



Nandi v Super Bargains Glass & Hardware Nakuru Hardware Limited (Formerly Amattullah Glass & Hardware Limited) (Cause 216 of 2018) [2024] KEELRC 840 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 840 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 216 OF 2018
DN NDERITU, J
APRIL 4, 2024**

BETWEEN

MARTIN AINEA NANDI CLAIMANT

AND

**SUPER BARGAINS GLASS & HARDWARE NAKURU HARDWARE
LIMITED (FORMERLY AMATTULLAH GLASS & HARDWARE
LIMITED) RESPONDENT**

JUDGMENT

I. Introduction

1. Vide an amended memorandum of claim dated 7th October, 2022 filed in court on 12th October, 2022 through Wasilwa & Co. Advocates the claimant prays for:
 - a. A declaration that the respondent's action of summarily dismissing the claimant without justifiable reasons was wrongful, unlawful and unfair.
 - b. A declaration that the claimant is entitled to payment of terminal benefits as pleaded
 - c. An order that the respondent issues the claimant with a certificate of service
 - d. An order for the respondent to pay the claimant terminal benefits, and damages, all totalling Kshs.2,308,162.00
 - e. Interest on d) above from the date of filing this claim till payment in full
 - f. Costs of the suit plus interest thereon
2. The amended memorandum of claim is accompanied with a verifying affidavit, a list of witnesses, the claimant's witness statement, and a list of documents and a bundle of copies of the listed documents.



3. The claimant changed his representation from Wasilwa & Co. Advocates to Olonyi & Co. Advocates vide a notice of change of advocates dated 1st March, 2021 filed in court on 16th March, 2021.
4. The respondent, represented by Kagwe Kamau & Karanja Advocates, filed an amended response to the amended memorandum of claim dated 7th October, 2022. The respondent prays that the claim for Kshs.2,308,162.00 as well as other prayers by the claimant be dismissed with costs.
5. This cause came up for hearing on 15th March, 2023 when the claimant (CW1) testified and closed his case. The defence was heard on the same day when ASHOK KUMAR PATEL (RW1), the respondent's human resource manager, testified and the respondent's case was closed.
6. By consent, counsel for both parties summarized their respective client's case in written submissions. Counsel for the claimant, Mr. Olonyi, filed his submissions on 24th April, 2023 while counsel for the respondent, Mr. Omiti, filed his on 26th June, 2023.

II. The Claimant's Case

7. The claimant's case is expressed in the amended memorandum of claim, the oral and documentary evidence adduced by the claimant (CW1), and the written submissions by his counsel. The claimant's case is summed up as hereunder.
8. As pleaded in the amended memorandum of claim, from November, 2004 to 4th November, 2016, the claimant worked as a loader and assembler for the respondent. His last monthly salary was Kshs.13,000/=. In the company of a driver the claimant was responsible for collecting hardware materials from Nairobi and supplying them to the respondent's clients in towns such as Eldoret, Bungoma, Kitale, Webuye, Busia, and others in the western region of Kenya.
9. The claimant pleads that he ordinarily worked for over 14 hours a day, exceeding the statutory eight hours per day without compensation for the six hours of overtime worked.
10. The claimant states that he was neither granted leave days nor compensated for un-utilized leave time. Additionally, the claimant pleads that he and the other employees of the respondent were allocated only 45 minutes for lunch break instead of the conventional one hour.
11. The claimant pleads that on 4th November, 2016 during the lunch break he was informed by a guard that by his manager, Mr. Tom Oyier, wanted to meet him. After the lunch break, the claimant reported back to work and met the said manager who dismissed him verbally from employment without providing a reason or notice therefor. The claimant believes the dismissal was unjustified, illegal, wrongful, unfair, irresponsible, and extremely harsh, and failed to follow lawful procedures of due process. He pleads that the respondent breached various provisions of the *Employment Act* (the Act) and the principles of natural justice, to wit -
 - a. The claimant had not committed any wrong or derelation of the duty as envisaged under the law,
 - b. No show-cause letter was issued to the claimant on the respondent's intention to dismiss him,
 - c. No charges of any misconduct were laid out against him,
 - d. No hearing was given to the claimant before the decision was taken to dismiss him as provided for under section 44 of the Act, and,
 - e. Due process was thrown out of the window in the haste to summarily dismiss the claimant.



