



**Ableey v Kenya Airports Authority (Cause E053 of 2023)  
[2024] KEELRC 1410 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1410 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E053 OF 2023**

**M MBARŪ, J  
MARCH 20, 2024**

**BETWEEN**

**AHMED MOHAMED ABLEEY ..... CLAIMANT**

**AND**

**KENYA AIRPORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The claimant is an adult male and the respondent is a statutory body.
2. The claimant was employed by the respondent on 12 February 2011 as a security warden stationed at Moi International Airport Mombasa. The last salary paid was Kshs. 104,279 per month.
3. On 15 August 2022 the court at Nairobi in ELRC Cause No. E259 of 2022 issued an order directing the members of the Kenya Aviation Workers Union (KAWU) including the claimant to withhold labour and remain out of the shop floor. The claimant had a right to participate in a lawful strike and compliance with the court order, he withdrew his labour as directed by the court.
4. The respondent issued the claimant with a notice to show cause over alleged desertion which was challenged by KAWU and the claimant responded to the show cause. The claimant was issued with a notice terminating his employment for alleged desertion of duty which was unfair and unlawful and for lack of due process. There was no valid reason to justify termination of employment. The respondent engaged in unfair labour practices for failing to comply with a court order and for punishing the claimant by stifling his constitutional rights.
5. Termination of employment on account of alleged desertion is unfair. The court order in ELRC Cause E259 of 2022 was upheld by the Court of Appeal in Civil Application No. Nai E534 of 2022 and that the same was unfair and done in breach of the *Employment Act* and the rules of natural justice and hence in contravention of the claimant's financial loss. The claimant is seeking the following orders;



- a) Notice pay Kshs. 104,279;
  - b) Unpaid salary for 4 months, November 2022 to January 2023 Kshs. 417,116;
  - c) Unpaid house allowance for 2 years Kshs. 35,000 per month Kshs. 840,000;
  - d) Unremitted NSSF deductions 5 months Kshs. 2,000;
  - e) Gratuity for 13 years Kshs. 104,279 x 13 years Kshs. 1,355,627;
  - f) 12 months' compensation Kshs. 1,251,348;
  - g) Damages for unfair labour practices;
  - h) Costs of the suit.
6. The claimant testified in support of his case that the union, KAWU issued a strike notice and eventually filed a claim in court in Nairobi ELRC Cause No. E259 of 2022. The strike was extended by 14 days. The claimant was one of the union officials referenced in the court order. There were 55 staff members of the union allowed not to attend court or at the station sites. He was last at work on 17 August 2022 when the strike started. This was not desertion but a strike sanctioned by the court. The claimant remained within the work premises at Moi International Airport Mombasa but not working.
  7. The claimant testified that during the strike other employees reported to work. The strike went on until August 2022 when he was dismissed. The notice that terminating his employment is dated 6 November 2022 but was only served after such date. KAWU general secretary had issued a public notice withdrawing the strike notice. The employees who remained at work had signed an Indemnity Form stating that they did not want the union to represent them in court.
  8. The ruling of the Court of Appeal confirmed the strike order was lawful. The claimant was lawfully on strike and hence the claims made should be awarded.

### **Response**

9. The respondent admitted that the claimant was employed on 12 February 2011 as a security warden trainee and posted at JKIA. He was confirmed to the position on 28 August 2012 and transferred to MIA. The claimant remained under his written contract of employment and the Human Resource Manual. At the end of employment, the claimant was earning Kshs. 53,689 per month.
10. On 17 August 2022, the respondent terminated the claimant's employment for desertion of duty despite all efforts to trace him.
11. The conduct of the claimant offended the provisions of CBA, Section N4(1)(a) of the Human Resources Manual, and Section 44(4) of the Act. The claimant absented himself from work for more than 7 consecutive days without due cause.
12. The strike the claimant sought to rely upon was unprotected. On 21 June 2023, the court extended orders prohibiting KAWU from executing the strike notice issued on 25 April 2022. Hence, KAWU in a press conference withdrew the strike notice.

