claimants were employed as causal paid at the end of every week but per day.
33. The Claimants' witnesses made no direct references to the nature of employment but it is decipherable that they deem it permanent and pensionable.
34. Section 2 of the *Employment Act, 2007* provides that casual employee means;

“ a person, the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”
35. Strangely, although the Respondent denied having employed the Claimants as alleged in the Memorandum of Claim and RWI repeated the same in his written statement, he failed to explain how and when he engaged the Claimants in light of the documentary evidence availed by the Claimants which reveal that the Claimants used to drive trucks on account of the Respondent.
36. But more significantly, the Respondent's witness testified that the Respondent was struggling to raise monthly salaries from January 2017 till June 2017 when it was unable to pay salaries in June 2017.
37. Why monthly salaries yet he testified that he used to pay per day but at the end of the week?



38. Equally, he testified that when the 1<sup>st</sup> Claimant went to his office on the issue of salaries, he advised him to return to work and the Claimants absconded duty and their employment was not terminated by the Respondent.
39. This implies that the Claimants were obligated to continue reporting to the workplace but failed to do so yet they were causal employees.
40. RWI testified that the drivers were to go back to work but they did not.
41. Significantly, the Respondent's witness confirmed on cross-examination that he had no evidence that the Claimants were causal employees or paid them as such.
42. Similarly, although the Claimant purported to disown some of the Claimants by stating that they were not in his daily payroll, he did not avail a copy of the alleged payroll or any other documentary evidence of his dealings with any of the Claimants.
43. The copies of the weekly worksheets on record for 2016 and 2017 show that drivers did not work on Sundays and public holidays.
44. The Respondent's contradictory evidence lends credence to the Claimants case that they were not casual employees.
45. For instance, it averred that the Claimants took all their leave days with pay for the years served and their National Social Security Fund dues were paid, and the salaries included housing allowance.
46. Would a casual employee be entitled to leave with pay?
47. To the issue whether the Claimants were causal employees of the Respondent, the court returns that the Respondent has failed to prove on a preponderance of probabilities that they were.
48. As to whether the Claimants deserted the workplace or their employment was unfairly terminated, parties have adopted opposing positions with the Respondent maintaining that they absconded duty and were not available for a disciplinary process.
49. The Claimants testified that they were summarily dismissed by word of mouth.
50. Black's Law Dictionary (10<sup>th</sup> Edition) defines desertion as;

“The wilful and unjustified abandonment of a person's duties or obligations.”
51. In the often cited South African case of *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court distinguished desertion from unauthorized absence from duty as follows:

“... 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”.
52. Although the Respondent averred and RWI testified that the Claimants deserted the workplace on 10<sup>th</sup> June, 2017, he admitted that he had no evidence of the alleged call to Mr. Kioko or used other drivers to reach out to the Claimants.
53. Closely related to the foregoing, the witness admitted that he did not issue a notice to show cause or any other letter to the Claimants for the alleged desertion.



54. The emerging jurisprudence on the defence of desertion is that the employer is required to demonstrate the steps it took to contact the employee to resume duty. (See *Simon Mbithi Mbane V Inter Security Services Ltd* (2018) eKLR and *Joseph Nzioka V Smart Coatings Ltd* (2017) eKLR.)
55. In *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR, Onyango J. held 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 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.”
56. From the foregoing, it is evident that the Respondent has failed to establish that the Claimants absconded duty.
57. As regards termination of employment, both the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination of employment to pass muster, the employer must prove that it had a valid and fair reason to do so and conducted it in accordance with a fair procedure as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows;
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness address the procedure adopted by the employer to effect the termination.”
58. In the instant suit, the Respondent adduced no evidence to show that termination of the Claimants’ employment was fair within the meaning of Section 45 of the *Employment Act*, 2007.
59. For the foregoing reasons, it is the finding of the court that the termination of the Claimants employment was unfair for want of substantive justification and procedural fairness.
60. As regards the reliefs sought, the court proceeds as follows:

**a. Declaration**

61. Having found that termination of the Claimants employment was unfair, a declaration to that effect is merited.

**b. Terminal dues**

**i. One month’s salary in lieu of notice**

62. The Respondent adduced no evidence to prove that it paid the Claimants in lieu of notice.  
The prayer is awarded.

**ii. Leave**

63. The Claimants tendered no evidence of the outstanding number of leave days and when the days accrued.
64. Neither the statement of Patrick Muoka Muthini nor that of Mathias Kyalo Mwaniki make reference to the particulars of the pending leave days of individual Claimants.
65. RWI testified that the Claimants took leave and were paid.



