



Kenya Union of Commercial , Food and Allied Workers v Amritlal Shah Wholesalers Limited (Cause E016 of 2022) [2024] KEELRC 2602 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2602 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E016 OF 2022
MA ONYANGO, J
OCTOBER 24, 2024**

BETWEEN
**KENYA UNION OF COMMERCIAL , FOOD AND ALLIED
WORKERS CLAIMANT**
AND
AMRITLAL SHAH WHOLESALERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent the employees in the commercial sectors as more specifically set out in the membership clause of its Constitution.
2. The Respondent is described in the Memorandum of Claim as a registered company dealing in wholesale business in Uasin Gishu.
3. The Claimant is therefore the appropriate trade union for the employees of the Respondent.
4. The claim herein was instituted by the Claimant on behalf of the Grievant Hosea Kiplagat, referred to in the Claim as an employee of the Respondent and a member of the Claimant’s Union.
5. The Claimant alleges that the Grievant was employed by the Respondent in 2015 as a General worker and that at the time of his termination from employment he was earning a gross salary of Kshs 13,715 per month.
6. It is averred that on 12th February 2019, the Grievant felt ill and sought medical attention at Kapsoya Health Centre and informed his supervisor that he was unable to report to work. That when he resumed duty on 15th February 2019, he was accused of being absent and told to report back on 19th February 2019. That when the Grievant reported back to work on the 19th February 2019, he was informed that he did not follow the proper channels of reporting his indisposition to the management.



That the Respondent verbally told the Grievant that his employment services had been terminated effective 18th February 2019.

7. It was pleaded that the Claimant tried to resolve the dispute at the shop floor but was not successful as a result of which it reported a dispute to the Minister for Labour. That parties were invited for joint conciliation meetings on 14th December 2021, 19th January 2022 and 26th January 2022.
8. The Claimant stated that it was after the parties failed to agree that the Conciliator issued a Certificate of Unresolved Dispute giving the Claimant the go ahead to institute this claim before this court.
9. In the Memorandum of Claim dated 29th June 2022 and filed in court on 15th July 2022, the Claimant seeks the following remedies on behalf of the Grievant:
 - a. Order that the Grievant be reinstated without loss of benefits. If reinstatement is untenable, the Claimant seek the following prayers: -
 - i. One month pay in lieu of notice Kshs 13,715
 - ii. 3 years Leave pay
13,715x21x3/30 Kshs 28,801.50
 - iii. Pro-rata leave of 2 months
13,715x21x3/3 Kshs 1,600
 - iv. 18 days worked in
February 2019 Kshs 8,228
 - v. 2 years Saturday overtime (1pm to 5pm)
4hoursx4weeksx28monthsxhourly
Rate (67.8) Kshs 30,374.40
 - vi. 3 years severance pay
13,715x15x3/30 Kshs 20,572.50
 - vii. Underpayment
14,400-13,715 x39 months Kshs 26,715
 - viii. 12 months compensation Kshs 164,580
Total Kshs 294,587.40
 - b. Certificate of Service
 - c. Costs of the suit to the Claimant
 - d. Any other order the Honourable Court deems fit to address the cause of justice
10. The Respondent filed a Response to the Statement of Claim dated 29th December 2022 in which it denies the allegations in the Statement of Claim.
11. According to the Respondent, the Grievant's employment was terminated for absconding duty and he was duly paid all his dues.
12. The Respondent prays that the claim be dismissed with costs.



13. On 14th June 2023, the court directed parties to proceed by way of written submissions. The Claimant filed its submissions on 14th July 2023 while the Respondent's submissions were filed on 17th July 2023.