### **The claimant was a repeat offender.**

13. The claimant deserted duty from 17 August 2022 and all efforts by the respondent to trace him were futile. He declined to receive calls on his phone number 0725... .89. The respondent issued the claimant



- with a show cause notice for desertion of duty on 27 August 2022 but he failed to respond and remained absent from work.
14. During this time, the claimant was facing allegations of illegal facilitation of miraa and had a notice to show cause.
  15. On 27 September 2022, the claimant was issued with a hearing notice and informed of his right to be accompanied by a colleague of his choice. The claimant remained absent from duty until 6 October 2022 for the disciplinary hearing on charges of illegally facilitating miraa. He was uncooperative at the hearing and refused to participate. He stated he remained at home because he was on strike and was following advice given by the union. He then left and the court could not be traced.
  16. On 14 October 2022, the respondent received a letter from the claimant purporting to be a response to the show cause notice about the desertion notice dated 27 August 2022. Efforts to reach the claimant were fruitless. On 24 October 2022, he was issued with desertion notice but he failed to respond.
  17. Through a letter dated 9 March 2023, the respondent terminated the employment of the claimant on the grounds of desertion of duty. A certificate of service was issued and all terminal dues including notice pay of one month were paid all Kshs. 37,582.37.
  18. Under the law, the claimant was taken through the due process, and his terminal dues were paid in full. The claim should be dismissed with costs.
  19. In evidence, the respondent called Anthony Njagi the general manager, of human resources development, and testified that the claimant was working at MIA as a security warden. At the end of his employment, he was earning Kshs. 37,582.37 per month.
  20. Mr Njagi testified that on 17 August 2022, the claimant deserted duty. Despite all efforts to trace him were fruitless. This was in breach of the CBA and the human resources manual. He remained absent for 7 consecutive days without good cause.
  21. The alleged strike was unprotected. On 21 June 2023, the court extended interim orders prohibiting the strike notice dated 25 April 2022. Subsequently, the union issued a notice withdrawing the strike notice.
  22. Upon the claimant deserting duty on 17 August 2022, a show cause was issued through a letter dated 27 August 2022 and he failed to respond. He was invited to a disciplinary hearing through a letter dated 27 September 2022 for being absent from work, he attended but remained uncooperative and then left. At the time, the claimant was on another show cause notice for illegal facilitation of miraa.
  23. Mr Njagi testified that due to desertion of duty, the claimant was issued with notice dated 24 October 2022. He failed to respond. He was issued with notice through the registered mail on 16 November 2022 but he failed to respond. Payment of salary stopped on 30 November 2023 and through a notice dated 9 March 2023, the respondent issued a letter terminating employment, and a Certificate of Service was issued. Final dues were paid in full.
  24. Mr. Njagi testified that in the year 2022, operations were affected due to a strike notice issued by KAWU but the members ignored the notice and signed indemnity Forms. KALPA issued a strike notice on 6 November 2022 while KAWU withdrew its strike notice.
  25. The claimant was a member of KAWU. His claim for payment of gratuity is not justified since he was pensionable and gratuity does not accrue. He was part of the pension scheme where he was paid 12.5% of his salary.



26. The claim for house allowance arrears for 20118/2019 the respondent is ready to pay on the condition that the claimant attends to clear. His pension dues are also ready upon clearance.
27. Upon cross-examination, Mr Njagi testified that he issued the claimant with the termination of employment notice notices on 17 March 2023. The letter was dated 9 March 2023 taking effect on 1<sup>st</sup> November 2022. Various notices had been issued through registered mail without the claimant responding after deserting duty on 17 August 2022. On 27 August 2022, the claimant submitted his response to the show cause notice and indicated that he was absent from work lawfully after the court order allowing him to withdraw labour from 15 August 2022. At the time, the claimant was on another show cause notice on the grounds of illegal facilitation of miraa.
28. At the close of the hearing, both parties filed written submissions.
29. In the case of *Kiambaa Dairy Farmers Co-Operative Society Limited v Rhoda Njeri & 3 others* [2018] eKLR Civil Appeal 180 of 2017 the court held that compensatory damages for unfair dismissal should be awarded only in deserving cases. There must be an assessment with the range of zero to twelve months in mind. This means that the less the violation of an employee's rights that accompanies his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Awards of the full 12 months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee-jerk award for every and any case of unfair dismissal. In the case of *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR Civil Appeal no. 62 of 2019 the court held that in ordinary practice, the Court does not encourage employees to claim multiple remedies arising from the same wrongdoing on the part of the employer, whether these violations are claimed to infringe *the Constitution*, the Statute or the Contract. However, where there is a serious constitutional violation that leads to an unfair loss of employment, which claim may also be statutory, compensatory damages may be awarded outside the realm of section 49 of the Act.
30. The Court of Appeal in *Bomas of Kenya v Thiriku (Civil Appeal 379 of 2019)* [2022] KECA 795 (KLR) (24 June 2022) (Judgment) in this case relied on the case of *Elizabeth Washeke and 62 Others v Airtel Networks (k) Ltd& another* [2013] eKLR:
- Whether conduct is fair or not necessarily involves a degree of subjective judgment. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice, the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public.
31. The claimant submitted that he is entitled to the remedies sought as an issue of justice in his case. He relied on the case of *Javan Kisoi Mulwa v S.A. An Interstate Traders (K) Ltd* [2018] eKLR where the court held that by definition, desertion implies an intention on the part of an employee not to resume