12. The claimant pleads that he is entitled to terminal dues amounting to Kshs.2,152,162.00. He avers that his employment was terminated abruptly, unfairly, and wrongfully, which led to a sudden loss of income that was traumatic as he was unable to meet his financial obligations. He is seeking maximum compensation equivalent to 12 months' gross salary.
13. It is pleaded that despite demand made and notice of intention to sue issued, the respondent has ignored, refused, or otherwise neglected to compensate the claimant leading necessitating the filing of this cause.
14. In his testimony in open court, the claimant reiterated the foregoing contents of his pleadings. He adopted his filed statement dated 11th September, 2017, alongside the list of documents of even date and a further list of documents dated 17th March, 2022. The listed documents were produced as claimant's exhibits 1 to 5 respectively.
15. In his oral testimony, the claimant stated that he was not paid for public holidays and overtime and that he worked for 10 years without taking leave.
16. In cross-examination, the claimant stated that he was orally dismissed on 4th November, 2016 by Mr. Tom Oyier, a manager of the respondent, without any notice or reason therefor. He emphasized that he was not given a hearing and or subjected to due process.
17. He stated that there were days when he worked from 8am to 10pm. He testified that he used to clock-in but the respondent rarely, deliberately and fraudulently, allowed him and the other employees to log-out as it did not wish to pay for overtime worked. He pointed out that the respondent is in possession of the employment records including his clock-in and clock-out records.
18. It is the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment to be entered in his favour as prayed in the amended memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. The Respondent's Case

19. The respondent's case is contained in the amended response to the amended memorandum of claim, the oral and documentary evidence adduced through RW1, and the written submission by its counsel. It is summarized hereunder.
20. In the amended response, the respondent denies each and every allegation made by the claimant in his amended memorandum of claim as alluded to in the foregoing paragraphs of this judgment.
21. The respondent avers that the claimant's work entailed travelling to Nairobi to collect hardware materials accompanying a driver in supplying them throughout the country on the one hand. On the other hand, the respondent avers that the claimant was employed as a loader at its godown in Nakuru and his duties and job description were limited to loading hardware merchandise in Nakuru. Therefore, the respondent avers that the claimant's employment was specific to the said go-down only.
22. The respondent admitted to the contents of paragraph 5 but denies paragraphs in regard to terminating of the claimant from his employment. The respondent further denies having employed a manager by the name of Mr. Tom Oyier at the time of the alleged termination.
23. In regard to the prayers sought, the respondent prays that the claim for Kshs.2,308,162.00 together with other prayers be dismissed with costs.



24. RW1, Mr. Ashok Kumar Patel, the respondent's human resources manager, adopted his filed statement dated 19th May, 2022 as his evidence in-chief. He testified that he was the one who hired employees and no one else. He denied that the respondent had a manager by the name of Mr. Tom Oyier but he admitted that the claimant was the respondent's employee as a loader.
25. RW1 confirmed that he was at work on 4th November, 2016 and alleged that there was no dismissal on that day. He avers that the claimant deserted work and failed to return. However, he did not inform as to whether the claimant was at work on the date alluded to above.
26. In cross-examination, he stated that there was no allowance payable to the claimant. He stated that the claimant worked for the respondent for about 10 years but left employment without notice and deserted duty. He also testified that the respondent had no obligation to look for him after he allegedly deserted duty. He stated that the demand letter presented as evidence on page 5 of the claimant's bundle of documents was not served or received by the respondent.
27. Further, he stated that there are no particulars of receipts or claims availed for travel allowance as demanded by the claimant and that there are no dates or routes indicated and as such the respondent could neither authenticate the same nor pay for the same.
28. It is on the basis of the foregoing that the respondent prays that the claimant's cause be dismissed with costs. The submissions by counsel for the Respondent shall be considered in the succeeding parts of this judgment alongside those by the counsel for the claimant.

