



**Mwaura v Gelmax Power Solutions Ltd (Cause 2024 of 2015)
[2024] KEELRC 1517 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1517 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2024 OF 2015
MA ONYANGO, J
JUNE 6, 2024**

BETWEEN

MATTHEW GITAU MWAURA CLAIMANT

AND

GELMAX POWER SOLUTIONS LTD RESPONDENT

JUDGMENT

1. Vide his Statement of Claim dated 12th November 2015 and filed on the same day against the Respondent, the Claimant alleges that his employment was wrongfully and unlawfully terminated by the Respondent and that he was not paid his terminal dues. He seeks the following reliefs:
 - i. The sum of Kshs 804,294.40 inclusive of compensation for wrongful dismissal to a maximum of 12 month’s wages.
 - ii. Costs of this suit
 - iii. Interest in (i) and (ii) above.
 - iv. Any other relief as the Court may deem just.
2. The Claimant particularized the compensation he is seeking from the Respondent as follows:
 - a. 3 months in lieu of notice.....Kshs 19,800
 - b. Salary arrears for Nov-Dec 2014.....Kshs 39,600
 - c. Unremitted NSSF deductions for Sept 2010 to Dec 2014(400 x 52).....Kshs 20,800
 - d. Service pay(19800/30 x 15x 7.9).....Kshs 78,210
 - e. Unremitted NHIF deductions for 52 months



- 320 x 52).....Kshs 16,640
- f. House allowance@15% on basic salary
(19800x15%x12x7.9).....Kshs 282,150
- g. Accrued leave days and not taken for 7.9 yrs
(19,800/30x21x7.9 yrs).....Kshs 109,494
- h. Compensation for unfair termination equivalent of 12 months' salary.....Kshs 237,600
- Total.....Kshs 804,294

3. The Claimant states that on or about 14th February 2007, the Respondent employed him as a driver through an oral contract at a monthly salary of Kshs 13,000 and that at the time he was terminated, he was earning Kshs 19,800.
4. He avers that he served the Respondent with loyalty and diligence until 31st December 2014 when his employment was terminated without due process.
5. On 17th December 2015, the Respondent filed a Memorandum of Reply dated 11th December 2015 denying the averments in the claim in totality.
6. In response to the averment by the Claimant that he served the Respondent with diligence and loyalty, the Respondent stated that the Claimant was a cantankerous individual who treated his duties with disdain and who had on more than one occasion been subjected to disciplinary hearings over his conduct at work, which conduct occasioned the Respondent monetary loss.
7. The Respondent stated that the Claimant's employment was not terminated, that on the contrary he wilfully absconded duty. The Respondent denied owing the Claimant terminal dues. It is the Respondent's case that the Claimant was paid a consolidated salary inclusive of all allowances payable to him. It is also contended that the Claimant had taken all his leave days.
8. The Claim was heard on 12th November 2019 when the Claimant testified as CW1 in furtherance of his case. CW1 told the court that he worked for the Respondent as a driver and a mason from 2007 to 2014. It was CW1's evidence that he was dismissed from employment on 31st December 2014 after he started following up on his unpaid salaries, the NHIF and NSSF deductions which were not being remitted. The Claimant prayed for payment of the November and December 2014 salary, service for 8 years, the unremitted NHIF deductions, leave allowance, house allowance, salary in lieu of notice as well as compensation for the unfair termination of his employment.
9. On cross examination by Mr. Onsare Counsel for the Respondent, the Claimant maintained that his salary excluded house allowance and that he was never told that the salary was consolidated.
10. The Respondent called Shadrack Wambua Mwalali who testified on 9th November 2021 as RW1 and introduced himself as one of the Directors of the Respondent. He adopted his witness statement dated 29th October 2019 as part of his evidence in chief. He also relied on the bundle of documents dated 11th December 2015 in support of the Respondent's case.
11. RW1 in his testimony stated that the Respondent employed the Claimant on permanent basis from March 2010. That the Claimant worked until 24th December 2014 when the company broke for Christmas and never reported back to work when the office reopened in January, 2015. According to RW1, the 24th of December 2014 was the last working day of the year for the company and the Claimant



left for the holidays but did not report to work on 6th January 2015. RW1 stated that he reached out to the Claimant on phone on 8th January 2015 and the Claimant told him that he was no longer interested in working for the Respondent.

