



**Onyango v Africa Apparel Epz Limited (Cause 1463 of 2017)  
[2024] KEELRC 2511 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2511 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1463 OF 2017  
K OCHARO, J  
OCTOBER 18, 2024**

**BETWEEN**

**NICHOLAS ONYANGO ..... CLAIMANT**

**AND**

**AFRICA APPAREL EPZ LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed the Statement of Claim dated 19.06.2017 and filed in court on 27.07.2017 through the firm of Gakoi Maina & Advocates. The Claimant prayed for judgment against the Respondent for:
  - a. A declaration that the termination of the Claimant’s employment was unlawful, and untimely and an order that he be paid his dues and benefits of KShs. 490, 000.
  - b. A declaration that the Claimant is entitled to a Certificate of Service.
  - b) Costs of the claim plus interest.
2. In response to the Statement of Claim, the respondent filed its Memorandum of Response dated and filed in Court on 04.04.2018 through Eshiwani Ashubwe and Company Advocates, denying the Claimant’s claim and entitlement to the reliefs sought.

**Claimant’s case**

3. At the hearing, the Claimant adopted his witness statement filed herein as his evidence in chief and had the documents that he filed as his documentary evidence.
4. It was his case that he first came into the employment of the Respondent on or about 29<sup>th</sup> November 2010 as a mechanic operator.



5. On 23<sup>rd</sup> December 2016, the Respondent closed for Christmas Holidays. Its employees were supposed to resume duty after the festivities, on the 3<sup>rd</sup> of January 2017. However, he wasn't able to travel back to work as his father got unwell and he had to attend to him. He reported his predicament to his line Clerk by phone. When he reported back to duty on 5<sup>th</sup> January 2017, he was asked to explain in writing concerning his absence from duty on the 3<sup>rd</sup> and 4<sup>th</sup>.
6. Subsequently, his job card was taken away from him. He was asked to be off his working place until that day he will be called back. He was not. Later his employment was terminated verbally on 5<sup>th</sup> February 2017. The Respondent withheld his salary for January and failed to pay him his terminal benefits. At the time of the separation, his monthly salary was KShs. 22, 102.
7. He had worked for the Respondent for 6 years. Throughout that time, he remained in the employment of the Respondent, he was not allowed to enjoy any annual leave.
8. He asserted that the termination of his employment was without a just cause and in complete disregard to the tenets of natural justice. The Respondent should be directed to pay him;
  - I. One month's salary in lieu of notices, KShs. 22,102.15
  - II. Compensation for unutilised leave days for six years, KShs. 107,110. 42
  - III. Compensation for unfair loss employment, twelve months salary, KShs. 265, 226,00
  - IV. Payment of service pay, KShs. 76, 507.44
9. Cross-examined by Counsel for the Respondent, the Claimant testified that though he was supposed to report back to duty on 3<sup>rd</sup> January 2017, he didn't, his father fell ill and he had to take care of him. He communicated his situation to the line Clerk, on the phone.
10. He testified further that at the end of the year, the Respondent could give its employees leave pay, which was an allowance to enable them to travel for their end-year holidays. The amount was not compensation for untaken leave days.
11. The Claimant further testified that he was entitled to twenty-one leave days, each year. However, for the six years he was in the employment of the Respondent he wasn't allowed to proceed on leave as his requests for the same were often declined.

### **The Respondent's case**

12. The Respondent presented one witness, Mr. John Wambua to testify on its behalf. The witness adopted his witness statement filed herein as his documentary evidence. He stated that the Claimant was employed by the Respondent as a Presser on 29<sup>th</sup> November 2010, a position which he held until his separation from employment.
13. On 23<sup>rd</sup> December 2016, the Respondent closed business to allow its employees to proceed with their Christmas holidays. They were instructed to report back on the 3<sup>rd</sup> of January 2017. The Claimant failed to report back on this stated date. He did on 9<sup>th</sup> January 2017, the Respondent considered this as desertion of duty.
14. Flowing from his desertion, the company suffered production losses as the required targets couldn't be met in his absence. As the Respondent could not continue to rely on an absent employee, it decided to terminate his employment.



