



**Juma v Robinson Investment Limited (Cause 185 of 2017)
[2024] KEELRC 2229 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2229 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 185 OF 2017
DN NDERITU, J
SEPTEMBER 19, 2024**

BETWEEN

LILIAN AYUMA JUMA CLAIMANT

AND

ROBINSON INVESTMENT LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a statement of claim dated 10th April, 2017 filed in court on 24th April, 2017 through Maragia Ogaro & Co Advocates. As it is the procedure, the statement of claim is accompanied with a verifying affidavit sworn by the claimant, a witness statement by the claimant, a list of documents and a bundle of copies of the listed documents. The claimant filed a second witness statement on 25th February, 2022 and a further list of documents and a bundle of copies of the listed documents on 21st March, 2022.
2. On 30th June, 2017 the claimant filed an amended statement of claim wherein she is seeking for the following reliefs –
 - a. Notice - Kshs 13,029.62
 - b. Arrears - Kshs 5,816.79
 - c. Underpayment - Kshs 69,479.25
 - d. Overtime - Kshs 118,331.00
 - e. Off duties - Kshs 58,966.12
 - f. Public holidays - Kshs 12,898.87



- g. Leave - Kshs 9,120.00
- h. Uniform money - Kshs 1,500.00
- i. Compensation - Kshs 156,348.00
- j. Medical expenses - Kshs 20,000.00

Total Kshs 465,509.65

3. The respondent through Githiru & Co. Advocates filed a memorandum of response to the claim on 7th June, 2017 wherein the claim is denied and the court urged to dismiss the entire cause with costs. Copies of two documents were filed alongside the response. Further lists and bundles of copies of documents were filed on 9th February, 2022, 14th February, 2022, and on 4th March, 2022.
4. A witness statement by Agnes Mukami Rutinu was filed on 2nd July, 2018 but later substituted with that of Stephen Mogusu (RW1) filed on 11th October, 2022.
5. After a considerably lengthy period of dormancy the cause came up in open court for hearing on 13th June, 2023 when the claimant (CW1) testified and closed her case. The defence was heard on the same day with RW1 testifying and the respondent's case was closed.
6. Counsel for both parties addressed the court by way of written submissions. Mr. Maragia for the claimant filed his written submissions on 31st July, 2023 while Mr. Githiru for the respondent filed on 23rd August, 2023.

II. The Claimant's Case

7. The claimant's case is expressed in the amended statement of claim, the oral and documentary evidence adduced by the claimant (CW1), and in the written submissions by her counsel.
8. In the amended statement of claim, the claimant pleaded that the respondent is a limited liability company offering security services in Nakuru City and elsewhere in the Republic of Kenya. It is pleaded that in September, 2014 the claimant was engaged by the respondent as a security guard and worked continuously until November, 2015 when she was allegedly wrongfully, unfairly, and unlawfully dismissed.
9. It is the claimant's case that the dismissal lacked both in substance and procedure as no show-cause notice was issued and served upon her and she was denied due process.
10. It is the claimant's case that she was denied pay for overtime worked, off duty not taken, public holidays worked, leave not taken, and that she was underpaid throughout the entire period of her employment.
11. In her testimony in court the claimant adopted her written statement filed on 25th February, 2022 as her evidence-in-chief. She withdrew the statement of 10th April, 2017. She produced all her filed documents as exhibits 1 to 13. She clarified that she was engaged by the respondent as a female guard (guardette) in September, 2014 and dismissed in November, 2015. She stated that she was neither informed of the reasons for the dismissal nor issued with a notice nor subjected to due process. She stated that the respondent denied her salary for October and November, 2015. She denied deserting duty as alleged by the respondent in its defence. She stated that she worked for 12 hours a day from 6am to 8pm without compensation for overtime.
12. The claimant stated that the records of work attendance lists filed by the respondent are false and she denied ever signing the muster roll or the duty roster filed. In asserting her testimony on this issue, the



claimant stated that she was involved in a road traffic accident in February, 2015 as a result of which she could not attend work from 9th to 28th of that month yet the records indicate that she was at work. She emphasized that the records filed by the respondent are all false. She stated that while she was terminated in 2015 the records filed by the respondents indicate that she was still an employee of the respondent in 2021 clearly demonstrating that they are all false/forgery.

