



**Odero v Tononoka Rolling Mills Limited (Cause 882 of 2018)
[2024] KEELRC 13482 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13482 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 882 OF 2018
CN BAARI, J
DECEMBER 19, 2024**

BETWEEN

TOBIAS OCHIENG ODERO CLAIMANT

AND

TONONOKA ROLLING MILLS LIMITED RESPONDENT

JUDGMENT

Introduction

1. Before Court is the Claimant’s Memorandum of Claim dated 30th May, 2018, and filed on 6th June, 2018. Under the claim, the Claimant seeks the following reliefs from the Respondent:
 - a. A declaration that the Claimant was unlawfully dismissed from his employment;
 - b. A declaration that the Claimant is entitled to payment of terminal dues and damages as prayed;
 - c. An order for the Respondent to pay the Claimant his terminal benefits and compensatory damages totaling to Kshs. 299,257/=;
 - d. An order that the Claimant be issued with a certificate of service; and
 - e. Costs of suit plus interest thereon.
2. The Respondent entered appearance and filed a Memorandum of Defence dated 17th July, 2018, together with a list of witnesses, list and bundle of documents of even date, and a witness Statement by one Elsa Okumu dated 13th July, 2018.
3. The Claimant filed a Reply to the Respondent’s Memorandum of Defence dated 14th August, 2018.
4. The matter was referred for Mediation through the Court Annexed Mediation No. MLM/MED/116 of 2022 on 16th March, 2022. The mediator appointed by the Court filed a Mediator’s Report dated



28th April, 2020, stating that parties did not reach a settlement. Consequently, the matter was referred back to Court for hearing and determination.

5. The Claimant's case was heard on 30th October, 2024, when the Claimant Mr. Tobius Ochieng Odero, testified in support of his case. He adopted his witness statement and produced his bundle of documents of even date as exhibits in the matter.
6. The Respondent case was also heard on the same day, where Ms. Elsa Okumu, the Human Resource Manager at the Respondent's Company, testified on its behalf, adopted her witness statement and produced documents filed as exhibits in the case.
7. Submissions were received from both parties.

The Claimant's case

8. It is the Claimant's case that he entered into an oral employment contract with the Respondent in September, 2017 on a casual basis as a loader on a renewable contract intended to run upto July, 2018. It is his case that the monthly salary was agreed to be fixed at Kshs. 17,518/=.
9. The Claimant avers that the Respondent assured him that he will reduced the oral contract into writing, but that the Respondent failed to honour his word despite several requests from the Claimant.
10. The Claimant states that despite the frustrations, he continued to perform his duties diligently and competently.
11. It is averred that on 29th December, 2017, the Respondent assigned the Claimant duties of a loader whereupon, he sustained severe bodily injuries. Specifically, the Claimant sustained the following injuries:
 - a. Blunt injury-lower back
 - b. Tear and prolapse 14-15 disc (4th and 5th disc)
 - c. Nerve root compression
12. The Claimant further avers that as a result of the injuries sustained, he received threats and intimidation from the Respondent warning him that he would be summarily dismissed if he failed to recover.
13. It is claimed that despite the Claimant being instructed on bed rest by his doctors, the Respondent continued to demand that the resumes duty and which situation encumbered his full recovery.
14. The Claimant states that he was unfairly terminated from his employment without being issued with a termination letter, and without being accorded a fair hearing and given reasons and grounds for termination despite his plea to be provided with the same.
15. The Claimant further states that the Respondent never paid his leave days and nor was he paid his salary in lieu of notice.
16. It is the Claimant's case that his termination was unfair for the reason that he was never issued with any notice of dismissal nor accorded a chance to be heard, and that his employment was arbitrarily terminated.
17. From the forgoing, the Claimant claims the following terminal benefits from the Respondent: -
 - a. One month salary in lieu of notice in the amount of Kshs. 17,518/=
 - b. Unpaid leave for 21 days X 17,518/26 in the amount of Kshs 14,149/=