12. RW1 told the court that the Claimant took leave during the course of employment and that he did not have any outstanding leave days.
13. On cross examination, RW1 stated that the Claimant was paid his salary for November 2014 and that the only salary that he is owed is the salary for December 2014 as the salary was to be paid in January 2015 after the Claimant absconded duty. That the same remained uncollected.

The Submissions

14. In his submissions dated 2nd December 2021, the Claimant framed the issues for determination to be:
 - i. Whether the termination of the Claimant's employment was wrongful, unfair and unlawful in the circumstances.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Whether the Claimant is entitled to the costs of the cause.
15. In addressing the first issue, the Claimant submitted that the termination of his employment was unfair and unlawful. That the Claimant worked for the Respondent for almost 8 years diligently. It was further submitted that there is no evidence or warning letters produced to demonstrate that he was not loyal.
16. The Claimant urged the court to find that he was unfairly, wrongfully and unlawfully terminated from employment.
17. On whether the Claimant is entitled to the reliefs sought, it is submitted that the Claimant had proved that he is entitled to the unpaid salary as the Respondent did not produce any proof of payment of the salaries or of receipt of the same by the Claimant. With regard to the NSSF and NHIF refunds, it was submitted that the Respondent never produced any employment records to rebut the claims. He submitted that he was entitled to service pay and leave allowance for the accrued leave days. Lastly, the Claimant submitted that he is entitled to costs. He urged the court to award him the Kshs. 804, 294.00 he sought in his Memorandum of Claim.
18. The Respondent on the other hand, in its submissions dated 4th February 2022 denied that the Claimant was unfairly terminated from employment and maintained that he absconded duty. According to the Respondent, the Claimant did not provide any evidence on where and how the termination took place. It is further submitted that there is no evidence advancing the allegation of non-payment of statutory deductions and salaries. The Respondent submitted that the Claimant had failed to discharge his burden of proof to the required standard.
19. The Respondent implored the court to find that the Claimant had absconded duty and averred that there is no provision in law on the procedure to be followed where an employee absconds duty. While citing the decisions in *Boniface Francis Mwangi v BOM Iyego Secondary School* (2019) eKLR and *Simon Mbithi Mbane v Inter Security Ltd* (2018) eKLR, the Respondent submitted that precedence dictates that the employer must go a step further and make an effort to contact the employee and that in the instant case, RW1 called the Claimant to inquire his whereabouts after he failed to report on duty and the Claimant told him that he was no longer interested in working for the Respondent.



20. With regard to the prayers sought by the Claimant in his Memorandum of Claim, the Respondent maintained that the Claimant was paid all his dues and is therefore not entitled to the prayers he is seeking in his Memorandum of Claim. The court was urged to dismiss this suit with costs.

Determination

21. Upon considering the pleadings, evidence of the respective parties, the submissions and the authorities cited, I find that the issues for determination are: -
- i. Whether the Claimant was unlawfully terminated or he absconded duty;
 - ii. Whether the Claimant is entitled to the remedies sought.
22. On the first issue, it is the Claimant's submission that his employment was unprocedurally and unlawfully terminated by the Respondent on 31st December 2014.
23. The Respondent on the other hand maintained that the Claimant did not report to work on 6th January 2015 when he was expected to and on being called by the Respondent's witness, RW1, he stated that he was no longer interested in working for the Respondent.
24. This court has in several decisions dealt substantively with cases where an employer pleads in its defence that an employee absconded duty. In the case of *Felistas Acheba Ikatwa vs Charles Peter Otieno* [2018] eKLR, the court pronounced itself 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 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.”
25. Further, in the case of *Judith Atieno Ouwor v Sameer Agriculture and Livestock Ltd* (2020) eKLR, this court observed as follows:
- “Further, 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 there 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 termination.”
26. In the instant case, although the Respondent's witness in his testimony stated that he reached out to the Claimant on 8th January 2015 to inquire why he had not reported to work, no documentary evidence was produced in court to prove that the Respondent made efforts to reach out to the Claimant, so as to disapprove the allegation that he was terminated from employment.
27. In the absence of any evidence to confirm that the Respondent reached out to the Claimant, this court finds that the Respondent being the employer, had the onus of providing employment records including call records to show that it reached out to the Claimant or that the Claimant indeed absconded duty. It is therefore the finding of this court that the Respondent did not prove that the Claimant absconded duty. The court concludes that the termination of the Claimant's employment was unfair within the meaning of section 45 of the *Employment Act*, 2007.