IV. Submissions by the Claimant's Counsel

29. The claimant's counsel identified two issues for determination- Whether the claimant deserted duty or his employment was terminated; and, Whether the claimant is entitled to the reliefs sought.
30. Counsel emphasizes that the claimant denies the allegation of deserting duty at any time during his entire service of 10 years to the respondent. It is submitted that on 4th November, 2016, when the claimant was on lunch break, he was informed by a guard that the manager, Mr. Tom Oyier, wanted to see him. It is submitted that when the claimant went to meet the said manager his services were orally, on the spot, terminated. He was told to wait for communication on payment of his terminal dues upon tabulation. It is submitted that up to this day the claimant's dues have neither been tabulated nor paid.
31. In reference to the defence by the respondent, counsel submits that the respondent's witness failed to explain why they never responded to the demand letter. Counsel urges that the respondent did not commence any disciplinary process against the respondent or afford him a hearing in due process. On desertion of duty it is submitted that the respondent did not notify the Labour officer or make any efforts in tracing the claimant and establish why he had deserted duty as alleged. Counsel submits that the claimant did not desert duty as there is no evidence adduced by the respondent to prove such desertion. It is submitted that the evidence on record confirms that the claimant was unfairly and unlawfully terminated without due process.
32. On the issue of unfair termination, counsel has cited section 41 of the Act on procedural fairness in dismissal or termination. Counsel argues that the respondent breached and abused the said law by denying the claimant a hearing. Counsel has also cited section 35 of the Act on notice before termination and it is submitted that the respondent again violated the same. It is submitted that the claimant's termination was unfair both procedurally and substantively.
33. On the appropriate reliefs, counsel submits that the claimant is entitled to the maximum compensation equivalent to 12 months gross pay for unfair termination under section 49 of the Act.



34. On the issue of gratuity, counsel has cited section 35(5) of the Act which provides that an employee is entitled to service pay for each year worked. The claimant pleaded for Kshs.109, 200/= to be awarded which counsel submits to be fair.
35. On the issue of unpaid leave, overtime, public holidays, and travelling allowance, counsel gave a tabulation and submitted that the same to be awarded as follows -
 - a. Unpaid leave Kshs.105,000/=
 - b. Overtime Kshs.1, 425,762/=
 - c. Public holidays Kshs.54,000/=
 - d. Travel allowance Kshs.432,000/=
36. In conclusion, the claimant's counsel submits that the claimant's termination was unfair and unlawful, both in substance and procedure. It is urged that the claim be allowed with costs.

V. Submissions by the Respondent's Counsel

37. The respondent's counsel identified two issues of determination- Whether the claimant was unfairly or wrongfully terminated; and, Whether the claimant is entitled to the reliefs prayed for in the amended memorandum of claim dated 7th October, 2022.
38. However, in the submissions counsel did not submit on the unfairness and or unlawfulness of the termination as alleged, alluded, and proclaimed by the claimant in his pleadings, testimony in court, and in the submissions by claimant's counsel. Counsel for the respondent opted to submit on the inappropriateness or disentitlement to the claimant of the reliefs sought.
39. In the circumstances, the submissions by counsel for the respondent on reliefs shall be considered in a succeeding section of this judgment alongside those by the counsel for the claimant.
40. Counsel has cited the Court of Appeal decision in Co-operative Bank of Kenya Ltd vs Banking Insurance Finance Union CA No. 188 of 2014 where it was held that in exercising the discretion of which remedy to award, the court must be guided by the comprehensive list of considerations under Section 49(4) of the Act. In Ol Pejeta Ranching Limited vs David Wanjau Muhoro (2017) eKLR it was held that the trial judge has discretion in making an appropriate award. However, such exercise of discretion should not be capricious or whimsical.
41. Counsel argues that the claimant has not provided enough evidence to be fully compensated for unfair termination. It is submitted that the claimant's testimony did not corroborate the circumstances that allegedly led to his termination. Counsel emphasizes that the reliefs sought by the claimant are not only discretionary but the same must be subjected to the factors listed under Section 49(4) of the Act.
42. On the untaken leave days, overtime, unpaid public holidays, and travelling allowance counsel cited the cases of Peter Ngunjiri Kariuki vs Board of Management Magomano Secondary school (2022) eKLR, Stephen Kamau Karanja vs Family Bank Ltd (201) eKLR and Berina Nthenya Musila & 3 others vs East African Growers Limited (2021) eKLR in propounding that the claimant is not entitled to the said reliefs as pleaded and sought.
43. On the issue of gratuity, counsel submits that the claimant is not entitled to Kshs.109,200/= as there is no legal basis for award of the same.



