



REPUBLIC OF KENYA



**M'Machi v Mombasa Cement Limited (Cause 2048 of 2017)
[2023] KEELRC 148 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 148 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2048 OF 2017
JK GAKERI, J
JANUARY 25, 2023**

BETWEEN

CALISTUS ANYWOLO M'MACHI CLAIMANT

AND

MOMBASA CEMENT LIMITED RESPONDENT

JUDGMENT

1. By a Memorandum of Claim filed on 12th October, 2017, the Claimant sued the Respondent alleging unfair, wrongful and unlawful dismissal.
2. The Claimant avers that he was employed by the Respondent in November 2013 at the Athi River unit under a 6 months contract at Kshs.13,426/= per month.
3. That following an injury in May 2015 and the suit for compensation, the Respondent frustrated and victimized the Claimant.
4. The Claimant avers that on 21st July, 2015, he reported to work at 6.00 am and was assigned duty at the bucket elevator as the Clinker Stockpile was not operating.
5. That security guards came around looking for one Dennis Monyoncho but were informed he was not present.
6. That at 10.30 am, the guards came asking whether there was an employee who worked at the clinker, stock pile section and the supervisor directed them to the Claimant who informed them that he knew Mr. Dennis but had not seen him on that day.
7. The Claimant further avers that at 10.30, he was requested to proceed to Human Resource where Dr. Rushein Delwash and Mr. Kurji questioned him about a theft of a cable which he had no knowledge of. That security guards were then summoned to escort the Claimant to Athi River Police Station where



the Claimant was arrested and arraigned in court on 22nd July, 2015 and charged with the offence of stealing by servant and released on cash bail.

8. That he reported to work on 23rd July, 2015 but was denied entry at the gate by one, George Kariuki citing instructions by the Human Resource Manager.
9. That no dismissal letter was issued and he was not taken through a disciplinary hearing.
10. That the criminal case was dismissed on 24th November, 2016.
11. The Claimant prays for;
 - i. A declaration that the dismissal of the Claimant was unlawful, wrongful and unfair.
 - ii. Pay for days worked Kshs.11,900/=
 - iii. Pay in lieu of notice Kshs.14,734/=
 - iv. Compensation Kshs.176,808/=
 - v. Damages for defamation.
 - vi. Costs of this cause.
 - vii. Interest on (ii – vi) herein above.

Respondent's case

12. The Respondent filed a Memorandum of Response on 14th December, 2017. It avers that the Claimant had several incidences of indiscipline and integrity issues.
13. That on 21st July, 2015 while not on duty, he was spotted by the Respondent's security guards carrying a sack on his head and when confronted, gave the name of Dennis Monyoncho, outmaneuvered the guards and run out of the compound leaving the sack which contained armoured cables and was positively identified the following day.
14. The Respondent avers that it did not terminate the Claimant's employment, he never showed up at his work place after he was arrested and charged and his whereabouts was unknown.
15. That he deserted the work place and was never denied entry into the premises.
16. The Respondent prays for dismissal of the suit with costs.

Evidence

17. The Claimant's written statement rehashes the contents of the Memorandum of Claim.
18. On cross-examination, the claimant stated that his basic salary was Kshs.14,617/= and had made a mistake in the Memorandum of Claim. That he was at work on 21st July, 2015 and was arrested on the same day. He admitted that the guards knew him physically but not by name. He denied knowledge of Mr. Dennis Monyoncho.
19. The witness stated that he was informed of the dismissal from employment by one, Mr. George Kariuki at the gate but was not given a termination letter. He denied having deserted duty. The witness confirmed that he had not provided particulars of the days claimed as days worked and had no evidence to prove the prayer.



Respondent's evidence

20. RWI, Mr. Samuel Maranga testified that the Claimant absconded duty. That the employee personal data form sets out the employee's contacts and attempts to reach the Claimant fell through.
21. The witness confirmed that the Claimant was not taken through any disciplinary proceedings and was terminated from employment because he deserted the work place and no letter of termination was issued.
22. That the Claimant was paid for the days worked including overtime and the certificate of service was ready for collection.
23. On cross-examination, the witness stated that the Claimant had a history of indiscipline but no documentary evidence had been provided. That the Claimant was arrested within the Respondent's premises and had a supervisor who allowed him to work.
24. That he had no record of attendance or evidence that certain items were missing.
25. The witness confirmed that the only contact the Respondent had was the Claimant's telephone number which he could not recall. He was unambiguous that the Claimant deserted duty. That the Claimant was not paid salary in lieu of notice as he absconded duty.
26. On re-examination, the witness stated that warnings to the Claimant were verbal and could not recall the telephone numbers of all employees.