- c. Payment of the remainder of the contract period in the amount from the month of March-July being Kshs. 17,518/= X5 in the sum of Kshs. 87,590/=
 - d. 12 months' salary for wrongful dismissal 12 months X 17,518/= in the sum of Kshs. 180,000/=
 - e. Total Claim in the sum of Kshs. 299,257/=.
18. In his Reply to Respondent's Memorandum of Defence, the Claimant states that the oral contract was later put into writing, but the Respondent failed to issue the Claimant with a copy of the written contract duly executed by both parties.
 19. The Claimant further avers that he was never issued with any caution letter by the Respondent for missing out on any physiotherapy sessions, and that he attended all the sessions as advised by his doctor.
 20. On cross-examination, the Claimant stated that he was employed by the Respondent to dispatch steel products and that he signed two contracts one dated 25th September, 2017 and another dated 15th December, 2017. It is his case that his second contract was to expire on 30th December, 2018.
 21. The Claimant admitted on cross-exam that he was paid salary until January, 2018, but could not remember whether he was paid in February, 2018.
 22. The Claimant stated that he got a letter asking him to attend physiotherapy sessions, but the Respondent told him not to go to hospital. It is his position that he attended the sessions and handed all the session attendance sheets to the Respondent. He states that he was terminated by the Respondent's Human Resources Manager.
 23. On re-examination, the Claimant testified that he was terminated in February, 2018 without any formal documentation, with no disciplinary hearing and was never recalled back to work.
 24. It is his prayer that the Court grants him the reliefs sought as listed in his claim.

The Respondent's case

25. The Respondent denies engaging the services of the Claimant as a casual labourer through an oral contract. It states that it employed the Claimant as a loader through a written contract dated 5th September, 2017 and signed by the parties on 6th September, 2017 for a period of three months, and which was renewed for a further period of six months from 1st January, 2018-30th June, 2018.
26. The Respondent avers that on 21st November, 2017, the Claimant complained of back problems and was referred to Mama Lucy Kibaki Hospital for treatment. It is the Respondent's case that the Claimant resumed work after two days, and that on 29th November, 2017, the Claimant was again referred to Radiant Group of Hospitals after complaints of back pain, and that the doctor recommended that he be assigned light duties for a period of four months.
27. It is the Respondent's case that on 10th January, 2018, the Claimant was advised to start light duties, but he refused stating that he was still in a lot of pain which resulted in him being referred back for further tests at Mater and Guru Nanak Hospitals.
28. The Respondent claims that the Claimant started missing work and failed to produce sick-off sheets from the hospital. The Respondent further states that the Claimant also failed to attend his physiotherapy sessions as advised resulting in the Respondent writing a letter to the Claimant dated 27th February, 2018 advising him to take his treatment seriously.



29. The Respondent denies terminating the Claimant's employment and instead, states that the Claimant absconded duty from 27th February, 2018, and did not resume work nor communicate with the Respondent on his whereabouts.
30. It is the Respondent's assertion that the Claimant's contract and employment expired by effluxion of time on 30th June, 2018, and which contract was not renewed.
31. The Respondent states that the Claimant collected his February, 2018 salary, where after, he absconded work. It is stated that all the Claimant's salary and other entitlements were fully paid up, and were up to date.
32. It is the Respondent's case that the Claimant is not entitled to a salary in lieu of notice since he was the one who absconded duty. The Respondent further denies owing the Claimant the sum of Kshs. 299,257/=.
33. It is further pleaded that the Claimant's leave pay was fully settled.
34. On cross examination, the Respondent's Witness (RW 1) stated that the Claimant absconded duty after being given light duties. It states that it had been advised by the doctor to give the Claimant light duties due to the nature of his injuries.
35. It is the Respondent's position that under the doctor's advice, it gave the Claimant sweeping as a light duty, but the Claimant later absconded work. It avers that it tried to reach the Claimant via his phone to no avail, as his phone was off. The Witness however told court that they did not produce evidence of efforts made to reach the Claimant.
36. The Respondent urges the Court to dismiss the Claimant's suit with costs.