44. On the NSSF contributions, counsel submits that the claimant is not entitled to the claimed Kshs.132,000/=. It is further submitted that the claimant is barred from making service pay claims under Section 35(6) (d) of the Act.

VI. Issues for Determination

45. The court has carefully and dutifully gone through the pleadings filed, oral and documentary evidence presented from both sides, and the written submissions by counsel for both parties. In my considered view, the following issues commend themselves to this court for determination -
- a. Whether the claimant's termination was unfair and unlawful;
 - b. Whether the claimant is entitled to the reliefs sought; and,
 - c. Costs.

VII. Termination

46. Section 45 (1) and (2) of the Act provides as follows -
- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
47. Further, Section 44 of the Act provides for summary dismissal, that is termination without notice or on a shorter notice than the agreed period or provided for in the law, for reason of absenteeism from work, being intoxicated in the workplace, neglect to perform any work, an employee using abusive or insulting language at the workplace, failing to abide by a lawful command in the course of duty from an employer at the workplace, an employee having been arrested for a cognizable offence, or being suspected of committing a criminal offence against or to the substantial detriment of his employer's property.
48. Section 47 (5) of the Act provides that -
- For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
49. The claimant pleaded and testified that on 4th November, 2016 he was informed by a guard during his lunch break that a manager by the name of Mr. Tom Oyier wanted to see him. After his lunch break the claimant proceeded to meet the said manager and the two had the following conversation:
- Tom: wewe rudi nimekuongeza lunch
(You go back as I have added more time to your lunch break)



The Mimi nishaenda lunch. Kama kuna kosa nimefanya niambie (I have already gone for lunch. If claimant has committed a wrong, kindly tell me.)

Tom: Huyu ni kama anataka kufutwa. Kaa pale ufanyiwe hesabu yako. Umefutwa. (Looks like this one wants to be fired. Sit over there you wait for your tabulation of your dues. You have been fired.)

50. Although RW1 denied that there was ever a manager of the respondent by the name Mr. Tom Oyier, there is no convincing evidence or information on how the claimant left his employment with the respondent after serving for over 10 years. RW1 alleged that the claimant deserted duty and yet no efforts were made to trace him or get into contact with him. That cannot be true as the respondent, as a responsible employer, ought to have made efforts to trace and confirm the whereabouts of the claimant who had offered them such long service. Besides, the respondent ought to have informed the local labour office of the desertion. Even if the claimant had deserted duty as alleged, which is however not the case, is what RW1 stated in court the way to treat and part ways with an employee who had served for over 10 years? The statement by RW1 to the effect that the respondent was under no obligation to look for the claimant after the alleged desertion is arrogant, irresponsible, and against best labour practices. The respondent had an obligation to establish why the claimant had deserted duty and his whereabouts just in case he needed medical care or attention or had other urgent need. Mind you the claimant was not a casual; he was a long time employee of the respondent.
51. In any event, no evidence was availed by the respondent on how long the claimant absconded duty, the dates thereof, and what efforts were made to establish the reason(s) for his absence.