13. She stated that her salary as at the time of dismissal was Kshs 7,000/= but the respondent made unlawful and unexplained deductions without settling the difference. She stated that she worked on all public holidays and was denied off-days and leave.
14. In cross-examination the claimant stated that she was involved in a road traffic accident on 4th February, 2015 when riding on a motorbike. She stated that her last salary was Kshs 7040/=. She stated that she was not a casual but on a contract for six months. She stated that on the day of dismissal in September, 2015 she was summoned by the human resources manager and told that her services were no longer needed without any notice or explanation. She insisted that she did not desert duty and that her disciplinary record was clean.
15. In re-examination the claimant stated that the respondent was aware of her sickness in February, 2015 following the road traffic accident and that the human resources manager visited her in the hospital and as such the reason for her absence from duty in that month was well known and documented by the respondent.
16. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in her favour as prayed in the amended statement of claim. The submissions by her counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

17. The respondent's case is contained in the statement of response to the claim, the oral and documentary evidence adduced through RW1 and the written submissions by its counsel.
18. In the response to the statement of claim the respondent vehemently opposed the prayers in the statement of claim. While it is admitted that the claimant was engaged by the respondent as a day-guard from 5th September, 2014 following her application dated 3rd September, 2014, it is stated that on 19th July, 2015 the claimant deserted duty as a result whereof a warning letter was issued to her and she did not ever return to work thereafter. It is thus pleaded that the claimant was not dismissed or terminated howsoever but rather she deserted duty. It is pleaded that nonetheless the desertion amounted to gross misconduct and a warning letter dated 20th July, 2015 was consequently issued to the claimant. It is further pleaded that it is the claimant who constructively terminated her employment through desertion. In the circumstances, it is pleaded that the claimant is not entitled to any of the reliefs sought.
19. In his testimony in court RW1, the human resources manager, relied on and adopted his written statement filed on 11th October, 2022 as his evidence-in-chief. He produced the filed documents as respondent's exhibits 1 to 4. He claimed that the claimant was a casual employee who worked for less than one year from 5th September, 2014 to 19th July, 2015. He stated that the claimant was on a daily wage of Kshs 300/=. He further stated that the claimant served as a day-guard in a local supermarket and that guards worked on three shifts – 6am to 1pm, 1pm to 9pm, and 9pm to 6am. He stated that the claimant worked for only eight hours a day as per the muster roll availed and produced in court. He stated that the claimant was entitled to one off-day per week and that she took all her off-days.



20. He testified that the claimant failed to report to work on 19th July, 2015 as a result whereof she was issued with a warning letter dated 20th July, 2015. It is pleaded that the claimant failed to ever report to work again hence terminating her own employment. He stated that it is true that the claimant was injured in a road traffic accident in February, 2014 but she subsequently fully recovered from allegedly minor injuries that she sustained and resumed duty until 19th July, 2015 when she deserted duty for good. He stated that since the claimant was a casual the respondent presumed that she had terminated her services with the respondent without notice.
21. He stated that the fact that the claimant was a casual can be ascertained by the fact that she was paid less for February, 2014 when she was absent from work for several days. He stated that the respondent was under no legal obligation to meet the medical expenses incurred by the claimant as a result of the road traffic accident as she was not injured at work but on a motorbike ride as she went home. He stated that the claimant is not entitled to any of the reliefs sought.
22. In cross-examination RW1 alleged that the respondent attempted to contact the claimant on phone after she deserted duty and even sent her supervisor but she adamantly refused to resume work. However, he admitted that no formal communication was addressed to her. He admitted that the respondent had no records of leave or off-days taken by the claimant. He also admitted that there was no evidence that the warning letter dated 20th July, 2015 was served upon the claimant. He alleged that the claimant was paid her salary for July, August, and September, 2015 which according to him was an overpayment. However, he admitted that the respondent had not counter-claimed for the alleged overpayment of salary or return of the uniform from the claimant. He stated that the claimant worked for less than one year as a casual and hence did not earn annual leave.
23. It is on the basis of the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs. The submissions by the respondent's counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions

24. On the one hand, the claimant's counsel identified the following issues for determination –
 1. Whether the claimant was employed by the respondent and in what capacity.
 2. When the employment ended. Was it July, 2015 or November, 2015.
 3. Who ended the employment. Did the claimant desert duty or was he terminated?
 4. Whether the Respondent's documents as filed meet the threshold of reliance by Court in terms of Section 75 of the [Employment Act](#) in regard to authenticity.
 5. Whether the respondent has disproved the claimant contention for the reliefs of Overtime, off duties, Public holidays and leave.
 6. Whether the respondent underpaid the claimant and if the claimant is entitled to the relief.
 7. Whether the claimant is entitled to notice pay and compensation in proof of termination.
 8. Whether there exists salary arrears and if the claimant is entitled to the same.
 9. Whether the claimant is entitled to uniform refund.
 10. Whether the claimant is entitled to medical expenses refund.
 11. Who bore costs of the suit?



25. On the first issue, it is submitted that the uncontested evidence is that the claimant was engaged by the respondent as a day-guard and served from September, 2014 to November, 2015.
26. On the second issue, it is submitted that the respondent terminated the claimant in November, 2015. It is submitted that the allegation by the respondent that the claimant deserted duty on 19th July, 2015 does not hold water as the bank statements availed by the claimant as exhibit confirm that she was paid a salary up to September, 2015 and that if the salary was paid in error as claimed by RW1 there is no evidence that the respondent ever demanded or recovered the same from the claimant. Further, it is submitted that the muster-roll filed confirms that indeed the claimant was in attendance and in employment of the respondent for July, August, September, October, and November, 2015. It is submitted that this renders the allegation by the respondent that the claimant absconded duty in July, 2015 false and dishonest.
27. It is submitted that the documents filed by the respondent were all falsely manufactured with the sole purpose of defending the cause. It is submitted that while the warning letter dated 20th July, 2015 claims that the claimant failed to show-up for work on 19th July, 2015 the muster-roll produced by the respondent confirms that indeed the claimant was at work on 19th July, 2015. Further, it is submitted that while the respondent's case as advanced in the evidence of RW1 alleges that the claimant did not return to work after 19th July, 2015 the muster-roll indicates that the claimant was indeed at work after that date.
28. On overtime claimed it is submitted that it was upon the respondent, the employer and custodian of employment records, to avail records to show how many hours the claimant worked. It is submitted that by failing to avail such records the claimant's relief on pay for overtime, off-duties, leave, and public holidays remain unchallenged. The court is urged to allow the same.
29. On underpayments it is submitted that the position of a guard is in the category of a general worker in the scale of minimum wages. It is submitted that Section 26(1) of the *Employment Act* (the Act) and Section 48(1) & (2) of the *Labour Institutions Act* make it mandatory for employers to pay not less than the gazetted minimum wage. It is submitted that since the claimant's salary was paid through her bank account for which the statements have been filed and produced in court the claimant has demonstrated and proved that she was indeed underpaid as claimed.
30. Likewise, it is submitted that the claimant was not issued with a notice of termination and she is thus entitled to payment in lieu thereof in accordance with Section 36 of the Act. The court is further urged to allow the claim for compensation, salary arrears, deposit on uniform, and the medical expenses as claimed.
31. The court is urged to allow the cause in its entirety with costs.
32. On the other hand, counsel for the respondent identified the following issues for determination by the court –
 - a. Whether the claimant's employment was terminated or did she desert her employment?
 - b. Whether claimant was underpaid?
 - c. Whether the claimant worked overtime and during public holidays?
 - d. Whether the claimant is entitled to relief sought or she has no claim against the respondent
 - e. Who should pay the costs hereof?