Claimant's submissions

27. The Claimant identified two issues for determination, namely; whether dismissal of the Claimant from employment was fair and lawful and entitlement to the reliefs sought.
28. On the 1st issue, it was urged that based on the evidence on record, the Respondent did not establish that the Claimant deserted duty or efforts made to trace him.
29. Reliance was made on the decisions in *Richard Maingi V Wells Fargo Ltd (2017) eKLR*, *Simon Mbithi Mbane V Inter Security Services Ltd (2018) eKLR*, *Joseph Nzioka V Smart Coatings Ltd (2017) eKLR* among others in support of the submission.
30. The court was urged to find that the Respondent terminated the Claimant's employment as it did not contradict his evidence that Mr. George Kariuki had instructions of the Respondent's Human Resource Manager not to allow him into the respondent's premises.
31. On procedure, reliance was made on sections 41 and 45 of the *Employment Act* to urge that the Claimant was dismissed from employment without due process.
32. The decisions in *Samuel Muchiri Gikonyo V Henkel Chemicals (EA) Ltd (2014) eKLR*, *Peter Apolo Ochieng V Amed Centre Kenya Ltd (2016) eKRL* and *Peter Onyango Nyabongo V Citadelle Security Ltd (2015) eKLR* were relied upon to urge that the provisions of section 41 of the *Employment Act* were not complied with.
33. As regards the reliefs sought, it was submitted that the Claimant is entitled to pay in lieu of notice as the provisions of section 35 of the *Employment Act* were not complied with and 12 month's compensation for unfair termination as ordained by section 49(1)(c) of the *Employment Act*.
34. As regards damages for defamation, it was submitted that the Respondent caused the arrest of the Claimant and was falsely accused and suffered shame and loss and could not associate with people



- or secure employment and had to retreat to his rural home and prays for Kshs.3,500,000/= as compensation.
35. The decisions in *Naqvi Syed Qmar V Paramount Bank Ltd & another* (2015) eKLR and *Daniel Mungai Karanja V Attorney General and another* (2018) eKLR were relied upon to urge the court to award compensation.
 36. Finally, it was submitted that the Claimant was entitled to certificate of service, costs and interest.

Respondent's submissions

37. The Respondent identified similar issues for determination.
38. As to whether termination of the Claimant's employment was unfair, wrongful or unlawful, it was submitted that the Claimant was the alleged thief and had been positively identified by guards on the following day and was taken to the police station.
39. It was urged that if an employee by the name Dennis Mohancho or Monyoncho existed, the Claimant should have called him to testify as RWI confirmed that the Respondent had no employee by that name.
40. The Respondent maintained that the Claimant deserted duty and was not dismissed from employment. That he did not report to the work place after arraignment in court.
41. It was submitted that the Respondent tried to reach out to the Claimant in several instances using his bio data to no avail and the Respondent had thousands of employees.
42. That the Claimant sued in bad faith as the action was commenced before 14 days lapsed after the demand letter.
43. Reliance was made on the decision in *Cyrus Ng'ang'a Njuguna V Kahoya & Kahoya Ltd* (2016) eKLR to urge that the Claimant's evidence was contradictory.
44. That the Respondent was unable to reach or trace the Claimant using the personal data in their records and the Claimant did not reach out to the employer.
45. The decision in *Caroline Gathoni Gikonyo V Kenya Association of Investment Groups* (2015) eKLR was relied upon to urge that an employee has a duty to inform the employer of their whereabouts.
46. That the acquittal in Criminal Case No. 525 of 2015 did not mean that theft of cables had not taken place or that the Claimant was not to blame and the failure by the prosecution to call witnesses and prove its case ought not be visited upon the Respondent.
47. On reliefs, it was urged that the sum of Kshs.11,900/= claimed lacked particulars of the month or period or how it was arrived at and was not submitted on.
48. Reliance was made on the decision in *Julius Gicheru Gachahi & another V Board of Governors of Maragi Secondary School* (2013) eKLR to urge that the Claimant must clearly demonstrate how the amount claimed was calculated.
49. That the Claimant made a blanket claim without an explanation or computation and the same should not be allowed.
50. It was submitted since the claimant deserted duty, no pay in lieu of notice was due to him.
51. It was further urged that the Claimant was not entitled to compensation for he absconded duty.