work. Also, in the case of *Philomena Kiprotich Kirui v Lessos Veterinary Suppliers Ltd* [2016] eKLR the court held that;

an employer who terminates the services of an employee on grounds of abscondment or desertion has to demonstrate and/or prove that the employee had no intention of resuming work.

32. To discharge this burden, the employer must demonstrate efforts made to reach out to the deserving employee. The respondent failed to discharge its burden in this regard and the claimant is entitled as pleaded.
33. The respondent submitted that in the *Joash Alubale Jacob v Mega Pack Limited* [2019] eKLR Cause No.248 of 2017 the court held that an employee, who takes part in, calls, instigates, or incites others to take part in a strike that is not protected is of gross misdoubt and subject to summary dismissal. Such an employee invites a sanction against himself. In this case, for stoppage of work, nonattendance of work, and despite notice and warnings being posted, the claimant failed to resume duty. The summary dismissal issued was at the invitation of the claimant. He cannot blame the respondent for the sanction issued. It was justified. In *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR Cause No. 295 of 2014 the Court held that desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing the absence of communication from the employee, the duration of absence, the impact of the absence, and the nature of the employee's duties.
34. The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbors, or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary.
35. The respondent submitted that the claimant was on another show cause notice for different allegations at the time he absconded duty. Great efforts were made to trace him but these were frustrated. The sanction issued is appropriate and lawful

### **Determination**

36. The issues for determination are whether there was an unfair termination of employment and whether the remedies sought should be issued.
37. First, the respondent has admitted that the claimant is entitled to house allowance arrears for the period of 208/2018 together with his pension dues. These are payable upon the claimant attending at the shop floor for clearance, upon which, his dues will be paid.
38. On this note, the claimant shall attend, and ensure clearance, and his dues will be paid.
39. On the claim that there was unlawful and unfair termination of employment, the claimant's case is that following a court order in Nairobi Cause No. E259 of 2022 on 15 August 2022, he was allowed to withdraw labour and he proceeded to do so for good cause.
40. The respondent case is that from 17 August 2022 the claimant deserted duty, all efforts to trace him failed and he was issued with a notice to show cause but failed to respond. He was invited to a disciplinary hearing on 27 September 2022 but he remained uncooperative and left. On 16 March 2023, he was issued with a notice terminating employment dated 11 March 2023 with effect from 1<sup>st</sup>



November 2022 for desertion of duty. At the time, the claimant was on another notice to show cause for the illegal facilitation of miraa.

41. Section 44(4)(a) of the Act allows an employer to summarily dismiss an employee who deserts duty or is absent from work without good cause.
42. Through notice dated 9 March 2023, the respondent terminated the claimant's employment on the grounds of desertion of duty with effect from 1st November 2022. From 17 August 2022, the claimant had not been at work. At the time he was under another show cause dated 25 July 2022 for alleged gross misconduct which was pending determination.
43. In the case of *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Cool Rivers Hotel Ltd* (2017) eKLR the court held that;

The question of what constitutes desertion in employment law is not a straightforward one.

Desertion is not the same as being absent from the place appointed for work without permission or lawful cause as envisaged under section 44(4)(a) of the *Employment Act*, 2007.

It needs no debating that absence without permission or lawful cause attracts summary dismissal. However, the absent employee has no intention of not resuming work.

Desertion, on the other hand, in employment law, is a repudiation of the contract of employment. The employee who deserts is in breach of contract, and an employer is entitled to dismiss him on the grounds of repudiation of contract. This is because he has no intention of turning up for work.