What reliefs should then issue?



28. The Claimant particularized and sought the following reliefs which I proceed to address in separate heads.

a. Salary in lieu of notice

The parties herein are not disputing that the Claimant was employed verbally and that no employment contract was ever executed by the parties. In the absence of an employment contract stipulating the notice period, I award the Claimant one month's salary in lieu of notice in terms of section 35(1)(c) of the [employment Act](#).

b. Salary arrears

The Respondent's witness maintained that the Claimant was paid his November 2014 salary and that the Claimant absconded duty before he was paid the December 2014 salary. The court was told that the Claimant was paid salary in cash. No documentation in form of a voucher or any paperwork showing that he signed acknowledging that he was paid was tendered in court to confirm that the Claimant had indeed been paid his November salary. I therefore award the Claimant salary for November and December 2014.

c. Unremitted NSSF and NHIF deductions

The Claimant in his testimony told the court that the Respondent remitted the NHIF and NSSF deductions after he filed the instant suit. From a perusal of the Respondent's documents, there is evidence that these deductions were remitted to the statutory bodies. It therefore follows that the Claimant is not entitled to this relief.

d. Service pay

Section 35(6) of the [Employment Act](#) excludes employees who are members of NSSF from the benefit of service pay. Having found that the Respondent remitted the Claimant's NSSF contributions, the Claimant is not entitled to service pay.

e. House allowance

The Claimant had worked for the Respondent for almost 8 years on an oral contract without defined terms of employment. He did not adduce any evidence that he had at any time sought payment of house allowance. Having been in employment that long, what he would be entitled to is underpayments if the salary paid to him was less than the statutory minimum wages gazetted under the Regulation of Wages (General) Order.

The Claimant having been a driver cum mason, and having not stated that he was a graded artisan, I will assume that he was an ungraded artisan and drove a small vehicle. The statutory minimum wage for both positions as per General Order of 2013 which was in force in December, 2014 when the Claimant's employment was terminated is Kshs. 13,201.55 for both driver (cars and light vans) and ungraded artisan. With 15% house allowance (Kshs. 1980.50) the consolidated salary was Kshs. 15,181.80. His salary having been 19,800, I find that the Claimant was paid a consolidated salary and is not entitled to house allowance. I therefore decline the prayer for house allowance at 15% of the basic salary.

f. Accrued leave days and not taken

In his testimony, the Claimant averred that he never went on leave during the course of his employment with the Respondent. On the other hand, the Respondent maintained that the Claimant had no outstanding leave days as he had exhausted all his leave days as at the time he left employment. Section 74 of the [Employment Act](#) confers responsibility on the employer to



keep employee records. In the absence of documentation to prove that the Claimant went on leave during his employment period, I award the Claimant leave for the duration served.

- g. 12 months Compensation for unfair termination

The Respondent having failed to prove the reasons for termination of the Claimant's employment, and the termination having been unprocedural and unlawful, the Claimant is entitled to compensation in terms of section 49 of the *Employment Act*. Taking into account his length of service and all other relevant factors under section 49(4) of the Act, I award the Claimant 6 months' salary as compensation.

29. In the end, I enter judgment in favor of the Claimant in the following terms:

- i. 1 month's salary in lieu of notice.....Kshs. 19,800
- ii. Salary for November and
December 2014Kshs 39,600
- iii. Accrued leave pay for 7 years 9 months.... Kshs 109,494
- iv. 6 months' salary as compensation for unfair
Termination..... Kshs 118,800
Total..... Kshs. 287,694

30. The Respondent shall bear the Claimant's costs of this suit.

31. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 6TH DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE

