



**Daniel v Mastermind Tobacco (K) Limited (Cause 32 of 2017)
[2024] KEELRC 926 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 926 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 32 OF 2017
JK GAKERI, J
APRIL 9, 2024**

BETWEEN

JOSEPH MULWA DANIEL CLAIMANT

AND

MASTERMIND TOBACCO (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 11th January, 2017 alleging wrongful and unfair termination of employment, failure by the Respondent to pay terminal dues and infringement of fundamental rights enshrined in *the Constitution* and pleads his case as follows;
2. The Claimant avers that he was employed by the Respondent in 2004 as a construction general worker, in 2005 he joined the Production Section and between 2006 and 2015, he worked as a minder on the threshing line at Kshs.6,500/= which had risen to Kshs.15,000/= by the date of termination after having worked for 12¹/₂ years and had an accident in 2015 and another in March 2016.
3. The Claimant avers that he took time off to recover and when he reported back in May 2016, the Respondent informed him that he had been dismissed without notice and his services were no longer needed.
4. The Claimant prays for;
 - i. 12 months compensation Kshs.180,000/=.
 - ii. One month's salary in lieu of notice Kshs.15,000/=.
 - iii. Annual leave for 10 years Kshs.150,000/=.
 - iv. Certificate of service.



- v. Costs of the suit.
- vi. Interest on (i), (ii) and (iii).
- vii. Any other relief as this Honourable Court may deem fit to grant.

Respondent's case

5. The Respondent filed its response to the Memorandum of Claim on 28th March, 2017 stating that it employed the Claimant for 7 years and one month as a minder and later a Forklift Operator for one month till March 2016 and fulfilled its duty of care to the Claimant but he ignored the Respondent's protocols. That he had sought to adjust a carton of tobacco by hand which hit his face injuring him and the Respondent paid all the Claimant's medical bills in 2015 and 2016 until he recovered.
6. The Respondent denies having terminated the Claimant's employment and avers that after recovery, he did not return to the work place or enquire about his employment.
7. It is the Respondent's case that the Claimant constructively resigned by his prolonged unexplained absence from work from 7th March, 2016.
8. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

9. The Claimant adopted the written statement on record and testified that he was employed in 2004 as a general worker, paid Kshs.4,000/= every two weeks in cash, later in production operating a machine and finally forklift driver in March 2016.
10. That when he returned from treatment in June 2016, he was notified at the gate that he would be called but was not and added that he had not proceed on leave or given a termination notice.

Respondent's evidence

11. The Respondent did not avail a witness even after being served with the hearing notice through its counsel on record. However, it availed documentary evidence together with its response.

Claimant's submissions

12. As to whether termination of the Claimant's employment was unfair, counsel relied on the provisions of Sections 41, 43, 44 and 47 of the [Employment Act, 2007](#) to urge that it was, as the relevant provisions were not complied with.
13. Reliance was made on the sentiments of the court in *Alice Njeri Kamau & 2 others V Attorney General & 2 others (2020) eKLR* for the proposition that the Claimant's evidence was unchallenged and uncontroverted to urge that the two scenarios were similar.
14. The Respondent did not file submissions.

Determination

15. The issues for determination are;
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether termination of the Claimant's employment was unfair.



iii. Whether the Claimant is entitled to the reliefs sought.

16. Although the Claimant pleaded and testified that he was employed by the Respondent in 2004, he tendered no shred of evidence to show or suggest that there was such a relationship between him and the Respondent.
17. The unauthenticated copies of the Claimant's MPESA statements for Number 0725080758 reveal that he received monies regularly from the Respondent from November 2013 to late March 2016.
18. In its response, the Respondent admitted that it employed the Claimant for seven (7) years and one (1) month which would suggest that the Claimant joined the Respondent sometime in 2009.
19. In the absence of any evidence of an employment relationship between the Claimant and the Respondent outside the period admitted by the Respondent, the Respondent's evidence appears more plausible and reliable than the Claimant's evidence, other than the MPESA statements which are included in the Respondent's admission of the duration of employment.
20. (See *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR citing *Monica Kanini Mutua V Al- Arafat Shopping Centre and another* (2018) eKLR on the burden of proof of the employee in undefended suits).
21. As regards the nature of employment, it is clear that the Claimant joined as a casual as he testified but in the absence of evidence to prove that his services were discontinuous, the court is satisfied that the employment transitioned to term in accordance with the provisions of Section 37 of the [Employment Act](#), 2007.
22. The foregoing is also reinforced by the Claimant's evidence which the Respondent confirms to a large extent that the Claimant was initially a minder, then proceeded to the production department where he operated a machine and later became a forklift driver.
23. In a similar vein, documents availed by the Respondent reveal that the Respondent expected the Claimant to report back to work after recovery.
24. On termination of employment, the Claimant's counsel submitted that it was unfair for non-compliance with the law and particular that the Respondent had neither a valid or fair reason nor did it comply with the procedural requirements.
25. (See *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR).
26. However, the Claimant's evidence on termination is shaky.
27. In his written statement recorded on 12th August, 2016, about 5 months after the accident on 7th March, 2016, the Claimant testifies that in the March 2016, he was injured when a 215 kilograms carton of tobacco fell on him and he took time off to recover.
28. That on or about the month of May 2016 when he reported back, he was informed that he had been dismissed and his services were no longer needed.
29. The Claimant states that the company refused him to go back to his employment.
30. In court on 7th December, 2023, the Claimant testified that he returned to workplace in June 2016 and he was informed at the gate that he would be called but was not.