44. Desertion of duty goes to the heart of the employment relationship. It is the abandonment of employment. There is no notice or intention to resume duty. Such violates Section 44(3) of the Act which allows summary dismissal for breach of contract.
45. Where the employer pleads desertion of duty, such matter must be demonstrated. That the employer made all efforts to trace the employee without success.
46. In this case, the claimant admits that from 17 August 2022, he was not at work. He was in obedience to a court order issued on 15 August 2022 which allowed him to withdraw labour.
47. The claimant attached the subject order of 15 August 2022 issued in Nairobi Cause No. E259 of 2022 – *Kenya Airports Authority v Kenya Aviation Workers Union (KAWU)*. The court allowed KAWU members to withdraw labour. The court also directed that the employees subject to such measures should not be victimized.
48. The union, KAWU wrote to the respondent herein on 15 August 2022 addressing the court orders.
49. Through a letter dated 15 August 2022, the union further issued notice to all employees, users, and stakeholders as follows;

#### ALERT ON WITHDRAWAL OF LABOUR BY KAA EMPLOYEES

We regret to advise you that with effect from Tuesday 16 August 2022 at 8.00 am, all unionized employees of Kenya Airports Authority in all airports, ... shall withdraw labour in accordance with the law until further notice. ...

50. Through notice dated 27 August 2022, the respondent directed the claimant to show cause why he had deserted duty.



51. A protected industrial action is allowed under the *Labour Relations Act*, of 2007. That is where the court, upon good cause, allows unionized employees to withdraw labour. In this case, the respondent was the claimant in Nairobi Cause No. E259 of 2022, and hence, orders issued on 15 August 2022 directly resonate. The claimant, being unionized under KAWU, the respondent union therein, and its members were allowed for a good cause to withdraw labour.
52. The claimant did not desert duty as alleged. He was lawfully out of work for a good cause.
53. The respondent asserted that the union withdrew the strike notice. Such notice is not filed herein.
54. Termination of employment on account of desertion is not justified. A protected industrial action cannot be a good basis or justification to terminate employment. This results in unfair and unlawful termination of the claimant's employment.
55. The claimant is entitled to compensation and notice pay.
56. At the end of employment and through a notice dated 9 March 2023, the respondent offered to pay one month's pay in lieu of notice, leave days earned, and pension dues. Final dues were tabulated and cheque No.0559781 for Kshs. 37,582.37 was issued. Such resolved notice pay is due.
57. On compensation for unfair termination of employment, the claimant does not deny that he had a record. At the time of his alleged desertion, he was required to show cause why disciplinary action should not be taken against him for gross misconduct and illegal facilitation of miraa. He had not addressed such a matter at all. Under Section 45(5)(b) the court in assessing the compensation due, the record of the claimant becomes relevant. Without any response in this case, though the matter was not addressed to its logical conclusion, the claimant failed to clear his name. Such matter is herein taken into account and compensation awarded at one month gross salary.
58. The last due salary is not agreed upon. The claimant applied the rate of Kshs. 104,279 while the respondent asserted that the last pay was Kshs. 37,582.37. The respondent as the employer did not file the last payment statement. The statements filed by the claimant indicate his last basic pay was Kshs. 53,689 and house allowance at Kshs. 35,000 as of July 2023. The basic wage remained constant from October 2019. Various allowances accrued. The basic pay plus house allowance is Kshs. 88,689.
59. Without a contrary record and payment statement by the employer, the last gross salary due is Kshs. 88,689. Compensation is awarded at one month at Kshs. 88,689.
60. On the claim for 4 months' unpaid salary, termination of employment was through a notice dated 9 March 2023. Termination of employment was backdated to 1<sup>st</sup> November 2022. The respondent confirmed that they stopped paying the claimant on 30 November 2022. The date employment took effect is vide notice dated 9 March 2023 and not before. Where the respondent made efforts to trace the claimant without success, recourse is Section 18(5) of the Act. An employer is allowed to notify the labour Officer where the subject employee cannot be traced. Such well insulates the employer from claims such as herein.
61. As addressed above, the claimant was lawfully out of the shop floor and until the end of his employment through a notice dated 9 March 2023, his salaries are due at Kshs. 88,689 per month. For 4 months, the claimant is entitled to Kshs. 354,756.
62. The claim for NSSF deductions, these are not due to the employee but to the statutory body.
63. The claim for gratuity on the admitted pension dues does not accrue.



- 64. The claim for damages for unfair labour practices is addressed through the finding that there was unfair termination of employment which is redressed with compensation.
- 65. On the claim for costs, on the awards outlined above, each party will meet its costs.
- 66. Accordingly, judgment is entered for the claimant against the respondent in the following terms;
  - a) Compensation Kshs. 88,689;
  - b) Unpaid salaries for 4 months Kshs. 354,756;
  - c) The claimant will attend at the shop floor and undertake clearance upon which his house allowance arrears and pension dues will be processed and paid, if due.
  - d) Each party to bear its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.**

**M. MBARŪ**  
**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

