



**Angaluki v Aquamist Limited (Cause 2246 of 2017)
[2023] KEELRC 225 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 225 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2246 OF 2017
JK GAKERI, J
JANUARY 31, 2023**

BETWEEN

HENRY ASENA ANGALUKI CLAIMANT

AND

AQUAMIST LIMITED RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 6th November, 2017 and filed on 14th November, 2017, the Claimant sued the Respondent alleging unfair termination of services and non-payment of terminal dues.
2. The Claimant avers that he was employed by the Respondent as a driver on 1st December, 2016 at a monthly salary of Kshs.25,233.00 under a written contract of service and served the Respondent diligently and faithfully until 29th July, 2017 when the Respondent terminated his employment by word of mouth and without notice of pay.
3. The Claimant further avers that the Respondent had no valid reason to terminate his services.
4. The Claimant prays for;
 - i. A declaration that the dismissal from employment was wrongful and unlawful.
 - ii. The terminal benefits as set out in paragraph 7 herein totaling to Kshs.451,194/= as follows:Salary in lieu of notice Kshs. 25,233Remaining period 3 months Kshs. 75,69921 leave days Kshs. 17,66312 months compensation Kshs.302, 796Certificate of serviceTotal Kshs.421,391
 - iii. The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.



- iv. The Respondent to pay the costs of this claim.
- v. Interest on the above at court rates.

Respondent's case

5. In its statement of defence filed on 22nd January, 2018, the Respondent admitted that it engaged the Claimant's services as a general labourer under a ten (10) months contract from 1st December, 2017 at a sum of Kshs.21,384/= per month and the contract was terminated by the Claimant on 29th July, 2017 when he absconded duty.
6. That the Claimant was rude to his superior, absented himself from work and converted to his own use Respondent's office resources.
7. That the Claimant absented himself from work for 14 days and his employment was accordingly terminated.
8. It was the Respondent's case that once a driver had delivered bottled water to various customers, he was bound to account for the deliveries made and the empty bottles collected and if a driver arrived after 5 p.m, he was required to close the vehicle and account for the deliveries and empty containers the following day.
9. The Respondent avers that on 29th July, 2017, the Claimant arrived after 5 p.m and was seen on CCTV picking empty containers and putting them in his truck. That previously on 20th June, 2017, he could not account for two empty bottles and 20 litre water bottles and one full twenty litre water bottle, a similar scenario repeated itself on 24th July, 2017.
10. That subsequently, the Claimant was summoned to the office, shown the CCTV footage, was requested to proceed home and report on the following day to explain why he was loading bottles in his truck. That the CCTV footage was lost after reprogramming of the CCTV system.
11. The Respondent avers that the Claimant did not report on the following and remained out of the workplace for over one (1) month until he was replaced.
12. The Respondent denies having terminated the Claimant's employment. That the Claimant absconded duty and was unavailable for a disciplinary hearing.
13. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

14. The Claimant's written statement states that he was employed in 2004 and his services were terminated on 29th July, 2017. The statement makes no reference to the circumstances in which termination of employment took place and who was involved.
15. In oral testimony, the Claimant made reference to a Mr. Rahaz who questioned him about his presence in the compound on 29th July, 2017 and who told the guard that the Claimant should not be seen in the compound. He explained that he had a 10 months renewal contract and had done only 3 months and was not taken through a disciplinary hearing.

Respondent's evidence

16. Owing to the inactivity in this matter from February 2020, the court issued a Notice to Show Cause dated 25th October, 2021. On 16th November, 2021, the Notice to Show Cause was deferred as none



of the parties was in court. On 16th December, 2021, counsel for both parties were present and the Notice to Show Cause was vacated and the suit scheduled for pre-trial before the Deputy Registrar on 24th January, 2022.

17. The Respondent's counsel was absent during the pre-trial proceedings on 24th January, 2022 and during subsequent mentions on 7th February, 2022 and 28th March, 2022 when the hearing date was fixed. Counsel for the Claimant served the hearing notice and filed an affidavit of service.
18. On 12th May 2022, hearing was adjourned as the Respondent's counsel was absent and when contacted indicated he was no ready. The court ordered counsel to pay the Claimant's counsel's costs for the day and a Court adjournment fee of Kshs.1,000/= before the next hearing date.
19. On 21st September, 2022, the Claimant's counsel was absent and hearing proceeded at 12.30 p.m.
20. After the hearing, the Claimant's counsel prayed for and was granted 7 days to file and serve submissions. The Respondent's counsel was accorded 7 days after service. By 12th October, 2022 when parties were to confirm filing of submissions, the Respondent's counsel had neither filed nor served submissions and had not done so by 12th November, 2022 when the court retired to prepare this judgement.