The Claimant's submissions

14. In its submissions, the Claimant framed the issues for determination to be:
- a. Whether the Grievant was unfairly and unlawfully terminated from employment.
 - b. Whether the Grievant absconded duties
 - c. Remedies available
15. On the first issue, the Claimant has maintained that the Respondent verbally terminated the employment of the grievant and failed to give the grievant a reason for the termination or a chance to be heard or make his representation as required in Section 45 of the *Employment Act*, 2007.
16. It is the Claimant's submission that the Respondent has not produced any evidence before the court to prove that it followed the laid down procedure before terminating the employment of the grievant. According to the Claimant, the Grievant was neither issued with a show cause letter nor a letter expounding on the reasons why he was sent away from employment nor was he given a chance to defend himself in accordance with the provision of Section 41 of the *Employment Act*. It is therefore the Claimant's submission that the termination of the Grievant's employment was defective, substantively unjustified and procedurally unfair.
17. On the second issue for determination, the Claimant has submitted that an employee accused of deserting duty must be accorded both substantive and procedural fairness. According to the Claimant, the Respondent alleges that the Grievant deserted duty from 18th February, 2019 but failed to produce any evidence that they invited the grievant for a disciplinary hearing or even issued a show cause letter to the Grievant. In support of this position, the case of *Florence Audiab Adhiambo v Kenjap Motors Limited* [2020] eKLR was cited.
18. Further, while citing the case of *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR. It is the Claimant's case that the letter to the County Labour Officer notifying of such desertion was just an afterthought by the Respondent to absolve itself from any liability.
19. While placing reliance in the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR, the Claimant submits that the mere assertion that an employee deserted duty without any proof of an attempt to reach or contact the employee falls far below the standards set by courts with regard to allegations of employees absconding duty.
20. It is the Claimant's position that the Respondent has the onus to show that it attempted to contact the Grievant and all these attempts must be proved by way of evidence. That in the instant case the Respondent did not produce any evidence before the Honorable to show any attempts to contact the grievant who had served diligently and industriously for a period of over 4 years.
21. The Claimant has also submitted that Section 74 of the *Employment Act*, 2007 places a burden upon the employer to keep employment records and that the Respondent as the keeper of records ought to have produced the work attendance record/book or any other evidence of the alleged desertion of duty by the grievant.



22. The Claimant therefore submitted that the Grievant is entitled to the reliefs sought as he was unlawfully terminated without even a notice or any reason for such termination as required under Section 43 of the *Employment Act*, 2007.

The Respondent's submissions

23. On its part, the Respondent identified the issues for determination as:
- a. Whether the Grievant was unlawfully terminated from employment
 - b. Whether the Grievant is entitled to the reliefs sought
 - c. Who is to bear costs of this suit.
24. On the issue whether the Grievant was unlawfully terminated from employment, the Respondent submits that the Grievant absconded duty and never reported back. It avers that it took legal steps to inform the labour office about the Grievant's conduct as evidenced by the letter to the County Labour Office dated 15th March, 2019.
25. The Respondent submits that it is trite law that absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Respondent cited the case of *Ann Njoroge v Topez Petroleum Ltd* (2013) eKLR in support of the position that there was no termination in the first instance as the Grievant absconded duty and that as such, the provisions of section 43 and 45 of the *Employment Act*, 2007 do not apply in the Grievant's case.
26. Regarding the reliefs sought by the Claimant, the Respondent submitted that it has established that the Grievant absconded duty and never reported to work hence he is not entitled to any of the prayers he is seeking.
27. On this basis, the Respondent prayed that the Claimant's claim against it be dismissed with costs

Determination

28. Upon considering the pleadings on record and the submissions as well as the authorities cited, I find that the issues for determination are: -
- i. Whether the Grievant was unlawfully terminated or he absconded duty
 - ii. Whether the Claimant is entitled to the remedies sought.
29. On the first issue, it is the Claimant's submission that the termination of the employment of the Grievant by the Respondent after he failed to go to work on 12th February 2019 while he was unwell was unprocedural and unlawful.
30. The Claimant in its bundle of documents attached the Grievant's treatment chit from Kapsoya Health Center as evidence that he was indeed unwell during the said date.
31. The Respondent on the other hand maintained that the Grievant was lawfully terminated from employment after he absconded duty.
32. In order to determine whether the termination of the Grievant's employment was fair and lawful, this court is called upon to establish if the reasons advanced by the Respondent for the said termination were valid and whether that there was procedural fairness before the said termination.



33. Section 43 of *Employment Act* 2007 provides as follows:

“ 43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

34. Section 44(4) (a) of the *Employment Act* 2007 provides as follows:

- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
 - (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

35. From a reading of the above section, it is clear that absence from work per se does not constitute a valid ground for dismissal unless an employee has absconded duty without leave or other lawful cause. In this case, it was explained that the Grievant informed his supervisor of his indisposition and a treatment chit that was stamped on 12th February 2019 was relied upon in support of the Grievant’s averment that he was unwell on the said date.

36. In the unreported case of Samuel Kipkemboi *Too v University of Eastern Africa, Baraton*, Eldoret ELRC Cause No E023 of 2021, this court held as follows:

“For an employer to determine if the absence is for lawful cause or otherwise, it has to give the employee an opportunity to explain the reason for the absence. Section 43 of the *Employment Act* demands that the employer proves the grounds for dismissal. Further, Section 30(2) is specific that “For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.”