15. The witness stated further that according to the Respondent's policy, any untaken leave days within a specific year aren't carried on to the following year. Compensation for such leave days could always be made before the close of the year within which the days accrued. At the separation, the Claimant had no untaken leave days.
16. Cross-examined by Counsel for the Claimant, the witness testified that the Claimant wasn't at any time asked to attend the Respondent's offices to pick his terminal benefits as he alleges. He could not be paid one month's salary in lieu of notice because he deserted duty. The company had no choice but to terminate his employment as he had deserted duty.
17. The Respondent didn't place forth any evidence from which it can be discerned that it made efforts to trace the Claimant without success. Further, documents that could prove the Claimant's leave status at the time of separation.
18. The termination was on account of desertion. He was not present at work, and couldn't be reached, a disciplinary hearing against him could not be possible.
19. The Claimant testified that she was abruptly summoned to a meeting by the Respondent's Human Resources Manager on 24<sup>th</sup> April 2017 whereby she was informed of her demotion. The act to demote her was without prior notice or justification. Further, he was subjected to extreme interrogation, humiliation and harassment at the said meeting.

### **Analysis and Determination**

20. I have carefully considered the pleadings, the evidence and submissions by the parties herein, and the following issues emerge for determination;

SUBPARA I. Was the termination of the Claimant's employment fair?

II. Whether the Claimant is entitled to the reliefs sought.

### **Was the termination of the Claimant's employment fair?**

21. In a dispute like the instant, where the fairness of termination of an employee's employment is in contestation, the Court is enjoined to interrogate two statutory aspects, procedural fairness and substantive justification. Section 41 of the *Employment Act* provides a mandatory procedure which any employer contemplating termination of an employee must adhere to. The procedure embodies; the notification component- the employer must inform the employee of the intention to take action against him or her, and the reason[s] for the intended action; the hearing component- the employer must accord the affected employee an adequate opportunity to prepare and make representation on the grounds. Tied to this component is the requirement that the employer should allow the employee to be accompanied by a colleague of choice or a trade union representative if the employee is a member of a trade union; and the consideration component- the employer shall consider the representations made before making a final decision on the matter.
22. No doubt, the fair procedure contemplated under the above-stated provision was not followed at all. The Claimant was not accorded a hearing against the alleged infraction of desertion. The Respondent's witness asserted in his evidence under cross-examination that a disciplinary hearing could not be conducted against the Claimant as he had deserted duty, and couldn't be reached. With great respect, the reason makes no sense. In its pleadings, the Respondent admits that the Claimant's employment was terminated on 5<sup>th</sup> February 2017 as pleaded by the Claimant. One wonders why then, the Respondent didn't initiate the disciplinary process against him, starting with notifying him of the



