



**Gambedze v Kyumwa & 2 others (Cause E027 of 2024)
[2024] KEELRC 2807 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2807 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E027 OF 2024
M MBARÚ, J
NOVEMBER 14, 2024**

BETWEEN

RASHID GAMBEDZE CLAIMANT

AND

MIRIAN KYUMWA 1ST RESPONDENT

ANTONIO ALESSANDRIA 2ND RESPONDENT

ESTUARY KONGO RIVER (WATER SPORTS CENTRE AND RESTAURANT) 3RD RESPONDENT

JUDGMENT

1. The Claimant is represented by his trade union, KUDHEIHA Workers.
2. The claim is that the claimant was a paid-up member of the Union. The 1st respondent is a female adult, co-owner, and proprietor in charge of the operations of the 3rd respondent. The 2nd respondent is the proprietor and co-owner and is in charge of the operations of the 3rd respondent. The 3rd respondent is established in the hospitality sector, offering food and drinks.
3. The claim is that the respondents employed the claimant on 15 July 2020 as a night security guard until termination on 9 September 2022. The claimant was paid a basic wage of Ksh.12, 000 per month.
4. On 28 July 2022, the claimant fell ill and could not attend work. He contacted the 2nd respondent about his inability to report to work that evening. On 29 July 2022, the claimant sought medical treatment and was diagnosed with flu and fatigue. He was given three days of bed rest.
5. The second respondent called the claimant on 29 September 2022, seeking him to report to work, but he could not due to the doctor’s directions. He was advised to remain home until he recovered and would be recalled back to work. However, after the three days of sick leave, the claimant was not



- allowed back to work. He reported to the union, and a dispute was reported, and parties attended without agreement.
6. The claim is for payment of terminal dues following unfair termination of employment. The claimant is seeking the following;
 1. Underpayment of wages for 2 years ksh.89,342.40;
 2. House allowance for 2 years ksh.56,599.20;
 3. Notice pay ksh.18,081;
 4. Service pay for 2 years ksh.18,081;
 5. Work during public holidays Ksh.26,518.36;
 6. 12 months compensation ksh.216,972;
 7. Off days for 2 years ksh.57859;
 8. Two hours overtime for 2 years Ksh.86,788;
 9. Annual leave Ksh.36,162;
 10. Costs of the suit.
 7. The claimant testified in support of his case that upon employment by the respondents, he worked until he got unwell on 28 July 2022 and could not report to work. He called and informed the respondents attended treatment and were given 3 days of bed rest. Upon his return to work, the respondents did not allow him to return. This led to unfair termination of employment contrary to due process and without payment of terminal dues.
 8. The claimant testified that his work hours were 8 pm to 8 am on the night shift and vice versa for the day shift.
 9. Upon cross-examination, the claimant testified that he had 2 monthly rest days. After getting sick, the doctor gave him 3 sick days, but the respondent terminated his employment upon resuming work.
 10. In response, the respondent made mere denials, stating that there was no valid employment contract between the parties and, hence, it was not clear who the employer was. There was a substantive reason leading to termination of employment, and the claimant was an employee of an independent contractor. The claims that the claimant was sick are without evidence, and the claim should be dismissed with costs.
 11. The respondent called no witnesses.
 12. At the close of the hearing, both parties agreed to file a written submission, but only the claimant complied.
 13. The claimant submitted that under the provisions of Sections 41 and 43 of the *Employment Act*, before termination of employment, the employer must issue notice to the employee and allow him to attend to make his reorientation. Where the mandatory provisions of the law are not adhered to, under Sections 43 and 45 of the Act, there is unfair termination of employment as held in the case of *Walter Oagal Anuro v Teachers Service Commission and Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR. The claims made should be allowed with costs.



