



Nyongesa v Idyllic Mistle House (Employment and Labour Relations Cause 917 of 2018) [2024] KEELRC 2698 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2698 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 917 OF 2018
AN MWAURE, J
OCTOBER 25, 2024**

BETWEEN

ERIC KHISA NYONGESA CLAIMANT

AND

IDYLLIC MISTLEY HOUSE RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 30th April 2018.

Claimant's case

2. The Claimant avers that he was employed by the Respondent as a Security Guard earning a monthly salary of Kshs 13,000/= and he carried out his services with loyalty, dedication and diligence.
3. The Claimant avers that his services were verbally terminated by the Respondent on 31st December 2017, without any given reason.
4. The Claimant avers that he was wrongfully arrested by the Respondent from 1st to 2nd January 2018, without any charges preferred against him.
5. The Claimant avers that the Respondent acted with malice to deny him his dues and harm his reputation and character.

Respondent's case

6. In opposition to the Claim, the Respondent filed a reply to the Memorandum of claim dated 6th October 2022.



7. The Respondent denies the Claimant's termination was unlawful and avers that the Claimant absconded from duty without notice on 1st January 2018.
8. The Respondent avers that the Claimant's arrest on or about 30th December 2017 was due to his involvement in a physical altercation with the Respondent's manager, Mr. Moses Munyiri, who reported the incident to Kiamumbi Police Station under OB Number 49/1/01/2018.
9. The Respondent avers that the Claimant and Wilson Lekamuge were arrested and later released on 2nd January 2018 and they were required to appear at the police station on 12th January 2018.
10. The Respondent avers that the claimant was absent from work after the physical altercation and was subsequently dismissed for gross misconduct. The Respondent states that it could not follow the summary dismissal procedure due to the claimant's absence.
11. The Respondent denies the Claimant's claims regarding the assault, the subsequent dismissal, his salary and his working environment.

Claimant's evidence in court

12. The Claimant (CW1) adopted his witness statement dated 30th April 2018 as his evidence in chief.
13. CW1 testified that he was terminated over the phone and further says he used to work 12 hours with 4 hours of overtime.
14. CW1 testified that he was not given any warning letter and neither did he have any disciplinary issues.
15. In cross-examination, CW1 stated that he had worked for the Respondent for 8 years and had a good relationship with the respondent.
16. CW1 stated that he was arrested without being informed of the offence and denies assaulting the Respondent's manager.
17. CW1 stated that he used to go on leave but he did not use all his leave days.
18. CW1 stated that he did not have documentation to show he was working overtime.

Respondent's evidence in court

19. The Respondent's witness (RW1), Jane Kahenya stated she is a partner of the Respondent and adopted her witness statement dated 6.9.2022 as her evidence in chief and produced one exhibit.
20. RW1 testified that when the claimant was arrested, she was out of Nairobi. She stated that the manager told her that he was assaulted by guards and was advised to report the incident to the police.
21. RW1 testified that she was not aware that the claimant was terminated on 31st December 2017 by the manager and she did not have any reason to terminate the claimant.
22. RW1 testified that the Claimant absconded work and he did not appear again after his release from the police station.
23. During cross-examination, RW1 stated that she did not avail any employment records as some documents and files were stolen.
24. RW1 stated that she did not reach out to the Claimant and she did not write a show cause letter for his desertion.



25. RW1 also stated that she did not call for a meeting to discuss the claimant's conduct as he was not around and there is no evidence to show that he absconded from work.
26. RW1 stated that she was not required to follow up on the assault case as it was against an individual and not the company.

Claimant's submissions

27. The claimant submitted that he was not accorded an opportunity to defend himself in accordance with Section 41 of the *Employment Act*.
28. The Claimant submitted that he received no official communication about his termination as he was terminated verbally. The claimant further submitted that the Respondent provided no written record of the disciplinary process or its outcome.
29. The Claimant cited the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR where the court stated:

“Whatever reasons an employee services are terminated employee must be taken through the mandatory process outlined under section 41 of the Act.”
30. The Claimant submitted that according to Section 50 of the *Employment Act*, the court should assess the circumstances of termination and award remedies similar to those recommended by a labour officer under Section 49 of the *Employment Act*, as it was settled in the *CMC Aviation Limited v Captain Mohammed Noor* [2015] eKLR.