52. As regards damages for defamation, it was urged that the court had no jurisdiction to determine the claim as defamation was not specifically pleaded or explained how arraignment in court amounted to defamation.
53. Reliance was made on the decision in *Washington Odera Sideka V Githaiga Kamwenji & another* (2018) eKLR to urge that the court had no jurisdiction to hear defamation suits.
54. The court was urged to find that the Respondent was not in default for not issuing a certificate of service as the Claimant deserted duty.
55. On costs, it was urged that they follow the event and the Claimant had not proved his case against the Respondent.

Determination

56. After careful consideration of the pleadings, evidence on record, submissions by the parties and the law, the issues for determination are;
 - i. Whether the Claimant's employment was unlawful or unfairly terminated or he absconded or deserted duty.
 - ii. Whether the Claimant is entitled to the reliefs sought.
57. As to whether the Claimant absconded duty or was unlawful and unfairly terminated from employment, parties adopted contrasting positions. While the Claimant's counsel submitted that the claimant's employment was unfairly terminated by the Respondent, the Respondent submitted that the Claimant deserted the work place and was unreachable.
58. According to Black's Law Dictionary, 10th Edition, Desertion means

“The wilful and unjustified abandonment of a person's duties or obligations.”
59. In the often cited South African decision in *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court stated 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.”
60. From the evidence on record, the Respondent alleged that the Claimant did not report to the work place after he was arrested and charged on 22nd July, 2015 and thus deserted duty.
61. The Claimant on the other hand testified that on 23rd July, 2015, he reported to the work place ready to work but was not allowed in by one Mr. George Kariuki, a security guard, who informed him that he had been instructed by the Human Resource Manager not to allow him in and was not given a termination letter, a fact confirmed by RWI on cross-examination.
62. The Respondent did not deny that it had a security guard by the name George Kariuki stationed at the gate.
63. On cross-examination, RWI further confirmed that the Claimant's employment was terminated because he deserted duty. Curiously and as stated above, the Respondent did not issue a termination letter.



64. From the evidence on record, it is also unclear as to when the Respondent discovered that the Claimant had indeed deserted the work place.
65. In navigating the terrain of desertion, the court is guided by the sentiments of the court in *Felistas Acheha Ikatwa V Charles Peter Otieno (2018) eKLR* as follows;
- “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.”
66. Similar sentiments were expressed in *Joseph Nzioka V Smart Coatings Ltd (Supra)*, *Simon Mbithi Mbane V Inter Security Services Ltd (Supra)* and *Richard Maingi V Wells Fargo Ltd (Supra)* among others.
67. These decisions are explicit that it must be shown reasonable steps were taken to contact the employee to resume duty but to no avail and disciplinary process was initiated.
68. In the instant case, although the Respondent’s witness testified that the Claimant was unreachable, he could not tell who called the Claimant and when.
69. Puzzlingly, the witness had confirmed on cross-examination that the only contact the Respondent had was the Claimant’s cell phone number which he could not recall as the company had thousands of employees as submitted and it was the employee’s duty to provide contact details.
70. The second schedule to the Claimant’s employment letter dated 21st August, 2014 contained the Claimant’s telephone contact 0726545939 and that of the spouse, Ann Mary Wahu Muthiora No. 0717667739. The schedule sets out the postal addresses of the Claimant and the spouse as 65 Yala and 1295 Webuye respectively.
71. If indeed the Respondent attempted to contact the Claimant but he was unreachable, why did it not try the spouse’s number, which it had and why could it not write and post letters to both addresses and have them registered? The respondent was obligated to demonstrate that it made reasonable efforts to contact the claimant.
72. The court is further guided by the sentiments of Onyango J. in *Judith Atieno Owuor 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 to show this court it did accord the claimant a fair hearing prior to termination.”
73. Similarly, even assuming that the Respondent attempted to reach out to the Claimant through his cell phone number and was unsuccessful, it adduced no evidence of what it did thereafter to express its disappointment with the Claimant’s desertion of duty. It neither issued a show cause letter nor notify the Labour Officer or issue a termination letter to close the issue. Such evidence would have demonstrated that reasonable attempts had been made to reach the Claimant but to no avail.
74. For the above-stated reasons, the court is satisfied and finds that the Respondent has on a balance of probabilities failed to prove that the Claimant absconded or deserted duty.