33. It is submitted that having deserted duty the claimant is not entitled to any compensation as she is the author of her own misfortune. It is submitted that the claimant served on agreed terms and conditions including the salary paid and as such she cannot turn around and claim underpayment. Further, it is submitted that the claimant worked for only eight hours a day as per the checklist adduced as evidence. It is submitted that the claimant did not work on public holidays. It is further submitted that the claimant did not surrender her uniform as she deserted duty and all attempts by the respondent to contact her thereafter were futile.
34. The court is urged to dismiss the entire cause with costs.

V. Issues For Determination

35. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for the parties. The following issues commend themselves to the court for determination-
- a. What was the nature, terms, and conditions of engagement of the claimant by the respondent?
 - b. Whether the claimant deserted duty or was terminated.
 - c. Whether the claimant is entitled to the reliefs sought.
 - d. Who should bear the costs of the cause?

VI. Employment

36. By way of a letter dated 3rd September, 2014 the claimant applied for an unspecified job with the respondent in their “security office”. In an agreement dated 6th September, the claimant was offered employment as a “casual security guard” for an all-inclusive monthly salary of Kshs 9,500/=. The contract indicated that the engagement was valid for one year (12 months) from the date thereof and the claimant was to commence work immediately.
37. The evidence on record is that the claimant commenced duty and worked until 19th July, 2015, according to the respondent, or according to the claimant until November, 2015. What is not in dispute, however, is that the claimant was in continuous employment of the respondent at least up to July, 2015 with a salary paid on monthly basis.
38. It is the respondent’s position that the claimant was a casual employee whose services could terminate without notice while the claimant holds that she was on a one year contract. The Act defines a “casual employee” as “a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.” This definition leaves no doubts that the claimant was not a casual employee as alleged by the respondent. The claimant was on a contract that was valid for a period of 12 months. That is what the parties agreed and signed to and the court may only interfere with their freedom to contract on basis of illegality in the contract. The court finds and holds as above and shall proceed on that basis.
39. For avoidance of doubt, the above contract contained several terms or clauses that are evidently and clearly illegal. For example, the engagement of the claimant on the above terms was not casual but contractual for a minimum term of 12 months from 6th September, 2015. Likewise, the respondent could not terminate the contract without prior notice as such a move offended the law on substantive and procedural fairness in the Act.



VII. Desertion Or Dismissal?

40. It is the respondent's case that the claimant deserted duty from 19th July, 2019 and efforts to contact her were fruitless. The respondent produced a warning letter dated 20th July, 2015 as evidence of the claimant's failure to report to work on the 19th. However, the court finds and holds that this allegation by the respondent is false and manufactured with the sole purpose of defending this cause for the following reasons. The muster-roll availed by the claimant indicate that as late as October, 2015 the claimant was still working for the respondent. Likewise, the bank statements availed and exhibited by the claimant confirm that in October, 2015 the respondent paid a salary to the claimant.
41. In the circumstances, the court finds and holds that the claimant worked for the respondent until about October or November, 2015 well beyond the contract entered into by and between the parties as alluded to above. The court is inclined to believe the evidence by the claimant that she was terminated without notice or due process. The alleged desertion by the respondent is a ploy to mislead the court. In any event, even if the claimant deserted duty as alleged, which is however found not to be the case, what efforts did the respondent make in tracing her and establishing why she was not reporting to work?
42. As rightly submitted by counsel for the claimant, based on *Walter Ogal Anuro v Teachers Service Commission* (*supra*) and many other decisions the respondent failed the substantive and procedural fairness tests. See also – *Mary Chemweno v Kenya Pipeline Company Limited* [2017] eKLR, and *Loice Otieno v Kenya Commercial Bank Limited* [2013] eKLR,
43. The respondent thus dismissed the claimant as no notice was issued. Likewise, the claimant was not subjected to due process. The dismissal was thus wrongful, unfair, and unlawful.