In the circumstances, the court is inclined to believing the evidence by the claimant that he was orally dismissed without notice following the above, not-so-friendly, interaction with the manager. That termination cannot find any backing or justification in the afore-stated law. The same was wrongful, unfair, and unlawful, lacking both in substance and procedure. It is so held and declared – See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.

VIII. Reliefs

52. Having found and held that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful, the court shall in this section consider each of the reliefs sought in a chronological order as hereunder.
53. Prayer (a) is for a declaration that the summary dismissal of the claimant was wrongful, unfair, and unlawful. The court has found as such in the foregoing paragraphs and a declaration is hereby issued accordingly.
54. Prayers (b) and (d) are in regard to various items of reliefs as deliberated on hereunder.
55. Item (i) is for notice pay in the sum of Kshs.13,000/= being the last gross monthly salary. This salary is not disputed by the respondent and in any event no alternative pay has been submitted by the respondent as the custodian of the employment records. No notice was issued to the claimant before dismissal and as such the above claim is allowed and awarded in the pleaded sum.
56. Item (ii) is for leave pay for untaken leave in the sum of Kshs.105,000/= for the period of 10 years worked. It is important to note that Section 90 of the Act limits this court to claims falling within three years from the accrual of the claim. The court shall therefore grant the leave pay for three years only which amounts to Kshs.31,500/=. It was incumbent upon the respondent to avail records of



- employment of the claimant so as to establish that he indeed took leave contrary to his assertion. The respondent therefore failed to dislodge this claim by the claimant and the same is allowed as above.
57. Item (iii) is for overtime for an alleged period of 12 years amounting to Kshs.1,425,762/=. Again, the court can only bed backwards for three years from 4th November, 2016. This claim brings to the fore two diametrically opposed aspects in employment causes. On the one hand, under Sections 10 and 74 of the Act it is the duty and indeed obligation of an employer to keep and maintain records of employment. Legally, therefore, when the claimant made this claim the respondent ought to have filed records to show and prove claimant's work attendance.
 58. On the other hand, is the age-old evidential principle and doctrine that he who alleges shall prove, derived from Sections 106, 107, 108, and 109 of the *Evidence Act*.
 59. However, the puzzle above is not hard to solve or discern. While the *Evidence Act* is the general law applicable in matters evidence, it is within legal limits for a specific law to provide for and place a burden on a specific party to prove specific aspects of an issue in contest. Ostensibly, Sections 10 and 74 of the Act cited above place a burden on an employer to keep and avail records of employment and that is the only way that an allegation made by an employee on specific matters, such as being present or absent at work, hours worked, job description, and salary paid, may be rebutted and countered by an employer. Failure by an employer to avail and provide such records renders the court amenable to upholding the position and oral evidence by the employee.
 60. This cause and the evidence adduced herein is distinguishable from the decision of this court in Peter Ngunjiri Kariuki V Board of Management Magomano Secondary School (2022) eKLR wherein the claimant failed to prove the fact of his employment as to then render the court to decide on the reliefs sought therein.
 61. The question then becomes – how much overtime did the claimant work for the applicable period of three years? In the considered view of this court a claim for overtime is not in the category of continuous injury as each overtime period worked is payable as and of its own right to the claimant at the end of salary-payment period, in this cause end of each month.
 62. However, there are no particulars of the overtime worked listed or pleaded by the claimant. On which dates and for how many hours did the claimant work overtime over the applicable period of three years from November, 2013 to November, 2016? So as to properly shift the burden of proof to the employer, an employee shall plead the particulars of such claim with precision so as to evidentially and lawfully call upon the employer to respond thereto. That is how the burden of proof is legally and properly shifted. Law is to a large extent about logic and common sense. Rhetorically, for what period and for which specific days/dates was the respondent to avail records so as to rebut the allegations by the claimant on overtime?
 63. Illustratively, the claimant did not, even in his oral testimony, avail any evidence and particulars of the dates when he worked overtime. Would it be fair, just, logical, reasonable, and lawful for this court to award the blanket figure for the applicable period of three years? My answer is no. As much as the standard of proof is on a balance of probability the claimant ought to have specified the dates/days when he did overtime and the number of hours worked overtime for each of those dates/days. That way the burden of proof would have properly and legally shifted upon the respondent to avail the employment records for the specific dates/days and the hours of overtime, if any, worked.
 64. For the foregoing reasons the court shall deny the claimant prayers (iii) and (iv).
 65. Item (v) is for travelling allowance of Kshs.432,000/=. Again, no evidence was adduced in support of this claim. It was not proved as a term of the contract or a payable allowance under any other head or



