



REPUBLIC OF KENYA



**Mwaniki v Ava Chem Limited (Cause E013 of 2022)  
[2023] KEELRC 55 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 55 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E013 OF 2022  
ON MAKAU, J  
JANUARY 20, 2023**

**BETWEEN**

**VERNANZYO MAINA MWANIKI ..... CLAIMANT**

**AND**

**AVA CHEM LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as a Sales Manager from 17<sup>th</sup> November 2021 until 6<sup>th</sup> January 2022 when he alleges that he was unfairly dismissed by the company. He brings this suit seeking the following reliefs;
  - a. Salary for the month of December @ Kshs.90,000/-
  - b. Salary for 6 days worked in January @ Kshs.18,000/-
  - c. 7 days payment in lieu of notice @ Kshs.21,000/-
  - d. Airtime allowance @Kshs.1000/-
  - e. Transport and night out allowance @ Kshs.14,000/-
  - f. N.H.I.F payments @ Kshs.1000/-
  - g. Twelve (12) months' salary as compensation for unprocedural and unlawful termination @ Kshs.1,080,000/-  
Total –Kshs.1,225,000/-
  - h. Costs of the suit plus interest.
2. The respondent denies the alleged dismissal and avers that the claimant failed to perform his duties as expected, absconded duty from 28<sup>th</sup> to 31<sup>st</sup> December 2021 and thereafter deserted his job without



notice from 4<sup>th</sup> January 2022, the day he reported back. Therefore the respondent seeks by way of counter claim the following reliefs;

1. A declaration that the claimant absconded duty on 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> December 2021 in breach of his contract of employment with the Respondent;
  2. A declaration that the claimant constructively by his conduct resigned his employment with the Respondent in breach of his contract of employment with the Respondent;
  3. Kenya shillings One Hundred and Two Thousand (Kshs.102,000) as particularized in the Respondent's Counterclaim herein;
  4. Interest on Kenya shillings One hundred and Two thousand (Kshs.102,000) at court rates until payment in full;
  5. Costs of the suit;
  6. Such other or further reliefs as this Honourable court may deem appropriate in the circumstances.
3. The suit was disposed by written submissions based on the pleadings, witness statements and the documentary evidence filed.

#### **Evidence**

4. The claimant reiterated the facts in the Memorandum of Claim that he was employed by the respondent vide the letter dated 17<sup>th</sup> November 2021 for a monthly salary of Kshs.90,000/- plus airtime of Kshs.3000. The first 3 months was a Probation period. He put his best foot forward in November and December 2021 serving the respondent diligently.
5. On 3<sup>rd</sup> January 2022, he reported back to work but he was received coldly particularly by the General Mnager, Ms Cynthia who stopped him from continuing with recruitment process he had started in 2022. The vehicle he had been assigned for carrying out his work was also recalled for other purposes.
6. On 6<sup>th</sup> January 2022 while on duty in Kiambu County, he received a call on his mobile phone advising him to stop working immediately. According to the claimant, no reason was cited for the termination and the procedure followed was not fair. Consequently he prayed for the reliefs sought in the suit.
7. In support of his testimony he produced Appointment letter dated 17<sup>th</sup> November 2021, email trail between him and the respondent, minutes from a meeting held on 7<sup>th</sup> December 2021, Demand letter dated 31<sup>st</sup> January 2022, WhatsApp screenshots from 29<sup>th</sup> December 2021 to 7<sup>th</sup> January 2022 and Delivery Note from Ava Chem Limited dated 4<sup>th</sup> January 2022.
8. The Respondent filed written statement from two witnesses dated 12<sup>th</sup> April 2022. Mr.Christopher Irungu Mwangi, respondent's Director stated that the company employed the claimant on 17<sup>th</sup> November 2021 on probationary basis. On 23<sup>rd</sup> December 2021, the company closed down for Christmas break to resume work on 28<sup>th</sup> December 2021. However, the claimant did not report back to work on 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> December 2021 and waited until 4<sup>th</sup> January 2022 at 9.16 am when he showed up. On that day he held a meeting with him and the General Manager –Cynthia Wanjiku Wairimu where he was asked for reports of sales duties but the claimant failed to provide.
9. After the meeting the claimant was loaded some of the respondents' product samples in his vehicle and left. From that time the claimant cut all communications with the company until he served a demand



letter asking for his salary. He also sent a Mr. David Muchemi to ask for his pay but the company served the letter dated 5<sup>th</sup> March 2022 asking the claimant to collect his cheque which he did on the same date.