The Claimant's Submissions

37. It is submitted that the Respondent has not proved a case of desertion. He submits further that the Respondent must prove that the Claimant had a clear intention not to continue with employment with the intention being evident from the Claimant's conduct or communication. He sought to rely in the cases of Boniface Nkubi Karagania -Vs- Protective Custody Limited [2019] eKLR and Philomena Kiprotich Kirui -Vs- Lessos Veterinary Suppliers Ltd [2016] eKLR to support this position.
38. It is further submitted that the Respondent's claim on desertion are unsubstantiated as the Respondent failed to prove that the Claimant expressly communicated his intention not to continue with work.
39. It is the Claimant's submission that he testified that he indeed reported to work only for the Respondent to instruct his security guards not to let him into the work premises, and was thus summarily dismissed by the Respondent's Human Resource.
40. It is submitted for the Claimant that the Respondent's witness testified on cross examination that there was no communication to the Claimant nor summon for disciplinary action against him, and no proof of any attempts made by the Respondent to reach the Claimant.
41. The Claimant further submits that the Respondent unlawfully terminated the Claimant from employment which amounts to a summary dismissal contrary to the *Employment Act* (Section 44(2)) and the rules of natural justice.
42. Further, the Claimant contends that the lack of an administrative procedure in terminating the Claimant's employment was in breach of Article 47(1) of *the Constitution* of Kenya, 2010.



43. It is also submitted that the failure to issue the Claimant a termination letter is in violation of Section 35 of the *Employment Act*, 2007.
44. On whether the Claimant is entitled to the reliefs sought, the Claimant relied on the holding of the Court of Appeal in the case of National Bank of Kenya -vs- Samuel Nguru Mutonya [2019] eKLR where the Court held that in finding that the Claimant's termination was unlawful and unfair, the Claimant is thus entitled to the reliefs sought.
45. On payment of his terminal dues, the Claimant submitted that he was never issued with a termination notice or paid in lieu of notice prior to his unlawful termination.
46. The Claimant further contends that he is entitled to leave with full pay as provided under Section 28(1) of the *Employment Act* for the period he worked.
47. Further the Claimant contends that he is entitled to the maximum compensation of 12 months as provided under Section 49(1)(c) of the *Employment Act*, for having been unlawfully and unfairly terminated.

The Respondent's Submissions

48. On the 1st issue, the Respondent submitted that the Claimant was employed for a fixed term contract and there was no need to issue a termination notice as the contract was to end on 30th June, 2018.
49. Further, the Claimant submitted that it was a term of the contract that:-

“After the expiry of this contract and receiving your dues as stated above, there shall be no further claims towards the company”
50. The Respondent relied on the holding in the cases of Stephen M. Kitheka -vs- Kevita International limited [2018] eKLR and Ronald Ongori Gwako -vs- M/s Tyroplast Limited [2022] eKLR and submitted that the Claimant is not entitled to notice of termination of employment and that his employment was not unfairly terminated.
51. It is further submitted that it is not possible for the Respondent to have issued the Claimant with a caution letter dated 27th February, 2018 and at the same time dismissed him from employment.
52. The Respondent submits that it made efforts of tracing the Claimant but the Claimant's phone was switched off.
53. On payment of one months' salary in lieu of notice, the Respondent submits that the same is not due as no notice was required as the term contract expired by effluxion of time.
54. On payment of leave days, the Respondent submits that the same is not due reason as leave was payable on completion of the contract for all consecutive months worked, and leave earnings would be calculated at one- and three-quarter days in each completed month of service.
55. It is further submitted that the claim for salary for the remaining contract period should not be allowed since the Claimant did not render any services to the Respondent warranting payment of salary.
56. The Respondent contended that even if the Claimant was entitled to compensation for unfair termination, the court would have to take into account the fact that the Claimant had only worked for 5 months at the time he absconded duty, and that the Claimant should not be rewarded for breaching the terms of his contract of employment.



57. On costs, the Respondent submitted that the Claimant is not entitled to costs as the demand notice was not served upon the Respondent, and there is no evidence on the mode of service of the demand notice.
58. The Respondent maintains that it acted in accordance with justice and equity in not renewing the Claimant's employment contract, and urges the Court to dismiss the claim and award it costs.