Claimant's submissions

21. The Claimant's counsel identified two issues for determination namely;
 - i. Whether the Claimant's dismissal was unfair and unjustified.
 - ii. Whether the Claimant is entitled to the reliefs sought.
22. As regards dismissal, reliance was made on the provisions of section 45 of the *Employment Act*, 2007 to urge that termination of the Claimant's employment was by word of mouth and unfair.
23. The provisions of Section 41 of the *Employment Act* were relied upon to urge that the Respondent did not abide by the prescribed procedure.
24. The decisions in *Walter Ogal Auro V Teachers Service Commissions* (2013) eKLR, Edward Mariga through Stanley Mariga v Nathaniel D. Schulter were cited to buttress the submission that the Claimant's evidence was uncontroverted as the Respondent did not adduce evidence.
25. It is further submitted that the Respondent's assertion that the Claimant was seen on CCTV camera interfering with the Respondent's property was unproven as the Respondent did not produce the CCTV footage relied upon.
26. As regards absconding duty, reliance was made on the decisions in *Boniface Francis Mwangi v B.O.M Iyego Secondary School* (2019) eKLR and *Geoffrey Anjere v Unique Suppliers Ltd* (2015) eKLR to urge that the employer is required to demonstrate the steps it has taken to ascertain why the employee is not at work and issue a notice to show cause.
27. In conclusion, it was argued that even if the Claimant absconded duty, the Respondent was still obligated to issue a notice to show cause as held in *Abdi Halake Garamboda V Fidelity Security Services Ltd* (2015) eKLR.
28. As to whether the Claimant is entitled to the reliefs sought, reliance was made on the provisions of Sections 107, 108 and 109 of the *Evidence Act* to submit that the Respondent had the opportunity to call evidence to counter the Claimant's evidence but failed to do so rendering the Claimant's evidence uncontroverted.



29. That the Claimant was entitled to the reliefs sought in the Memorandum of Claim.
30. Finally, it was urged that costs follow the event.

Determination

31. The issues for determination are;
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether termination of the Claimant's employment was unfair and unlawful.
 - iii. Whether the Claimant is entitled to the reliefs sought.
32. As to whether the Claimant was an employee of the Respondent, the Claimant testified that he was employed by the Respondent in 2004 as a driver. However, paragraph 3 of the Memorandum of Claim states that he was employed on 1st December, 2016, a date the Respondent is in agreement with which and as evidenced by the written agreement the Claimant executed on 5th December, 2016.
33. In determining this issue, the court is guided by the sentiments of Onyango J. in *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR as follows;

“In the case of *Monica Kanini Mutua v Al- Arafat Shopping Centre and another*, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
34. From the documentary evidence on record, it is clear that the Claimant was employed by the Respondent from 1st December, 2016 for a period of 10 months at a monthly salary of Kshs.21,384.00 and was entitled to 21 leave days per year. In addition, the Respondent admits that it terminated the Claimant's services when he absconded duty on 29th July, 2017.
35. As regards termination of the Claimant's employment, the provisions of Section 45 of the *Employment Act* are explicit that for a termination of employment to pass muster, the employer must prove that he/she had a valid and fair reason related to the conduct, capacity or compatibility of the employee or operational requirements of the employer and conducted the termination in accordance with fair procedure. While the burden of proof is embellished by the provisions of section 43 (1) and 47 (5) of the *Employment Act*, the procedural precepts are embodied in section 41 of the Act.
36. The dual requirement under the foregoing provisions was underscored by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

“However, for a termination to pass the fairness test, it must shown that there was not only substantive justification for the termination but also procedural fairness.”
37. The learned judge explained that whereas substantive justification involved the reason(s) relied upon by the employer to terminate employment, procedural fairness was concerned with the process employed to effect the termination.
38. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR and *Kenafic Industries Ltd V John Gitonga Njeru* (2016) eKLR among others.