31. The absence of the actual date on which the Claimant reported back to work and what transpired and where in the written statement recorded a few months after the incident happened and the month in which he reported back implicates his credibility.
32. Documents provided by the Respondent reveal that the Respondent investigated the accident on 7th March, 2016 and found that the Claimant had contributed to the injury by attempting to move a heavy carton with his hands as opposed to the equipment he had.
33. A document availed by the Respondent reveals that the Claimant may not have returned after treatment and recovery.
34. In its response to the claim, the Respondent suggests that the Claimant absconded duty.
35. The Respondent was aware that after the injuries, the Claimant was under treatment at the Metropolitan Hospital and Kijabe Hospital and underwent an operation and was on bedrest for sometime yet the Respondent made no attempt to ascertain his whereabouts or why he was not reporting to the work place or send him a notice to show cause as held in legions of decisions such as *Simon Mbithi Mbane V Inter Security Services Ltd (2018) eKLR*, *Joseph Nzioka V Smart Coatings Ltd (2017) eKLR*.
36. In *Felistas Acheha Ikatwa V Charles Peter Otieno (2018) eKLR*, the court held;

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to 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.”
37. Finally, as held in *Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd (2020) eKLR*;

“... , even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support their having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this court it did accord the Claimant a fair hearing prior to her termination.”
38. In this case, the Respondent has not adduced evidence to show that the Claimant did not return to the workplace or his employment was fairly terminated.
39. Flowing from the foregoing, it is the finding of the court that termination of the Claimant’s employment was unfair.

Whether the Claimant is entitled to the reliefs sought

40. The Claimant prays for the following reliefs.
 - a. Salary in lieu of notice Kshs.15,000/=
41. The Respondent provided no evidence of compliance with the provisions of Section 35 or 36 of the *Employment Act*, 2007, the prayer for salary in lieu of notice is granted, Kshs.15,000.00.
 - b. Annual leave for 10 years



42. In his written statement dated 12th August, 2016 prepared shortly after termination of employment, the Claimant makes no reference to not having proceeded on leave for the entire duration of employment.
43. The Claimant has not explained why he did not proceed on leave or whether his application for leave was denied or he was not interested in going on leave.
44. The Claimant is inviting the court to believe that for the duration of 7 years and one month, he did not take leave for a single day for any reason.
45. Finally, the Claimant has not provided the relevant particulars.

The claim is declined.

- c. 12 months compensation
46. The Claimant is entitled to the relief under Section 49(1)(c) of the Employment Act, 2007 for unfair termination of employment.
47. The court has considered that the Claimant was an employee of the Respondent for about 7 years. The Claimant did not contribute to the termination of employment.
48. The Claimant did not express his wish to continue in the employment of the Respondent or appeal the dismissal.
49. In the circumstances, the court is satisfied that the equivalent of 4 months' salary is fair, Kshs.60,000.00.
 - d. Certificate of service
50. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.
51. In the end, judgment is entered in favour of the Claimant against the Respondent as follows;
 - **a. Salary in *lieu* of notice Kshs.15,000.00.**
 - **b. Equivalent of 4 months' salary Kshs.60,000.00.**
Total Kshs.75,000.00
 - c. Certificate of service.**
 - **d. Costs of this suit.**
 - **e. Interest at court rates from date of judgment till payment in full.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH 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.

DR. JACOB GAKERI

JUDGE

DRAFT

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