



Musyoka v Integrity Loss Assessors & Adjusters Co. Ltd (Employment and Labour Relations Cause 739 of 2016) [2024] KEELRC 893 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 893 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 739 OF 2016**

MA ONYANGO, J

APRIL 18, 2024

BETWEEN

DAVID SAMUEL MUSYOKA CLAIMANT

AND

INTEGRITY LOSS ASSESSORS & ADJUSTERS CO. LTD RESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim dated 18th April 2016 seeking compensation from the Respondent for unlawful termination.
2. It is the Claimant's case that he was employed by the Respondent on 14th September 2012 as a Senior Investigator/Assessor at a monthly salary of Kshs 30,000 among other benefits.
3. The Claimant states that he worked diligently until 5th June 2013 when the Respondent terminated his services verbally without any reasonable cause or notice.
4. He therefore filed the instant claim seeking for orders that: -
 - a. A declaration that he was wrongfully and unfairly dismissed from his employment.
 - b. Unpaid dues..... Kshs 48,800
 - c. Notice pay of one month..... Kshs 30,000
 - d. 12 months' salary as compensation for wrongful and unfair termination (30,000 x12) Kshs 360,0000
 - e. Punitive and aggravated damages for breach of the Claimant's constitutional rights
 - f. Costs and incidental to the suit



5. The Respondent in response filed its Memorandum of Response on 3rd June 2016 in which it denied the averments made by the Claimant in his Memorandum of Claim. The Respondent denied that it had employed the Claimant and stated that the Claimant had requested to be trained as a loss assessor, adjuster and investigator in the Respondent's company. The Respondent further stated that as a trainee, the Claimant acted dishonestly by unlawfully misrepresenting facts of his investigation reports to clients which caused the Respondent to lose business and money from its clients.
6. It is the Respondent's case that the purported appointment letter produced by the Claimant in his bundle of documents filed in court is a forgery and that there was no employment contract between itself and the Claimant which could be breached.
7. The Respondent stated that even as a trainee the Claimant deserted and left employment without any notice after he was challenged to account for his omission, commission and misrepresentation of facts in his investigation reports to clients and misappropriation of money.
8. The Respondent filed a counterclaim in which it prayed for compensation of Kshs. 700,000 which it alleged was loss of money due to the Claimant's acts of omission and commission. The Respondent also sought general damages for loss of business. It alleged that it was removed from the panel of assessors, adjusters and investigators by its clients.

The Evidence

9. CW1, the Claimant, testified on 2nd November 2021 and adopted his witness statement filed in court on 18th April 2016 as part of his evidence in chief together with his bundle of documents filed in support of his case.
10. In his testimony, CW1 told the court that he was employed by the Respondent on 14th September 2012 as a Senior Investigator and worked until 5th June 2013 when his employment was verbally terminated by the Respondent's Managing Director.
11. On cross examination, CW1 stated that his employment was terminated when he was on probation and denied that he left employment when he was on training.
12. When referred to the Respondent's internal memo dated 7th April 2013, CW1 stated that he was not aware of the complaint by the Respondent that he had underperformed. He stated that he was never shown the letter dated 4th March 2013 through which the Respondent's client had terminated a contract with it on account of the Claimant's failure to perform.
13. CW1 maintained that he was verbally dismissed from employment and denied the allegation made by the Respondent that he deserted duty.
14. On re-examination, CW1 told the court that during his employment with the Respondent he was never issued with any letter on grounds of non-performance. He further stated that he was never served with any memo during his employment. He stated that had he been served with any letter he would have signed to acknowledge receipt.
15. The Respondent called Dr. Wilson Kivindu who testified on 5th May 2022 as RW1 and introduced himself as the Managing director of the Respondent. He adopted his witness statement recorded on 2nd June 2016 as his evidence in chief and also adopted and relied on the documents filed on behalf of the Respondent.
16. According to RW1, the Claimant was never employed by the Respondent but had been taken in as a trainee. RW1 stated that the Claimant left the Respondent in the course of his training. RW1 stated



- that he confronted the Claimant after the Respondent's client refused to pay fees on account of the Claimant's underperformance. It was RW1's evidence that out of anger, he shouted at the Claimant saying, "Get out of my office" only for the Claimant to leave and never come back.
17. RW1 reiterated that the Claimant having joined the Respondent as a trainee, was never confirmed as an employee at any time.
 18. On being cross examined, RW1 admitted that he issued the Claimant with the appointment letter dated 14th September, 2012 and that he was to be on probation for 6 months. RW1 stated that after the probation period ended, the Claimant's probationary period was verbally extended for another three months to give him a chance to improve in the performance of his work.
 19. RW1 stated that after two of the Respondent's clients complained of the Claimant's underperformance, he confronted the Claimant and told him to go away. He stated that he never saw the Claimant again.
 20. When referred to a letter dated 7th April 2013 addressed by him to the Claimant to the effect that the Respondent no longer needed the Claimant's services, RW1 contended that the said letter was not a termination letter but a letter showing that RW1 did not need the Claimant's services as a trainee.
 21. RW2 was Mercy Wanjiru Ndungu the Respondent's Administrative Manager. She adopted her witness statement dated 11th December 2019 as her evidence in chief. According to RW2, the Claimant had a confrontation with the Respondent's Managing Director sometimes in June 2013 after which the Claimant handed her the office keys and never went back to the office of the Respondent.
 22. On cross examination, RW2 stated that the Claimant's work was not good as a result of which the Managing Director and the Claimant had several private meetings which culminated in the confrontation between the Claimant and the Managing Director on the day the Claimant left employment and never went back.