Reason(s) for termination

39. The Claimant testified that his services were terminated by one, Mr. Rahaz by word of mouth on 29th July, 2017 evidence the Respondent did not controvert.
40. In its statement of defence, the Respondent admitted that it terminated the Claimant's services on 4th August 2017 on grounds of dereliction of duty as he had not reported to work for a continuous period of 14 days.
41. According to the Respondent, the Claimant deserted duty or absconded. However, the Respondent did not provide copies of a notice to show cause or a letter of termination of employment.
42. Black's Law Dictionary, 10th Edition define Desertion as;
- “The wilful and unjustified abandonment of a person's duties or obligations.”
43. In the regularly cited South African decision in *Seabolo v Belgavia Hotel* (1997) 6 BLLR 829 (CCMA) the court explained Desertion as follows;
- “... desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”
44. Regrettably, the Respondent tendered no evidence to substantiate the allegation that the Claimant deserted the workplace for 14 days.
45. In *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR, the court held;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
46. Similar sentiments were expressed in *Boniface Francis Mwangi v B.O.M Iyego Secondary School* (2019) eKLR, *Simon Mbithi Mbane v Inter Security Services Ltd* (2018) eKLR and *Joseph Nzioka v Smart Coating Ltd* (2017) eKLR.
47. The Respondent did not demonstrate the steps it took to ascertain why the Claimant was not reporting for work. More significantly, it did not send him a warning letter or notice to show cause for alleged desertion.
48. The court is further guided by the sentiments of Onyango J. in *Judith Atieno Ownor v Sameer Agriculture and Livestock Ltd* (2020) eKLR as follows;
- “Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent show this court it did accord the Claimant a fair hearing prior to her termination.”
49. These sentiments apply to the facts of the instant case on all fours.



50. In sum, the Respondent has on a balance of probabilities failed to show that it had a valid and fair reason to terminate the Claimant's employment on 4th August, 2017. The Respondent led no evidence of the alleged desertion.

Procedure

51. In his oral testimony on 21st September, 2022, the Claimant stated that he was not taken through a disciplinary hearing and the Respondent's documents on record make no reference to a disciplinary process.

52. From the evidence on record, it is clear that the Claimant was not taken through a disciplinary hearing before termination of employment.

53. The mandatory provisions of Section 41 of the *Employment Act* were not complied with and the termination of the Claimant's employment was procedurally flawed.

54. In the end, it is the finding of the court that termination of the Claimant's employment was neither substantively justifiable nor procedurally fair.

55. As regards the reliefs sought, the court proceeds as follows;

i. Having found that termination of the Claimant's employment was unfair for non-compliance with the provisions of the *Employment Act*, a declaration to that effect hereby issues.

ii. Salary in lieu of notice

56. The Respondent did not adduce evidence to demonstrate that it accorded the Claimant notice in accordance with the provisions of the *Employment Act* or pay in lieu of notice.

The Claimant is awarded pay in lieu of notice Kshs.25,233.00

iii. Remaining 3 months of the contract Kshs.75,699/=

57. Clause 16 of the Contract of Employment dated 1st December, 2016 provided that the contract of employment was terminable by either party giving the other one month's notice. The claim for compensation for the remaining period of the contract is thus unjustified. Relatedly, this is a claim for anticipatory earnings and has no anchorage in law. (See *D.K Njagi Marete v Teachers Service Commission* (2020) eKLR).

The prayer is denied.

iv. 21 leave days

58. Neither the undated written statement nor the oral testimony make reference to pending leave days and the relevant particulars.

The prayer is declined.

v. 12 months compensation

59. Having found that termination of the Claimant's employment was unfair within the meaning of Section 45 of the *Employment Act*, the Claimant is entitled to the relief provided by Section 49 (1) (c) of the *Employment Act*.

60. In determining the quantum of compensation, the court has considered that;



- i. The Claimant was an employee of the Respondent for about 8 months which is a relatively short time and led no evidence of his wish to continue.
 - ii. The Claimant had a warning letter dated 20th June, 2017 on missing items and thus contributed to termination of his services.
61. In view of the foregoing, the court is satisfied that the equivalent of 2 month's salary is fair, Kshs.50,466/=.
62. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
- a. One month's salary in lieu of notice Kshs.25,233/=.
 - b. Equivalent of two (2) month's salary Kshs.50,466/=.
 - c. Costs of this suit.
 - d. Interest at court rates from the date hereof till payment in full.
 - e. Certificate of service.
63. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY, 2023.

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

