



**Masake v Bob Morgan Services Ltd (Cause 2006 of 2016)  
[2023] KEELRC 152 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 152 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2006 OF 2016  
SC RUTTO, J  
JANUARY 27, 2023**

**BETWEEN**

**JOSEPH OSAPIRI MASAKE ..... CLAIMANT**

**AND**

**BOB MORGAN SERVICES LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent as a security guard on or about April 16, 2003. That he served with loyalty and diligence but the respondent did not appreciate his services and instead, terminated him without following due process. The claimant considers his termination as unprocedural and unfair, hence seeks against the respondent the sum of Kshs 162,373.00 being salary in lieu of notice, uniform refund and compensatory damages.
2. The respondent denies the claimant's averments and asserts that it is him who deserted his place of work without leave or lawful cause. The respondent further contends that it followed due procedure and gave reasons for the claimant's termination. That the claimant is not entitled to any of the prayers sought hence urges the court to dismiss the claim with costs.
3. The matter proceeded for part hearing on May 4, 2022 and subsequently on July 14, 2022, when the respondent presented and closed its case. At the trial, each side called one witness.

**Claimant's case**

4. The claimant testified in support of his case and for starters, he adopted his witness statement to constitute his evidence in chief. It was his testimony that on September 4, 2015, he was stationed at Intercontinental Hotel when a Mr. Kamenyi from the operations, came and accused him together with his colleagues, of sleeping while at work. That since his name was among those who were allegedly sleeping, Mr. Kamenyi instructed him to report to his office. That as such, he went to see Mr. Kamenyi the following day, who in turn chased him away and told him not to report to his assignment. That



the said Mr. Kamenyi further called the field operations officer by the name Mr. Langat and asked him not to allow the claimant report for duty.

5. That he therefore went home and waited to hear from the respondent but he received no feedback. That a month later, he was called by a colleague by the name Mr. Silas, who informed him that he had been terminated from employment on account of desertion. That subsequently, he proceeded to Kituo Cha Sheria and registered his complaint. That a demand letter was issued to the respondent by Kituo Cha Sheria but no response was forthcoming hence he moved the Court through the instant suit.

### **Respondent's case**

6. The respondent tendered oral evidence through Mr. Dennis Michieka, who testified as RW1. He identified himself as the respondent's Chief of Staff. He also proceeded to adopt his witness statement and the documents filed on behalf of the respondent, to constitute his evidence in chief.
7. It was his testimony that the claimant was reported absent from work on October 5, 2015. That his general conduct while in employment was below expectation despite recommendations that he be transferred to work as a dayshift guard. That on October 3, 2015, while the claimant was stationed at Intercontinental Hotel, the respondent received a report from its client, that he was asleep while on duty, thereby exposing the client to a threat of security. That following the complaint, the respondent sought to transfer the claimant to the day shift but he refused to abide by the said recommendation. That the claimant deserted duty on October 5, 2015 and reported back on October 14, 2015 when communication about his desertion was made to his referees to confirm his whereabouts.
8. RW1 stated in further evidence that the claimant reported back to work on November 5, 2015 to claim his monthly salary knowing very well that he did not work from October 5, 2015 and was uncooperative with the officer who was handling the case. That the claimant refused to accept communication from the management of the respondent regarding his desertion until February, 2016.
9. That following investigations, the respondent's management recommended the claimant's dismissal. That the claimant was given reasonable time to respond to the allegations levelled against him and he did not lodge an appeal against his dismissal. That the claimant was paid for the days worked in October, 2015. In the opinion of RW1, the claimant is not entitled to the reliefs sought.

### **Submissions**

10. The claimant submitted that his termination was wrongful and unfair and was without due regard to the law. That he was granted an opportunity to be heard and was not given notice. That at the time of his termination, he had been in the respondent's employment for over 12 years.
11. On its part, the respondent submitted that the claimant did not mention Mr. Kamenyi in his pleadings nor the person who dismissed him from employment. That blaming Mr. Kamenyi for his dismissal is an afterthought meant to cover up for his absence from work.
12. It was the respondent's further submission that desertion is a repudiation of the contract of employment. That the employer accepted the repudiation by effecting termination of the employment contract and that an employee who deserts is in breach of the employment contract and an employer is entitled to dismiss him on the ground of repudiation of contract. That the claimant failed to demonstrate his whereabouts from October 5, 2015 to the day he collected his dismissal letter on February 18, 2016.
13. The respondent stated in further submission that the claimant opted not to lodge an appeal despite being afforded the right of appeal. That the Appeal would have enabled both the employer and the



employee establish the cause of the desertion from duty. That the absence of an appeal founded a belief in the employer that the claimant had no intention of ever returning to work.

### **Analysis and determination**

14. I have considered the pleadings on record, the evidentiary material before me and the rival submissions, and find the issues following issues falling for determination:
  - i. Whether the claimant deserted duty hence a justifiable reason to warrant his termination from employment;
  - ii. Whether the respondent complied with the requirements of a fair hearing;
  - iii. Is the claimant entitled to the reliefs sought?