- intention to act against him and the grounds the basis thereof on this date, for then it appears that he was available.
23. I have carefully considered the Respondent's pleadings, the Respondent plentifully asserted that the termination of the employment services of the Claimant was lawful and per the procedure contemplated under the *Employment Act*. The Respondent didn't present any evidence to establish this. In fact, its witness's evidence hereinabove stated radically departs from this averment in the pleadings.
  24. In the upshot, I hold that the termination of the Claimant's employment was procedurally unfair.
  25. Section 43 of the *Employment Act*, 2007 places a legal burden on the employer in a dispute regarding termination of employment to prove the reason[s] for the termination. Where a reason[s] is not proved, the termination shall be deemed unfair by dint of the provisions of Section 45 of the Act. This suggests that in Kenya the law does not allow termination of employment without cause.
  26. The Respondent maintained that the Claimant's employment was terminated with cause. That he absconded duty. As stated hereinabove, the Respondent admitted in its pleadings that the termination of the Claimant's employment occurred on 5<sup>th</sup> February 2017. How exactly it was affected, it didn't provide any explanations. It remained too sketchy. This court hasn't lost sight of the fact that the Respondent's witness, in his witness statement, gives the impression that the Claimant deserted duty till 9<sup>th</sup> May 2017 and as such he was considered a deserter. I got him then saying that the termination occurred on this date. An employer who puts forth sketchy evidence, that contradicts its pleadings, seldom can it be held that he discharged the legal burden in proving matters that it was obliged to in a case.
  27. However, it is not enough for the employer to prove the reason[s] for the termination as required by the provision above stated, the employer has to go that extra mile to satisfy the requirement under Section 45[2], that the reason[s] was valid, and fair - related to the grounds set out in Sub-section 2[b][i] and [ii].
  28. The Claimant doesn't deny that he didn't report to work on 3<sup>rd</sup> January 2017, as instructed. He stated that for a reason, his father's illness, he was impeded to travel back to work on that date but did report on 5<sup>th</sup> January 2017. Therefore, his absence from duty without authority, if it has to be seen so, was for one day. In my view, the Respondent did not discount this evidence. It was the bearer of employee records, nothing could have been easier than it, producing an attendance register to demonstrate that the Claimant didn't report back on the stated date.
  29. It is not enough for an employer to assert that the employee deserted duty. He or she must demonstrate the efforts made towards reaching out to the employee and intimating clearly that termination was being considered. See *Mariita v Leading Locks & Access Systems [Cause 2407 of 2017]* [2022] KEELRC 1194 [KLR], cited by Counsel for the Claimant. Contrary to what Counsel for the Respondent submits, the Respondent didn't show this.
  30. True as Counsel for the Respondent submitted, the Claimant who was admittedly absent from work without authority for one day [for I agree with the Claimant's version], had a duty to explain his absence. Undoubtedly, he explained. Counsel for the Respondent appreciated this in his submissions but stated that the explanation was unsatisfactory. I have carefully considered the evidence of the Respondent's witness, he didn't state this, and he didn't testify on the explanation the Claimant gave, to enable one to consider whether it was reasonable or not and whether a reasonable employer could terminate an employee's employment in the face of an explanation such as was given by the Claimant.



31. I find that the Claimant reported back on 5<sup>th</sup> January 2017. He gave a reasonable explanation regarding his absence from duty for one day. No reasonable employer objectively considering his circumstance and explanation could have terminated his employment on account of desertion.
32. By reason of the foregoing premises, I hold that the termination of the Claimant's employment was substantively unjustified as the reason for the termination wasn't fair and valid.

**Is the Claimant entitled to the reliefs sought?**

33. The Claimant's employment was terminable under the contract of employment and Section 35 of the Employment Act, by one month's notice or payment of one month's salary in lieu. The Respondent argued that as the Claimant was a deserter, he was not entitled to notice pay. In the termination letter, the Respondent admitted the Claimant's entitlement to notice pay, just as it did for compensation for the outstanding 22 leave days. I grant these two reliefs on admission.
34. The Claim for salary for the 14 days worked in May 2017, is unchallenged.
35. Section 49[1][c], of the Employment Act, bestows upon this Court the power to grant an employee who has successfully assailed their employer's decision to terminate their employment, a compensatory relief to the maximum extent of twelve month's gross salary. However, it should be noted that the grant is made discretionarily depending on the circumstances of each case.
36. I have carefully considered how the Claimant's employment was terminated, the Respondent's failure to adhere to procedural and substantive fairness, and the Respondent's action, which I see as without any legal or contractual basis for attempting to change the Claimant's role, the length of period that was remaining on her contract [almost one and half years] and hold that she is entitled to the compensatory award to an extent of five [5] months' gross salary.
37. In the upshot, Judgment is hereby entered for the Claimant in the following terms:
  - a. A declaration that the termination of his employment was unfair.
  - b. Compensation for unfair termination of employment pursuant to the provisions of Section 49[1][c] of the Employment Act, five months' gross salary, KShs. 110,510.75.
  - c. Salary in lieu of notice, KShs. 22, 102. 15.
  - d. Compensation for earned but untaken leave days, KShs. 107,110. 42.
  - e. Costs of this suit.
  - f. Interest on the amounts awarded above at court rates from the date of this Judgment, till full payment.

**READ, DELIVERED AND SIGNED THIS 18<sup>TH</sup> DAY OF OCTOBER, 2024.**

**OCHARO KEBIRA**

**JUDGE**

**In Presence of:**

Mr. Kibet for the Claimant.

Mr. Muimi for the Respondent.

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.*

**OCHARO KEBIRA**

**JUDGE**