circumstance(s). To re-emphasize what has already been stated and concluded in the foregoing parts of this judgment, it is not enough for a litigant to file a cause and throw the same to the face of the court and urge the court to find in his/her/its favour. A cause must be properly pleaded and proved to the required standard in law, which in civil cases is on a balance of probability, and beyond reasonable doubt in criminal cases. This prayer shall therefore fail and is denied.

66. Item (vi) is for gratuity in the sum of Kshs.109,200/=. For the umpteenth time the court re-states that gratuity is not a birth-right to any employee. It can only be paid where it is a term of the contract and the employee has met the conditions set therein, or at the discretion or behest of an employer as gratitude to an employee who is deemed to have served well. The claim by the claimant herein does not meet either of the two conditions. The sample letter of appointment annexed to the original claim, which is in any event not signed by the respondent, does not provide for payment of gratuity. May be, if properly pleaded and proved, the claimant may have been entitled to service pay. However, service pay is neither pleaded nor prayed for. This relief for gratuity is denied in toto.
67. Item (vii) is for NSSF contributions for years 2006, 2007, and 2008. Again, no basis has been laid for this claim either in the memorandum of claim or in the evidence adduced. Is it that the statutory deductions were made and not submitted to NSSF? In any event, the claim is statutory time barred and the same is denied and dismissed.
68. The claimant prays for maximum compensation in the sum of Kshs.156,000/= which is equivalent to 12 month's gross salary. The circumstances under which the claimant's employment terminated is sad and sympathetic. While this is not a court of sympathy or empathy but a court of law, the respondent was grossly unfair to the claimant who had served it for over 10 years prior to the dismissal. No reason was given for the dismissal and the claimant was denied due process. The respondent did not bother to follow up and pay whatever terminal benefits that it considered due and payable to the claimant after the wrongful dismissal. The parties have not expressed willingness to re-engage and the claimant considers himself dismissed for good. There cannot be any debate that the claimant must have suffered financially for no fault of his own.
69. Considering the factors listed in Section 49(4) of the Act, this court is of the view that this is a proper cause for award of the maximum compensation equivalent to 12 months gross salary. This relief is therefore allowed as prayed. The award is subject to statutory deductions.
70. Prayer (c) is that the respondent be ordered to issue the claimant with a certificate of service in accordance with Section 51 of the Act. This relief is allowed as prayed.
71. The awarded amounts shall earn interest at court rates from the date of this judgment till payment in full as per prayer (e).

IX. Orders

72. This court enters judgment in favour of the claimant against the respondent as follows -
 - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair and unlawful.
 - b. Consequently, the claimant is awarded as follows -
 - i. One month's salary
in lieu of notice Kshs.13,000/=
 - ii. Compensation for unfair



Termination Kshs.156,000/=

TotalKshs.169,000/=

- c. The above award shall attract interest at court rates from the date of this judgment till payment in full.
- d. The respondent is hereby ordered to issue and deliver a certificate of service to the claimant within 30 days of the date hereof.
- e. The claimant is awarded costs of the cause.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 4TH DAY OF APRIL, 2024.

.....

DAVID NDERITU

JUDGE