Determination

23. I have considered the pleadings, the evidence and the submissions of the parties including the cited authorities. In my view, the issues for determination are: -
 - a. Whether there was an employment relationship between the parties, and if so;
 - b. Whether the Claimant deserted duty or was terminated from employment by the Respondent
 - c. What orders should issue?
24. On the first issue, the Claimant in his evidence maintained that he was employed by the Respondent as a Senior Investigator/Assessor on 16th September 2012. This assertion was disputed by the Respondent who maintained that the Claimant was engaged by the Respondent as a trainee.
25. Where an employer denies that a person was its employee, the burden shifts on the person alleging existence of an employment relationship to prove that such a relationship existed. In the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* (2016) eKLR, the Court held:

“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the



Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word.”

26. In this case, the Claimant referred to the appointment letter dated 14th September 2012 to prove that he was indeed an employee of the Respondent and not a trainee as alleged by the Respondent.
27. From the terms and conditions in the Claimant’s appointment letter, there is no doubt that he was indeed an employee and not a trainee as alleged by the Respondent. Although the Respondent in its response to the Claimant’s Memorandum of Claim, alleged that the said appointment letter was a forgery, RW1 in his testimony confirmed that he issued the appointment letter to the Claimant. I therefore find and hold that the Claimant proved that he was an employee of the Respondent.
28. The Respondent in its evidence brought up the issue that the Claimant left employment during the probation period. I find this line of evidence to be irrelevant in this case as this was never disputed by the Claimant. In any event, the Respondent’s witness RW1 stated that the Claimant deserted duty after he had extended his probation period for another three months to give the Claimant an opportunity to improve.
29. With regard to the second issue for determination, the Claimant averred that his employment was terminated verbally by the Respondent’s Managing Director. The Respondent on the other hand maintained that the Claimant deserted duty.
30. In the case of *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR, the court observed as follows:

“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.”
31. Similarly, in the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed as follows;

“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.”
32. From the evidence of RW1 and RW2, there is no indication that the Respondent took any reasonable steps to contact the Claimant after he allegedly absconded duty.
33. Further, RW1 testified that he scolded the Claimant and told the Claimant to leave his office. Asked in cross examination why he did not call the Claimant when he was told the Claimant had left after the scolding, RW1 responded that he was still mad at the Claimant.
34. An employer has no authority to quarrel with an employee. Where an employer scolds an employee and tells the employee to leave his office, it is reasonable for the employee to consider himself summarily dismissed as the Claimant did. In the absence of evidence that the Claimant deserted duty, I find that the Respondent has failed to discharge its onus on a balance of probability that the Claimant deserted duty. On the contrary, the evidence points to a verbal dismissal. The termination of the Claimant’s employment was therefore unfair as due process was not followed.



What reliefs should then issue?

35. Having found that the Claimant was unfairly dismissed from employment within the meaning of Section 45 of the *Employment Act*, the Claimant is entitled to compensation and notice under section 49(1) and (2) of the *Employment Act*. In his Memorandum of Claim, the Claimant sought for the following reliefs:
- a. A declaration that he was wrongfully and unfairly and unfairly dismissed from employment.
As I have already found above, the Claimant is entitled to this prayer.
 - b. Unpaid dues totaling to Kshs 48,800
The Claimant did not adduce any evidence to prove that he had unpaid dues. I therefore find this prayer not proved and decline the same.
 - c. Notice period of one month
The Claimant's appointment letter does not provide for a termination notice. Under section 35 of the *Employment Act*, the duration of termination notice is one month or pay in lieu thereof. In this case, from the claimant's appointment letter, the Claimant was to be paid a salary of Kshs 30,000 monthly. In the circumstances, the Claimant is awarded one months' salary in lieu of termination notice.
 - d. 12 months' salary as compensation for wrongful and unfair termination
The Claimant's employment was terminated when he had worked for 9 months. An award of 12 months' compensation would be on the higher side. I find that an award of 4 months' salary as compensation for the unfair termination would be reasonable. In awarding the 4 months' salary I have taken into account not only the Claimant's length of service but the conduct of the Respondent and the manner in which the termination was effected. I have further taken into account all other relevant factors under section 49(4) of the Act.
 - e. Punitive and aggravated damages for breach of the Claimant's constitutional rights
I decline to make any awards under this head as the circumstances under which the Claimant's employment was terminated do not qualify for award of punitive and/or aggravated damages.

The Respondent's Counterclaim

36. As stated above, the Respondent prayed for compensation of Kshs 700,000 which it alleged was loss of money due to the Claimant's acts of omission and commission. The Respondent also sought general damages for loss of business. It alleged that it was removed from the panel of assessors, adjusters and investigators by its clients.
37. Although RW1 led evidence to the effect that two of its clients removed the Respondent from their panel on account of the Claimant's poor performance, no documentary evidence was produced in court to prove these allegations or that there was a loss of Kshs. 700,000 attributable to the Claimant. Special damages must be specifically proved. I find that the Respondent's counterclaim was not proved and dismiss it with costs.
38. In the end, judgement is entered in favour of the Claimant in the following terms:
- a. A declaration that the dismissal of the Claimant was unfair.
 - b. One month's salary in Lieu of Notice at Kshs. 30,000



- c. 4 months' Salary as compensation for unfair dismissal at Kshs. 120,000
- d. . Costs of the suit
- e. Costs of the counter claim
- f. Interest at court rates until payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 18TH DAY OF APRIL 2024

MAUREEN ONYANGO

JUDGE