Respondent's submissions

31. The Respondent submitted that the Claimant failed to prove that he was verbally terminated and cited the case of *Mourine Mukonyo v Embu Water and Sanitation Company* [2020] eKLR where the Court noted that:-

“It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that:-
“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

It is thus trite that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.”
32. In *Omar Ndaro Zuma v Modern Coast* [2019] eKLR the court stated as follows:

“Section 47(5) of the *Employment Act*, 2007 provides as follows:
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.”
33. The Respondent submitted that the claimant is not entitled to payment of one month in lieu as he had absconded from work. The Respondent also submitted that the claimant had exhausted all his leave days according to the evidence presented before the court and thus not entitled to leave days. The respondent cited the case of *Michael Mackenzie Maingi v Steel Structures Limited* [2021] eKLR



where the court calculated leave days using twenty-one (21) days and not thirty (30) days awarding Kshs 38, 769.23.

34. The Respondent submitted that the Claimant is not entitled to the general damages, as there was no termination, neither oral nor written of the Claimant's employment.
35. The Respondent urges the court to dismiss the Claimant's suit with costs as the claimant absented himself from work without notice.

Analysis and Determination

36. Having considered the pleadings, submissions, and evidence on record, the issues for the Court's determination are:
 - a. Whether the claimant was unfairly terminated by the respondent
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the claimant was unfairly terminated by the respondent

37. Section 47(5) of the *Employment Act* provides that for unfair termination or wrongful dismissal, the burden lies with the employee to prove it occurred, while the burden of justifying the reasons lies with the employer.
38. In this instant case, the claimant was arrested on 1st January 2018 on allegation that he assaulted the respondent's manager. He was released on 2nd January 2018 according to the Investigation diary presented before this court. The respondent submitted that the claimant absconded from work after he was released from the police station.
39. The respondent did not commence disciplinary proceedings against him on the assault incident in accordance with sections 41, 43, 45, and 47 of the *Employment Act*.
40. In cases of *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 dealt on what amounts to wrongful, unfair, and unlawful dismissal or termination. The court held in the *Mary Chemweno Case* (*supra*)

“In variable therefore before an employer can exercise their right to terminate the contract to an employee, there must be a valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes, resolution mechanism and with the application of the provisions of Section 5(7) (c) of the *Employment Act*.

Where this procedure is followed an employee would have addressed the procedural requirements outlined under Section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

41. The Respondent did not establish with any specificities the reasons that they considered to terminate the claimant from his employment. The claimant says he reported to work on 31st December 2017 and his employment was terminated orally. He said the following day he reported to work to collect his dues but was arrested. He was then released on 2nd January 2018 with no charges being preferred against him.



42. The respondent avers that the claimant absconded from duty and so was not unlawfully terminated. However, it is trite law that if an employer alleges that an employee has absconded from duty he must show efforts made to attempt to notify the said employee that he would be put through disciplinary process on the charges of abscondment and that the said disciplinary proceedings could lead to termination of services. There is no such evidence from the respondent save for mere allegations of abscondment.
43. In *Ronald Nyambu Daudi v Tornardo Carriers Limited* (2018) eKLR the court held
- “ The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”
44. The Respondent did not comply with the legal requirements hereto and therefore the court holds that the claimant was unlawfully and unfairly terminated from his employment. The Claimant is entitled to be compensated therefore.

Reliefs

- 45.
- (a) One (1) month salary in lieu of notice - Kshs 13,000/=
 - (b) Compensation for unlawful termination equivalent of seven (7) months' salary -Kshs 91,000/=
- Total award is -Kshs 104,000/=
- (c) Leave days is not proved and is declined.
 - (d) Claimant is awarded costs plus interest at court rates at 14% from the date of judgment till full payment.
 - (c) Claimant is to be given his certificate of service within thirty (30) days hereto.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

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 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.



A signed copy will be availed to each party upon payment of Court fees.