10. Ms Cynthia Wanjiku Wairimu, the respondents General Manager reiterated that the claimant was employed by the respondent on 17<sup>th</sup> November 2021; that on 23<sup>rd</sup> December 2021 the company closed down and directed all employees to report back to work on 28<sup>th</sup> December 2021; that the claimant failed to report back until 4<sup>th</sup> January 2022 when he showed up at 9.16 am; that a meeting was held between the Director and herself where the claimant was asked for sales reports but he failed to provide; and that after meeting some product samples from the respondent were loaded on the claimant's vehicle and he left.
11. Thereafter, the claimant cut all communications until he served a demand letter for his salary. Subsequently, he sent a Mr. David Muchemi to ask for his pay and the company served a letter dated 5<sup>th</sup> March 2022 asking the claimant to collect his cheque of Kshs.95,095.00 which he did on the same day. She denied that the claimant was dismissed by the respondent.

### Submissions

12. It was submitted for the claimant that he reported back to work in January 2022 when the respondent's General Manager called him over the phone and told him to stop working immediately. Reference was made to the screenshots of WhatsApp text messages as evidence that he was on duty on 5<sup>th</sup> January 2022 and that he had expected Kshs.450/- on fares since the company vehicle had been taken away from him.
13. It was further submitted that if at all he the claimant had absconded duty from 28<sup>th</sup> -31<sup>st</sup> December 2021, the employer would have served him with show cause letter or warning letter. It was further argued that if indeed he had absconded, he would not have written the email dated 22<sup>nd</sup> January 2022 and the subsequent demand letter.
14. The claimant maintained that he was dismissed on 6<sup>th</sup> January 2022 when he was also dispossessed of the company vehicle, which was his tool of trade. He further submitted that no explanation has been given as to why his salary for December 2021 was withheld until the suit was filed. He dismissed as vague the termination letter issued on 28<sup>th</sup> February 2022, one month after service of demand letter.
15. It was further urged that even if the contract of employment provided for probationary period, the employer was not entitled to dismiss him without explaining the reason to him and without serving him a notice of 7 days. Reliance was placed on section 45 and 43 of the *Employment Act*.
16. For the foregoing reasons, the claimant urged the court to award 12 months' salary as compensation for unfair termination, Airtime, transport and night allowance and unremitted NHIF. Reliance was placed on the case of *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited* (2013) eKLR.
17. The respondent submitted that the claimant's contract provided for 3 months' probation period from 17<sup>th</sup> November 2021 which was terminable by a notice of 7 days. The contract also required the claimant to work from Monday to Friday but he absconded duty from 28<sup>th</sup> - 31<sup>st</sup> December 2021. It also reiterated that the claimant only showed up on 4<sup>th</sup> January 2022 and he disappeared after loading company products in his vehicle.
18. It submitted that the claimant has not adduced any evidence of the alleged phone call between him and the Respondents General Manager on 6<sup>th</sup> January 2022. The respondent referred to the WhatsApp messages of 19<sup>th</sup> January 2022 whereby the claimant enquired about his employment status, which according to the respondent that contradicts the allegation in his pleadings and evidence that he was dismissed by the General Manager on 6<sup>th</sup> January 2022.



19. It was submitted that the claimant has failed to discharge his evidentiary burden of proof of the alleged termination of his employment by the respondent on 6<sup>th</sup> January 2022. It was further submitted that there is evidence on record showing that the employer was unhappy with the claimant's performance but it was denied that the respondent breached section 35 and 42 of the *Employment Act*.
20. In view of the foregoing matters it was submitted that the claimant is not entitled to the reliefs sought but the court was urged to allow the respondent's counter claim because there is evidence to substantiate the same.

### **Analysis and Determination**

21. Having considered the pleadings, evidence and submissions, it is common ground that the claimant was employed by the respondent as a Sales Manager from 17<sup>th</sup> November 2021 to 4<sup>th</sup> or 6<sup>th</sup> January 2022. It is also a fact that the contract of employment provided for a 3 months' probation period which was to lapse on 17<sup>th</sup> February 2022 meaning that the claimant did not complete the probationary contract.
22. The following issues commend themselves for determination:-
  - a. Whether the claimant deserted his employment or he was unfairly dismissed by the respondent.
  - b. Whether the claimant is entitled to the reliefs sought.
  - c. Whether the respondent's counter claim should be allowed.