Analysis & Determination

59. Upon careful consideration of the pleadings, the evidence adduced, witnesses' testimonies and the parties' submissions, the following issues crystalize for determination:-
 - i. Whether the Claimant's was unfairly and unlawful terminated
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's was unfairly and unlawful terminated

60. The Claimant's position is that he was asked by the Respondent's Human Resources Manager not to report back to work in February, 2018, and that he relocated to his rural village in Migori, and was never recalled back to work, hence this case.
61. The undisputed facts in this matter are that the Claimant got injured while on duty in the Respondent's premises and in the course of duty, and after seeking medical treatment, his doctor advised him to only do light duties on account of the injuries sustained. The Respondent admitted receiving the doctor's advisory on the Claimant's health and it told court that the only light duties it had was sweeping, which the Claimant declined to do.
11. Parties seem from the evidence before court to have had issues with the Claimant's attendance to physiotherapy sessions prescribed by his doctor, where on the one hand, the Claimant argues that he completed the sessions, while the Respondent maintains that the Claimant absconded the sessions and, on the Respondent trying to prevail upon him to complete the sessions, he left work on his own volition never to return.
62. The Respondent denies terminating the Claimant's employment and instead, contends that the Claimant deserted duty from 27th February, 2018, and did not resume work nor communicate with the Respondent on his whereabouts.
63. It is not disputed that the Claimant had a contract with the Respondent that was to lapse in June, 2018, about 4 months from when he was last on duty in February, 2018.
64. The question for the court is whether the Claimant deserted duty or whether he was terminated as he alleges. The law on desertion of duty is settled. An employer must show that it made effort to trace the whereabouts of the employee before it can consider him/her as having deserted duty, and subsequently dismiss him/her on account of desertion of duty.
65. In the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, it was held that it is not enough for an employer to say an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee.



66. Further in *In Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that:-

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

67. The Claimant got hurt doing the Respondent’s work and hence the Respondent should have discussed with him more understandably on the kind of light duties the Respondent company had that he could continue doing as he underwent treatment.

68. The manner in which the Respondent simply told the Claimant that sweeping was the only light duty it had, was in my view not accommodative.

69. In the premise, I find and hold that the Claimant’s termination was unfair.

Compensation for unfair termination

70. In my view, the Claimant’s admission that he relocated to his village where he has resided to date, can only be construed to mean that he did not intend to return to work with the Respondent. He did not therefore prove that he had legitimately expected to continue in the service of the Respondent after the lapse of his contract.

71. In the premise, I deem an award of 5 months’ salary as sufficient compensation for the unfair termination, and which is hereby awarded.

Salary for the remainder of term

72. The employer is under duty to pay salary/remuneration for work done. The Claimant in his evidence admitted having been told to leave by the Respondent’s Human Resources Manager in February, 2018. He did not therefore admittedly render service in the last 4 months of his contract and he cannot then be heard to claim payment when he did not render any labour.

73. This claim is dismissed.

Leave

74. The Respondent’s contention in respect of leave not taken, is that leave was payable on completion of the contract. The Claimant did not complete his contract with the Respondent at the instance of the Respondent. The Respondent has by this contention admitted not having paid the Claimant for leave days not taken as at separation.

75. The claim has merit and it succeeds.

Salary in lieu of notice

76. There is no documentation of how the Claimant left the service of the Respondent. His testimony that he was simply verbally asked to leave the Respondent’s premises goes to confirm that he was not at all given notice nor paid in lieu thereof.

77. This claim is thus equally merited and is allowed as prayed.

78. In the end, the Claimant’s claim succeeds, and orders granted as follows:-



- a. A declaration that the Claimant was unfairly terminated
- b. An order that the Respondent pays the Claimant: -
 - i. 5 months salary as compensation for unfair termination at Kshs. 87,590/-
 - ii. One month's salary in lieu of notice at Kshs. 17,518/=
 - iii. Unpaid leave for 21 days X 17,518/26 at Kshs 14,149/=
 - iv. Costs of the suit and interest at court rates from the date of this judgment until payment in full.

79. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 19TH DAY OF DECEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Ng'ongah h/b for Mr. Wamalwa for the Claimant

Ms. Nyaencha Present for the Respondent

Ms. Esther-CA