VIII. Reliefs

44. Flowing from the finding and the holding in the foregoing part of this judgment the court shall consider each of the reliefs sought as hereunder.
45. Prayer (a) is for notice pay or pay in lieu of notice in the sum of Kshs 13,029.62 based on what the claimant ought to have been paid as at the time of dismissal. The claimed pay is based on Legal Notice (LN) No 117 of 2015. In absence of any other or alternative LN in rebuttal from the respondent this claim is allowed.
46. Prayer (b) is for salary arrears for the month of February, 2015 which was unpaid and no reason given in the sum of Kshs 5,816.79. This claim is allowed as prayed.
47. Prayer (c) is for underpayments for the period from September, 2014 to November, 2015 based on *LN No 197 of 2013* and *LN No 117 of 2013* in the sum of Kshs 69,497.25. This claim is allowed as prayed.
48. Prayer (d) is for overtime pay in the sum of Kshs 118,331/=. This claim is allowed as prayed as the respondent, the lawful custodian of the employment records failed to rebut the position taken by the claimant that she worked for the overtime claimed.
49. Prayer (e) is for off-duty days not taken in the sum of Kshs 78,887/= and the same is hereby allowed as prayed. The records availed by the respondent are neither reliable nor genuine or admissible in evidence as the respondent failed to establish that they were signed by the claimant as alleged. The claimant disowned them. Some of the documents are signed in original and photocopy in the same pages. There is clearly some deleted and overlapping impressions which confirm the court's suspicion that the same were manufactured with the sole purpose of defending this cause.



50. Prayer (f) is for pay for public holidays worked in the sum of Kshs 8,715.37 which is hereby allowed as no evidence has been availed by the respondent in rebuttal to that availed by the claimant. The submission by the claimant's counsel in this regard has not been challenged by counsel for the respondent.
51. Prayer (g) is for leave earned and not taken in the sum of Kshs 9,120/= and the same is hereby allowed as no evidence was availed by the respondent in opposition to that adduced by the claimant.
52. Prayer (h) is for a sum of Kshs 1,500/- in cost for uniform. However, no evidence was availed by the claimant that she indeed returned the uniform to the respondent. This claim is denied.
53. Prayer (i) is for medical expenses incurred by the claimant in the sum of Kshs 20,000/=. The evidence on record is to the effect that the claimant was involved in a road traffic accident in February, 2015 as she rode on a motorbike home from work. Although it was alleged that the rider was her supervisor at work, there is no evidence that the motorbike belonged to the respondent and or that the claimant was on official duty as at the time of the accident. This claim is in the nature of a special damage that ought to not only have been specifically pleaded but also specifically proved. The court finds and holds that the claimant failed to properly plead and prove this claim. In my view, the claimant should have filed a specific suit for the claim on the alleged accident if she was inclined into seeking compensation arising from the alleged accident. This prayer is hereby denied.
54. Prayer (j) is for compensation under Section 49(1)(c) of the Act. The claimant is seeking the maximum compensation allowed in law equivalent to 12 months' gross salary. As noted elsewhere in this judgment the parties originally entered into a contract for one year running from September, 2014 to about August, 2015. However, the claimant continued working after the contract had come to an end to about October, 2015. While the claimant was wrongfully and unfairly dismissed the court takes the view that compensation equivalent to three month's gross salary is fair compensation in the circumstances of this cause. The same is calculated as Kshs 13,029.62 * 3 = Kshs 39,088.86.

IX.Costs

55. The claimant is awarded costs of the cause.

X.Orders

56. For all the foregoing reasons the court issues the following orders in disposal of this old cause –
 - 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 Kshs 326,748.51 made up as follows –
 - i. One month's pay in lieu of noticeKshs 13,029.62
 - ii. Salary arrears Kshs 5,816.79
 - iii. UnderpaymentsKshs 69,497.25
 - iv. Overtime pay Kshs 118,331.00
 - v. Off-duty pay Kshs 58,966.12
 - vi. Pay for public holidays Kshs 12,898.87
 - vii. Leave pay Kshs 9,120.00



viii. Compensation Kshs 39,088.86

TotalKshs 326,748.51

This award is subject to statutory deductions.

(c) Costs of the cause to the claimant.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 19TH DAY OF
SEPTEMBER, 2024.**

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DAVID NDERITU

JUDGE

