



Okalo v Msafi Cleaning Services (Employment and Labour Relations Cause 310 of 2017) [2024] KEELRC 13582 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13582 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 310 OF 2017
MA ONYANGO, J
DECEMBER 19, 2024**

BETWEEN

MICHAEL ANYANGU OKALO CLAIMANT

AND

MSAFI CLEANING SERVICES RESPONDENT

JUDGMENT

1. Vide a Statement of Claim dated 17th October 2017 the Claimant avers that the Respondent unprocedurally, unlawfully and unfairly terminated his employment. He seeks the following orders: -
 - a. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstances the claimant is entitled to compensation as prayed for herein above.
 - b. The sum of Ksh.9222,984.60/= as set out herein above.
 - c. Costs of this suit and interests at court rates from time of filing suit until payment in full.
 - d. Any other, further and better relief the Honourable Court may deem just and fit to grant.
2. The Respondent filed a memorandum of Defence in which it admits that the Claimant was its employee earning a gross salary of Kshs. 8000 and Kshs. 7500 net. It denies terminating the employment of the Claimant and avers that the Claimant deserted duty from July to October, 2017 when he appeared and alleged that he was arrested and detained. The Respondent denies that it unfairly terminated the Claimant's employment.
3. At the hearing the Claimant testified on his own behalf as CW1 while the Respondent called one WILSON MWANGI WAINAINA, its Chief Financial Officer who testified on its behalf as RW1. The parties thereafter filed and exchanged written submissions.



Claimant's case

4. The Claimant case is that he was employed by the Respondent in January, 2014 as a cleaner. He worked for the Respondent until July, 2017 when his employment was terminated. He was not given any reason for the termination. He was never involved in any disciplinary issue. He was never taken through a disciplinary hearing. He was not issued with termination notice or a show cause letter. He did not understand why his employment was terminated. He was never issued with a certificate of service.
5. The Claimant testified that on the material day he reported to work and went to change into his working clothes when his supervisor told him to go away as he had been replaced.
6. The Claimant testified that he was not paid salary for the month worked or in lieu of notice.
7. The Claimant testified that he reported to work at 5 am and worked until 5 pm for 7 days every week but was not paid overtime. The Claimant further testified that he was underpaid.
8. The Claimant denied that he absconded duty as alleged by the Respondent. He testified that he has never been arrested by police and locked up in custody for 3 months as alleged by the Respondent.
9. The Claimant testified that when his employment was terminated he went to the Labour Officer who directed the Respondent to pay him Kshs. 7000 to enable him pay rent.
10. He denied that he was transferred and refused to relocate as alleged by the Respondent.
11. On cross examination the Claimant stated that he worked on Saturday and Sunday.

Respondent's Case

12. RW1 testified that the head office of the Respondent is in Mburu Plaza, Nkuruma Street, Room 112, Thika Town. In Eldoret the Respondent's office was at Komora Plaza. Claimant was an employee of the Respondent from 2014 to 2017 as a cleaner. He denied that the Respondent was a briefcase company with no offices.
13. RW1 testified that the Claimant was given notice at the time of termination. That he was paid Kshs. 7000 to cater for transport to and notice.
14. RW1 testified that the contract with Nakumatt where the Claimant was working was terminated and the Respondent sent the Claimant to a new contract it had signed with Bidcoro in Thika.
15. Under cross examination RW1 stated that there was no warning letter against the Claimant or notice to show cause filed in court.
16. He further stated that there was no letter addressed to the Claimant over his alleged desertion of duty for 3 months. That the Respondent also had no evidence of efforts made to reach the Claimant at the time he was alleged to have deserted duty.
17. He testified that there was a letter of transfer issued to the Claimant confirming he had been transferred to Thika filed in court. That there was evidence that the letter reached the Claimant as the Claimant had admitted at the Labour Office that he had received the letter.
18. RW1 further stated that he had given the Claimant a termination letter at the Labour Office.
19. He stated that the Claimant worked from 8 am to 4 pm but he had no register to prove that same.