### **Desertion or Unfair Dismissal**

23. The claimant alleges that he was dismissed from employment on 6<sup>th</sup> January 2022 by the Respondents' General Manager Ms Cynthia Wairimu. The termination was not preceded by a notice of 7 days and no reason was explained to him.
24. Ms Cynthia Wairimu has denied that she dismissed the claimant on 6<sup>th</sup> January 2022 as alleged by the claimant. On the contrary she contended that the claimant reported back to work on 4<sup>th</sup> January 2022 after absconding work from 28<sup>th</sup> – 31<sup>st</sup> December 2021. That after a meeting between her, the Director and claimant, the latter resumed duty of sales but that was the last day he was seen at work.
25. The burden of proving unfair termination of employment lies with the employee pursuant to section 47 (5) of the *Employment Act*. I have considered the evidence and the rival submissions by both sides. There is evidence in the form of WhatsApp text messages between the claimant and the respondent's CEO showing that the employer was unhappy with the claimant's performance of duty. The employer was demanding sales Report from the claimant but none was given until the claimant was ordered to stop everything until the report was given. He gave a report on 6<sup>th</sup> January 2022 but the same was below the employer's expectation. Finally he gave another report on 7<sup>th</sup> January 2022 and apologized for the delay.
26. All the above was happening while the claimant was away from work. From the said text messages, he was writing while away on 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> January 2022. He again wrote on 19<sup>th</sup> January 2022, while away, enquiring about his employment status. It is therefore clear that after 4<sup>th</sup> January 2022 the claimant never returned to the respondent's premises and had deliberately withheld the required sales report from the month of December 2021.
27. He further continued with his absence from work after submitting the required report on 7<sup>th</sup> January 2022 and never went to the office or asked for his employment status soon thereafter. Instead he stayed



away until 19<sup>th</sup> January 2022. The court finds that the claimant absconded duty from 5<sup>th</sup> January 2022 and never reported back to work again. He therefore deserted his employment without prior notice and the employer cannot be accused of unfairly terminating the claimant's employment. If at all the employer had in deed dismissed him on 6<sup>th</sup> January 2022, one wonders why the claimant bothered himself by writing on 19<sup>th</sup> January 2022 enquiring about his employment status.

### **Reliefs Sought by the Claimant**

28. The claimant admitted in his submissions that his salary for December 2021 was paid and as such that claim is marked as settled.
29. The claim for salary for 6 days worked January 2022 has not been proved by evidence. Whereas the respondent maintains that it did not dismiss the claimant on 6<sup>th</sup> January 2022, it is debatable whether the claimant worked for the 6 days claimed.
30. The evidence on record shows that the claimant reported to work on 4<sup>th</sup> January 2022 and never returned to the office.
31. Since his absence from 1<sup>st</sup> – 3<sup>rd</sup> January 2022 does not seem to bother the employer, I award the claimant salary for 1<sup>st</sup> – 4<sup>th</sup> January 2022 being Kshs.12,000.00 calculated using his monthly salary of Kshs.90,000.00
32. The claim for 7 days salary in lieu of notice and 12 months' salary compensation for unfair termination is declined because there is already a finding that the termination of the contract of service was done by the claimant through desertion.
33. The claim for Airtime, NHIF, transport and night out allowances lacks particulars and supporting evidence and they are equally declined. A party who seeks special damages must set out particulars of the claim and adduce evidence to specifically prove the same.

### **Counter Claim**

34. The respondent alleges that the claimant absconded duty from 28<sup>th</sup> – 31<sup>st</sup> December 2021 and therefore claims from him Kshs.12,000.00. He further claims Kshs.90,000.00 being one month salary because the claimant terminated the contract of service without prior notice as required under clause 8 of his letter of Appointment.
35. I have already made a finding of fact that the claimant terminated the contract of service without prior notice and consequently the employer is entitled to salary of one month in lieu of notice pursuant to clause 8 of the Letter of Appointment. The said clause provided that the employee could resign at any time by serving one month written notice in advance.
36. As regards the claim for 4 days not worked but paid in December 2021, the court wonders why the same was not deducted at the time of payment of the December salary. That payment was deliberate and the only reason it was paid is because the claimant was lawfully away for Christmas holidays. There is no evidence adduced to show that the company was in operation during the 4 days complained of. Consequently, the claim for refund of 4 days' salary is declined.

### **Conclusion**

37. I have found that the claimant is entitled to salary for 4 days equaling at Kshs.12,000.00 while the respondent is entitled to Kshs.90,000.00 being salary in lieu of notice. It follows that the net result of this matter is a judgment in favour of the respondent in the sum of Kshs.78,000.00 plus interest from



the date of this judgment. Since both parties have partially succeeded in their respective claims, I award no costs to any of them.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF JANUARY, 2023.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