75. Needless to emphasize, the provisions of the *Employment Act*, 2007 are clear that for a termination of employment to be deemed fair, the employer must prove that it had a valid and fair reason to terminate the employee's services and did so in accordance with fair procedure.
76. The reason(s) for the termination must be proved in accordance with section 43(1) of the Act.
77. In *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, Ndolo J. stated as follows;
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
78. The Court of Appeal made similar sentiments in *Naima Khamis V Oxford University Press EA Ltd (2017) eKLR*.
79. On cross-examination, RWI confirmed that the Claimant was not subjected to disciplinary proceedings.
80. In a nutshell, the Respondent has not adduced evidence of a fair termination of the Claimant's employment or desertion of duty.
81. The court is satisfied and finds that termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness.
82. On entitlement to reliefs, the court proceeds as follows;
- i. Having found that termination of the Claimant's employment was unfair, a declaration to that effect is merited and hereby issues.
 - ii. Pay for days worked
83. This prayer lacks the necessary particulars. It is unclear on the days involved and how many they were. The Claimant admitted on cross-examination that he had neither particulars nor had no evidence to establish the prayer.
- The prayer is disallowed.
- iii. Pay in lieu of notice
84. From the evidence on record, it is clear that the Claimant was not accorded notice as ordained by section 35 of the *Employment Act* and is awarded the same, Kshs.14,728/=.
- iv. Compensation
85. Having found that termination of the Claimant's employment was unfair, the Claimant is eligible for the relief provided by section 49(1)(c) of the *Employment Act* subject to compliance with the provisions of section 49(4) of the Act.
86. In arriving at the level of compensation, the court has considered the following;
- i. The Claimant was an employee of the Respondent for a fairly short period of 11 months.
 - ii. Although the Respondent adduced no documentary evidence of the allegation that the Claimant had been involved in incidences of indiscipline, the Respondent's witness was consistent that verbal warnings had been given.



- iii. The fact that the Claimant was arrested and charged for an offence allegedly committed at the Respondent's premises implicated his character and although the Claimant's criminal case was dismissed under section 210 of the Criminal Procedure Act, it still dented his integrity as an employee.
87. In the circumstances, the court is satisfied that the equivalent of three (3) months' salary is fair, Kshs.44,180/= at a monthly salary of Kshs.17,728/= being the average of the Claimant's last three month's salary.
- v. Damages for defamation
88. Contrary to the Respondent's submissions that the court had no jurisdiction to determine this issue, the court is persuaded that it has as section 12(1) of the Employment and Labour Relations Court Act, 2011 covers all manner of disputes emanating from an employment relationship and would include the alleged defamation. However, the Claimant did not plead or prove any particulars of defamation.
89. The fact that the Respondent reported the matter to the police and the Claimant was arrested and charged but was subsequently acquitted under section 210 for lack of sufficient evidence to support the charge, does not of itself signify defamation.
90. In simple legal parlance, defamation is the publication of a false representation which tends to lower a person's image in the estimation of right thinking members of society who may tend to shun or avoid the person.
91. Defamation may be libel or slander and the elements of defamation must be proved, namely;Defamatory representation.In relation to the person allegedly defamed.Publication of the representation.
92. The Claimant adduced no evidence of how he was defamed and by who.
This prayer lacks substance and is dismissed.
- vi. Although the Claimant did not pray for certificate of service, it is a statutory right under section 51 of the Employment Act and is awarded.
93. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
 - b. One month's salary in lieu of notice Kshs.14,728/=
 - c. Equivalent of three (3) months salary, Kshs.44,180/=
- TOTAL KSHS.58,908/=
- d. Costs of this suit.
 - e. Interest at court rates from the date hereof till payment in full.
94. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH 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