37. From the record, the Grievant stated that he went back to work on 15th February 2019 and was accused of absconding duty and told to report back on 19th February 2019. The Grievant further averred that when he went back on 19th February 2019, he was informed that his employment had been terminated effective 18th February 2019. No evidence has been tendered in court to disprove the Grievant’s evidence that he was sick on the said date or that he absconded duty without lawful cause as alleged by the Respondent. In fact, the Respondent has not shown that it made any efforts to find out the whereabouts of the Grievant after he failed to report for duty. I have also not seen any letter or text message sent to the Grievant requiring him to explain why he should not be terminated for



absconding duty. I therefore find that the Respondent did not prove valid reason for termination of the Claimant's employment.

38. The next issue for determination is whether due process was followed by the Respondent before the termination of the Grievant's employment.

39. Section 41 of the *Employment Act* provides: -

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

40. From the materials placed before me, there is no evidence that the Grievant was subjected to any disciplinary hearing. The Court of Appeal in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR held that an employer is enjoined to comply with the mandatory provisions of Section 41 and 45 of the *Employment Act* in terminating an employee's employment, and that failure to do so renders the termination unfair.

41. Having found as above, it is my finding that indeed the Grievant's employment was terminated by the Respondent without any due process. The termination was thus unprocedural and therefore unfair.

What reliefs should then issue?

42. The Claimant sought the following reliefs on behalf of the Grievant:

a) Salary in Lieu of Notice

Having made a finding that the Respondent had no valid reason to terminate the Grievant's employment on account of absconding duty, and further that there was no due process in the termination, I find that the Grievant is entitled to one months' salary in lieu of notice and award him Kshs 13,715.

b) 3 years leave pay and Pro-rata leave pay

The Respondent did not produce any employment records as required under section 74 of the *Employment Act* to prove that the Grievant was paid his leave dues. All the Respondent contended was that it paid the Grievant leave dues for two years. In the absence of any evidence to the contrary, I award the Grievant the amounts claims under this heads totalling to Kshs 30,401.50

c) 18 days worked in February 2019

The Grievant's employment was terminated on 18th February 2019. He is entitled to pay for the days worked. I award the Grievant Kshs 8,229.00

d) Overtime

This prayer is declined as the Claimant did not lead any evidence to prove that the Grievant worked overtime that was not paid for.

e) 3 years severance pay



The claim for severance pay is not applicable as the evidence on record does not show that the termination of the Grievant's employment arose from a redundancy pursuant to Section 40 of the Employment Act.

f) Underpayment

In the Claimant's Statement of Claim, it is averred that the Grievant was employed by the Respondent as a general worker and that as at the time his employment was terminated he was earning Kshs 13,715 per month. Under the Regulation of Wages (General) (Amendment) Order 2018, the minimum monthly salary per month is provided as Kshs 12,552.70. 15% of this for house allowance is Kshs 1882.90. The total of the basic pay and house allowance is thus Kshs 14,435.60. The Grievant was therefore underpaid by Kshs 720.60 per month for 10 months from May 2018 to February 2019. I award him Kshs 7,206.00

g) Compensation for unlawful termination

The Respondent having failed to prove the reasons for termination of the Grievant's employment, and the termination having been unprocedural and unlawful, the Grievant is entitled to compensation in terms of section 49 of the Employment Act. The Grievant as at the time he was terminated from employment had worked for the Respondent for over four years. Taking into account his length of service, the circumstances under which he lost his job, the conduct of the Respondent in the process of terminating the Grievant's employment including all the relevant factors under section 49(4) of the Act, I award the Claimant 6 months' salary as compensation in the sum of Kshs 86,613.60.

h) Certificate of Service

The Grievant is entitled to be issued with a Certificate of Service pursuant to Section 51(1) of the Employment Act 2007. The Respondent is directed to issue the same.

43. In conclusion, judgment is hereby entered in favour of the Claimant against the Respondent in the total sum of Kshs 148,350.50.
44. The Respondent shall issue a Certificate of Service to the Grievant within thirty days of this judgment.
45. The Respondent shall bear the Claimant's costs of this suit which I assess at Kshs 50,000 as the Claimant was represented by one of its officers.
46. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF OCTOBER, 2024

MAUREEN ONYANGO

JUDGE