Determination

14. The respondent has challenged the claimant's employment on the basis that there was no employment as claimed. The claimant was under an oral contract that was not regulated, and an independent contractor employed him; hence, the claims made are not justified. However, the *Employment Act* allows for oral employment contracts, and the employer has the legal duty to write the employment terms and conditions. Such duty cannot be transferred to the employee. Where indeed the claimant was employed by an independent contractor, the respondent, as the contracting party, must submit such evidence.
15. Also, the respondents needed to produce such evidence when an independent contractor employed the claimant. If such an arrangement existed and the respondents were the beneficiaries of the claimant's labours, upon service of summons herein, recourse was to introduce such independent contract in these proceedings.
16. Upon the dispute, the union representing the claimant reported to the Minister. A conciliator was appointed and issued a Certificate of Unresolved Issues.
17. The Minister, the office of the Labour Office and the Conciliator are recognized in law as offering this court a primary duty of resolving disputes on the shop floor. The court is allowed to rely on the expertise of the Minister and its structures for fact-finding. Indeed, the respondent attended before the conciliator upon the dispute being reported, ipso facto, to address the employment relationship.
18. The claim is that the claimant got sick on 28 July 2022 and could not attend work. He attended treatment, and the doctor gave him 3 days of bed rest, but his employment was terminated upon resuming duty.
19. Under Section 44 of the *Employment Act*, the employer can terminate employment by summary dismissal where the employee is absent from work without due cause. The rationale is that the employee absent from work must do so with the approval and permission of the employer.
20. An employee who is absent from work due to illness or sickness is covered under the protections of Section 30 of the *Employment Act*. However, the employee must immediately inform the employer of such fact directly or through a third party and submit a medical certificate of such sickness or illness upon resuming duty.
21. The court addressed such matter in the case of *Olunga v Mumias Sugar Co. Ltd* [2024] KEELRC 2661 (KLR). It held that in the case of sickness, an affected employee must bring such matter to the employer's attention as soon as reasonably practicable. This position is reiterated in the case of *Banking, Insurance & Finance Union (Kenya) v Barclays Bank* [2014] eKLR.
22. In *James Gitau Waweru, Anthony Kirwa, Isaac Nyamosi Nyangao & Josphat Kiaries Mugo v China Railway No.10 Engineering Group Company* [2020] KEELRC 1080 (KLR), the court held that sickness can happen at any time. However, the affected employee must inform the employer and report back with a medical certificate from a recognized medical practitioner.
23. In this case, the claim that the claimant got sick on 28 July 2022 and was allowed 3 days of bed rest is left empty. The note filed in support of the claim is devoid of the characteristics necessary for a medical certificate from a recognized medical practitioner. Without such a record present, the claimant's absence from duty for 3 days became a serious omission and invited summary dismissal.
24. The claimant's conduct resulted in termination of employment. He cannot claim notice pay or compensation.



25. However, at the end of employment, the respondents should have paid the claimant all his terminal dues as required under Section 18(4) of the [Employment Act](#).
26. On the claim for underpayment of wages, the claimant was paid Ksh.12, 000 per month. The 3rd respondent is defined as being placed in Kwale. A security guard placed in Kwale under the Wage Orders applicable from 15 July 2020 to September 2022 provided for a minimum wage of Ksh.7, 240.95 per month. The due house allowance at 15% is Ksh. 1, 086 and the total gross wage is Ksh.8, 326 monthly. On the wage paid, the claimant was paid above the minimum wage, and a claim above the allocated amount is not justified.
27. The claim for service pay is due under the Regulation of Wages (Protective Security Services) Order, 1998, which regulates security guards. On the wage paid of 12,000, a sum of 15 days' pay for each full year worked is due. The claimant worked from 15 July 2020 to 9 September 2022. He had 2 full years and was hence entitled to Ksh.12,000 in service pay.
28. On the claim for work during public holidays, each public holiday is gazette by the Minister. These are not general days. Each due Public Holiday must be particularized for the court to assess and apply a computation. This needs to be addressed in this case, and a general claim cannot suffice.
29. On the claim for off days, the claimant testified at length that he had a day off each week and two days off each month. His claim was based on 96 days for 2 years. A proper tabulation of such days was imperative. Claiming for 96 days off was done without basis.
30. On the claim for 2 hours overtime for 2 years, the evidence that the claimant worked from 8 pm to 8 am each night shift and 8 am to 8 pm on the day shift was not challenged in any material way. The employer is the custodian of work records. While filing the response, the respondents should have addressed such a matter for the claimant and the court's benefit.
31. The claim for Ksh.86, 788 is due as claimed.
32. Annual leave is a right under Section 28 of the [Employment Act](#). Once allocated, the employer should keep and submit the records in court. In this case, for two years, the claimant is entitled to 21 days each year, all at Ksh.24, 000.
33. On costs, the claimant is represented by his union in these proceedings as allowed under the [Labour Relations Act](#). The claim is largely successful; costs are hereby awarded and assessed by the court, all at ksh.50 000.
34. Accordingly, judgment is hereby entered for the claimant against the respondents in the following terms;
 - a. Service pay ksh.12,000;
 - b. Annual leave ksh.24,000;
 - c. Overtime Ksh.86,788;
 - d. Costs Ksh.50, 000.

DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