The prayer lacks particulars and is dismissed.

### **iii. Off days**

66. From the documentary records availed by the Claimants and in particular the weekly worksheet, it is clear that the Claimants did not work on Sundays. Equally, the Claimants adduced no evidence of the days worked.

The prayer is dismissed.

### **iv. Unpaid public holidays**

67. The Claimants tendered no evidence of the particular holidays on which they rendered services.

68. More significantly, the worksheet for motor vehicle KCE 858Q under one Joseph shows that no services were rendered on Monday 2<sup>nd</sup> January, 2017 which was a public holiday.

69. The prayer for unpaid public holidays lacks essential particular and is dismissed.

### **v. Service/Gratuity**

70. The Claimants did not provide copies of their NSSF statements to prove that the Respondent was not remitting NSSF contributions.

71. Relatedly, the Respondent testified the Claimants were members of the NSSF.

The prayer is dismissed.

### **vi. House allowance**

72. The Claimants adduced no evidence to prove that the salary paid by the Respondent was not inclusive of house allowance.

73. RWI on the other hand testified that the salary was inclusive of house allowance.

The prayer lacks merit and is declined.

### **vii. Unpaid overtime**

74. Neither the statement of Patrick Muoka nor that of Mathias Kyalo adverts to the reporting or exit times by the Claimants. The claim by Mr. Patrick Muoka that he used to work from 3 am to 9.00-10.00 pm was not supported by any evidence.

75. More importantly however, Mr. Patrick Muoka has not prayed for overtime.

76. Only Mr. Joseph Muange Makau prayed for overtime and tendered no evidence as to when he reported or exited the work place.

The prayer is dismissed.

### **viii. 12 months gross salary**

77. Having found that termination of the Claimants employment by the Respondent was unfair, the Claimants are eligible for compensation under Section 49(1)(c) of the *Employment Act*, 2007.

78. Strangely, none of the parties adduced verifiable evidence of the salary paid or received by the Claimants.



79. However, RWT's evidence that the salaries alleged were inclusive of house allowance would appear to suggest the figures cited by the Claimants had a basis.
80. As the law imposes a duty on the Respondent to keep and maintain all employee records, it was the Respondent's duty to avail copies of payslips and other records to show how much it was paying the employees.
81. The foregoing is reinforced by Section 10(7) of the [Employment Act](#), 2007 which provides that;
- “If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
82. The Respondent adduced no evidence to controvert the Claimants' allegation on the salaries paid to them.
83. As regards the period of service, the Claimants were employees of the Respondent as follows:
- 1<sup>st</sup> Claimant 8 years 5 months
  - 2<sup>nd</sup> Claimant 1 year 9 months
  - 3<sup>rd</sup> Claimant 2 years 3 months
  - 4<sup>th</sup> Claimant 2 years 6 months
  - 5<sup>th</sup> Claimant 1 year 7 months
  - 6<sup>th</sup> Claimant 10 months
  - 7<sup>th</sup> Claimant 1 year 10 months
  - 8<sup>th</sup> Claimant 9 months
  - 9<sup>th</sup> Claimant 1 year 5 months
84. Other than Mr. Patrick Muoka, the Transport Manager, the Respondent's driver served for a relatively short time.
85. The Claimants neither expressed their wish to continue serving as employees of the Respondent nor appeal the Respondent's decision to terminate their employment.
86. From the oral evidence adduced in court, it is clear that the parties had a salary dispute and both sides appear to have been adamant.
87. Other than the 1<sup>st</sup> Claimant, the others substantially contributed to the termination of their employment. However, none of the Claimant had record cases of misconduct.
88. In the circumstances, the court is satisfied that the equivalent of 4 months' gross salary for the Transport Manager and 2 months gross salary for the drivers is fair.
89. In the upshot, judgement is entered in favour of the Claimants against the Respondent as follows:
- a. Declaration that termination of the Claimant's employment was unfair.
  - b. One month's salary in lieu of notice.
  - c. Equivalent of 4 months' salary for the 1<sup>st</sup> Claimant.



- d. Equivalent of 2 months' salary for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Claimant.
- e. Costs of this suit.
- f. Interest at court rates from date hereof till payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1<sup>ST</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

