



**Okwokwo v Jabali Kindergarten (Cause 354 of 2017)
[2024] KEELRC 846 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 846 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 354 OF 2017**

**JK GAKERI, J
APRIL 18, 2024**

BETWEEN

HARRIET NIGHT OKWOKWO CLAIMANT

AND

JABALI KINDERGARTEN RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit on 2nd February, 2017 alleging unfair/unlawful termination of employment and non-payment of terminal dues and compensatory damages.
2. It is the Claimant's case that she was employed by the Respondent in February 2014 as a cleaner and was engaged on a two year contract effective 1st January, 2015 at Kshs.9,000/= which she avers was below the minimum wage.
3. The Claimant avers that she was unfairly dismissed by one Jackline on 1st December, 2015.
4. It is the Claimant's case that she was informed that her services were no longer needed.
5. The Claimant prays for;
 - a. A declaration that her dismissal by the Respondent was unlawful and unfair.
 - b. Sum of Kshs.352,083/= as terminal benefits and compensatory damages plus interest comprising;
 - i. Salary in lieu of notice.
 - ii. Unpaid/untaken leave.
 - iii. Underpayment February – April 2014.
 - iv. Underpayment May 2015 – November 2015.



- v. Unpaid house allowance May – November 2015.
- vi. Unpaid salary.
- c. Costs of this suit plus interest.

Respondent's case

- 6. By its statement of defence filed on 18th May, 2017, the Respondent avers that the Claimant was its employee as alleged under a written contract of service at a consolidated salary of Kshs.9,000/= per month but denies having underpaid her.
- 7. That the Claimant took leave every year and denies having directed the Claimant to leave its premises.
- 8. It is the Respondent's case that the Claimant absconded duty on 18th November, 2015 after an annual appraisal and did not report to the work place again.
- 9. It is the Respondent's case that the Claimant is not entitled to any of the reliefs sought as she absconded duty, was paid as per the contract and exhausted all her leave days.
- 10. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

- 11. In her evidence in chief, the Claimant admitted having arrived to the work place late on the school's parent's day and was given a warning letter dated 9th May, 2015 but was not given a notice to show cause or invited for a hearing.
- 12. On cross-examination, the Claimant confirmed that she was engaged by one Mrs Jackline Njirwa.
- 13. That she could not recall having attended a meeting attended by Andrew, Elvis and others and her supervisor was Eunice Owade. That her last date at the workplace was 1st December, 2015 when Jackline told her to leave the school premises.
- 14. That she worked for 2 years without proceeding on leave and was not paid house allowance.
- 15. On re-examination, the Claimant testified that although she was employed in February 2014, she got the contract in 2015 and there was no evidence to show that she proceeded on leave and the employer did not respond to the advocate's letter.

Respondent's evidence

- 16. By an application filed on 2nd August, 2022, the Respondent sought to recall the Claimant for cross-examination and the court acceded to the request and gave the Respondent an opportunity to call its witness but neither the counsel nor its witness were in court on 28th July, 2023, the hearing date for the Respondent's case yet the date was taken in the presence of the Respondent's counsel.
- 17. The Respondent's case was closed and directions on submissions given and a mention was slated for 21st February, 2024 to confirm compliance and none of the parties were present and none had complied.
- 18. By 28th February, 2024 when the court retired to prepare this judgment, none of the parties had filed submissions.

Findings and determination

- 19. The issues for determination are;



- i. Whether termination of the Claimant's employment by the Respondent was unfair or she absconded duty.
 - ii. Whether the Claimant is entitled to the reliefs sought.
20. On termination, the Claimant testified that on 1st December, 2015, one Jackline called her and directed her to leave the school premises as her services were no longer needed and the Claimant obliged to await the Respondent's call but in vain.
21. It is her uncontroverted evidence that she was neither issued with a notice to show cause nor invited for a hearing.
22. Although the Respondent did not adduce evidence in court in support of its case, documents on record reveal that its defence to the Claimant's case is that she absconded duty or deserted the workplace on 18th November, 2015 after the annual appraisal.
23. According to Black's Law Dictionary (10th Edition), desertion means;