Determination

20. Having considered the pleadings, evidence and submissions of the parties, the issues arising for determination are:
21. Whether the Claimant's employment was terminated unfairly by the Respondent or he deserted duty;
22. Whether the Respondent terminated the Claimant's employment unfairly; and
23. Whether the Claimant is entitled to the reliefs sought in his claim.
24. On the first issue, the Claimant avers that his employment was terminated verbally by the Respondent without notice and for no reason. The Respondent on the other hand avers that the Claimant deserted duty on 8th July, 2017 immediately after he received salary for the month of July. That on 3rd October, the Claimant reported back to the office and claimed that he was arrested and detained for almost 3 months. That when the Respondent insisted on the Claimant producing court proceedings he left and came back with a letter from Labour Officer. That after intervention of the Labour Officer it was agreed that the Claimant be reinstated and transferred to a new contract in Thika as the cleaning contract where the Claimant previously worked in Eldoret with Nakumatt had been terminated on 1st October, 2017.
25. There is a letter of transfer dated 14th September, 2017 transferring the Claimant from Eldoret Branch to Ruiru Branch Bidcoro Africa Ltd where he was required to report to on 26th October, 2017.
26. This however does not tie up with the evidence of the Respondent that the Claimant deserted duty on 8th July immediately after receiving his salary for July 2017 and did not report back to work until 3rd October, 2017. If the Claimant deserted duty on 8th July and reported back on 3rd October, how would he have been transferred to Thika by letter dated 14th September, which in any case the Claimant stated that he never received.
27. Further, there is no evidence that the Respondent inquired about the Claimant's whereabouts between 8th July, 2017 when he is alleged to have deserted duty and 3rd October, 2017 when it is alleged he reappeared at work and stated he had been under police custody. That Claimant denied that he had ever been arrested and incarcerated for 3 months. Was he transferred during the period he is alleged to have deserted work?
28. I find that that there is no proof that the Claimant deserted duty. On the Contrary, the Respondent has not discharged its burden of proving that the termination of the Claimant's employment was for valid reason and with fair procedure. The termination was thus unfair under section 45(2) of the [Employment Act](#).
29. On the Remedies, the Claimant prayed for one months salary in lieu of notice which I award him as provided in section 49(1) of the [Employment Act](#).
30. He further prayed for unpaid salary Kshs. 114,489.60. at page 14 of the Claimant's bundle is a tabulation of the said amount which is therein referred to as unpaid off days. The Respondent did not produce any records to prove that the Claimant was given any off days. I thus award the Claimant the same at one (1) per week. Section 27(2) of the [Employment Act](#) provides for at least one rest day per week.
31. The Claimant prayed for overtime. The Claimant testified that he worked from 5 am to 5 pm daily. The RW1 on the other hand testified that the Claimant worked from 8 am to 5 pm. I find that the Claimant did not prove that he worked overtime. The prayer is declined for want of proof.



32. The Claimant prayed for underpayments for the entire period he worked. Although RW1 stated it paid salaries as per statutory minimum rates, there was no evidence to prove the same. The Claimant's salary of 8,000 according to the Respondent was below statutory minimum wage for 2017 which was Kshs. 10107 plus 15% house allowance making a gross of Kshs. 11,623. I find that the Claimant was underpaid and award him the sum claimed.
33. The Claimant prayed for severance pay. Having not proved that he was declared redundant, this prayer has not been proved and is declined.
34. The Claimant prayed for maximum compensation. Having found that the Claimant's employment was unfairly terminated he is entitled to compensation. Taking into account all the factors set out in section 49(4) of the Act, his length of service and all the circumstances of his case, I award him 6 months' salary as compensation.

Conclusion

35. In conclusion, judgement is entered for the Claimant against the Respondent as follows:

- i. Pay in lieu of notice (gross pay) Kshs. 13, 714.00
- ii. Off days Kshs. 57,244.80
- iii. Underpayments Kshs. 257,460.00
- iv. Compensation Kshs. 82,284.00

Total Kshs. 410,702.80

36. The Claimant shall have costs of the suit.

37. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 19th DAY OF DECEMBER, 2024

MAUREEN ONYANGO

JUDGE