### **Desertion of duty?**

15. As reasonably expected, both parties have taken different positions on this issue. Whereas the claimant avers that he was chased away by a Mr. Kamenyi and told not to report to work, the respondent contends that it is him whom deserted duty without leave and lawful cause.
16. To support its case, the respondent exhibited an occurrence report in respect of October 5, 2015 which indicates that the claimant together with other security personnel stationed at Intercontinental Hotel, were sleeping while on duty. This was supported by an email dated October 3, 2015 from the Assistant Security Manager of Intercontinental Hotel who complained as much. Within the said occurrence report is a note is a proposal to change the claimant's shift to daytime.
17. The occurrence report of October 9, 2015 indicates that the claimant had not reported on duty since October 6, 2015 hence was declared a deserter. On record, are letters dated October 14, 2015 by one John Ochuku to Erick Isayi Musila and Elija O. Owalla enquiring on the whereabouts of the claimant. The said Erick Isayi Musila and Elija O. Owalla were identified as the claimant's referees.
18. It is instructive to note that the claimant did not state in his pleadings that he was chased by Mr. Kamenyi and asked not to report for his assignment. He only raised the issue during his oral testimony. Further, despite stating that he was chased away by Mr. Kamenyi, he stated that his supervisor was Mr. Okeyo Peter. One therefore wonders if indeed, the claimant was chased away by a person who was not his supervisor, why did he not seek out his supervisor for further direction. If his version is to be believed, then he acted imprudently in the circumstances.
19. Explaining his absence from work, the claimant stated that he went home to await feedback from his employer. By all means, the period in question is considerably long for an employee to be sitting at home waiting for a word from his employer, considering the fact that he had not sent away through formal communication.
20. If anything, the evidence exhibited by the respondent is that the claimant was away from duty from October 5, 2015 hence the reason he was identified as a deserter. This lends credence to the respondent's assertion that the claimant absconded duty.
21. As a matter of fact, it defeats logic for the respondent to send away the claimant then identify him as deserter. This means that the respondent still considered him its employee.
22. In the circumstances, it is my finding that the respondent has proved to the requisite standard that the claimant deserted duty. Therefore, it had a justifiable reason to take disciplinary action against him on account of desertion of duty which notably, is a ground for dismissal under section 44 (4) (a) of the Act.



23. Having found as such, I now turn to consider whether the respondent followed due process and accorded the claimant procedural fairness prior to dismissing him from employment.

### **Procedural fairness?**

24. Procedural fairness is stipulated under sections 45 (2)(c) and 41 of the *Employment Act*. It requires an employer to notify an employee of the reasons it is considering terminating his services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative.
25. In the instant case, the claimant has averred that the respondent did not follow due process in terminating his employment. On its part, the respondent merely contended that the claimant deserted duty hence was summarily dismissed from employment. It did not state, let alone suggest that it undertook the process contemplated under section 41 of the *Employment Act*.
26. Besides the letter of summary dismissal, there is no communication to the claimant in the form of a notification through which he was required to explain his absence from work. It would seem that upon noting his absence from work, the respondent did not engage the claimant further and without much ado, proceeded to dismiss him from employment.
27. As I have found, the respondent had all the reason to take disciplinary action against the claimant for desertion of duty. Nonetheless, it was duty bound to comply with all the legal requirements which entailed notifying the claimant of the reasons it was considering terminating his employment in a language he understands and in the presence of an employee of his choice or a union representative. The respondent did not tender any evidence before court to prove that it indeed issued a notification to the claimant to that effect or accorded him a hearing.
28. Notwithstanding his desertion from duty, the respondent ought to have granted the claimant an opportunity to defend himself and give his side of the story. As I have found, no evidence was placed before court to prove that this was done and to that extent, the respondent is at fault for want of procedure.
29. In the end, the respondent's actions of dismissing the claimant from employment without following due process, rendered the dismissal unlawful.

### **Reliefs**

#### **One month's salary in lieu of notice**

30. As I have found that the claimant was not terminated in line with fair procedure, I will award him one month's salary in lieu of notice.

#### **Compensation for wrongful and unfair termination**

31. Having found that the respondent had valid grounds to terminate the claimant but failed to follow the stipulated procedure, I will award him four (4) months' gross salary in compensation as damages under this head.

#### **Refund of Uniform deductions**

32. The respondent indicated that it made a refund of uniform to the claimant and that the same was included in his terminal dues. In this regard, he is entitled to the said refund in the event he was not paid.



**Order**

- 33. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded:
  - a. 1 month salary in lieu of notice.....Kshs 17,995.35
  - b. 4 months' gross salary in compensation...Kshs 71,981.40Total Kshs 89,976.75
- 34. The total award will be subject to interest at court rates from the date of judgment until payment in full.
- 35. The respondent shall also bear the costs of this claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2023.**

.....  
**STELLA RUTTO**

**JUDGE**

**Appearance:**

**For Claimant In person**

**For the Respondent Mr. Njuguna**

**Court assistant Abdimalik Hussein**

**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 had 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.

**STELLA RUTTO**

**JUDGE**