“The wilful and unjustified abandonment of a person's duties or obligations.”
24. In *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), a South African Court explained desertion 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”.
25. In the instant suit, although the Respondent alleges that the Claimant absconded duty on 18th November, 2015 and reiterates the same in the witness statement, it adduced no evidence of the circumstances in which the desertion took place including, and more importantly what it did to contact the Claimant and make her aware that termination of employment on account of desertion was under consideration as held in *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR 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.”
26. With no shred of evidence to prove the requirements of desertion, the Respondent's plea remains unproven.
27. Similarly, on termination, the Respondent adduced no evidence to controvert the Claimant's allegation that on 1st December, 2015, the Director, one Mrs Jackline directed her to leave as her services were no longer required.
28. As held by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, for a termination of employment to pass the fairness test, it must be proved that the employer had a substantive justification for the termination and conducted it in accordance with a fair procedure.
29. In this case, the Respondent tendered neither evidence of a fair termination of employment nor desertion.



30. From the foregoing, it is the finding of the court that termination of the Claimant's employment by the Respondent was unfair.

31. On entitlement to the reliefs sought, the court proceeds as follows;

i. Salary in lieu of notice

32. In the absence of evidence to show that the Claimant was accorded the requisite notice under Section 35 of the *Employment Act*, 2007 or the provisions of Section 36 of the Act were complied with by the Respondent, the prayer for salary in lieu of notice is merited and is granted Kshs.12,597.9.

ii. Unpaid/untaken leave

33. The Claimant adduced no evidence of the number of outstanding leave days including whether she worked every day during the school holidays.

34. The written statement makes no reference to the outstanding leave days or the Claimant's work schedule during the school holidays.

35. The prayer lacks particulars and is declined.

iii. Underpayment February 2014 – April 2015

36. Under the Regulation of Wages (General) Order) 2013 and 2015, it is evident that the Claimant was underpaid by the Respondent for the entire duration of employment and the prayer for underpayment is merited as follows;

$$(9,780.95-9,000) \times 15 = \text{Kshs.}11,714.25.$$

iv. Underpayment May 2015 – November 2015

$$(10,954.70 - 9,000) \times 7 = \text{Kshs.}13,682.9.$$

v. Unpaid house allowance February 2014 – April 2015

37. Under the Wages Orders cited above, the Claimant's salary though consolidated as per clause 2(a) of the contract of employment was below the minimum wage and exclusive of house allowance.

38. The prayer for house allowance is thus merited as follows;

$$(15\% \times 9,780.95) \times 15 = 22,007.14.$$

vi. Unpaid house allowance May 2015 – November 2015

$$(15\% \times 10,954.70) \times 7 = \text{Kshs.}11,502.44.$$

vii. Unpaid salary on account of remaining contract period

39. Clause 20 of the Employment Contract dated 25th February, 2015 provided the exit clause which either party could invoke to terminate the employment relationship.

40. Arguably, there was no representation that the Claimant would remain in employment for the entire contractual period.

41. Relatedly, this is a claim for anticipatory earnings and the Claimant has not demonstrated its legal anchorage.

The prayer is dismissed.



viii. 12 months gross salary

42. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*, 2007 subject to the provisions of Section 49(4) of the Act.
43. The court has considered that the Claimant worked for the Respondent for about 22 months effective February 2014 as evidenced by National Social Security Fund statement on record and oral testimony led in court, the Claimant had a previous warning letter and neither appealed the termination nor express her wish to continue in the Respondent's employment.
44. In the circumstances, the court is satisfied that the equivalent of three (3) months gross salary is fair, Kshs.37,793.7.
45. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
 - b. Salary in lieu of notice.
 - c. Underpayment from February 2014 to November 2015.
 - d. House allowance.
 - e. Equivalent of 3 months' salary.
Total Kshs.96,700.43
 - f. Interest at court rates from date of judgment till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 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 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 *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.

