



REPUBLIC OF KENYA



KENYA LAW
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**Justus v Robinson Investment Ltd (Cause 1 of 2016)
[2023] KEELRC 19 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 19 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 1 OF 2016
DN NDERITU, J
JANUARY 19, 2023**

BETWEEN

ASUGO JUSTUS CLAIMANT

AND

ROBINSON INVESTMENT LTD RESPONDENT

JUDGMENT

I. INTRODUCTION

1. In a Statement of Claim dated January 5, 2016 and filed in court on even date through Maragia Ogaro & Co Advocates the Claimant prays for:-
 - a. Underpayment
 - b. Notice
 - c. Overtime
 - d. Off duties
 - e. Public Holidays
 - f. Leave
 - g. Refund of uniform money
 - h. Compensation Under Article 49(1)(c)



i. Costs

Claims Arrangement

- a. Underpayment - Kshs 138,233.70/=
 - b. Notice - Kshs 13,029.62/=
 - c. Overtime - Kshs 198,051.79/=
 - d. Off duties - Kshs 176,046.03/=
 - e. Public holidays pay - Kshs 30,395.26/=
 - f. Leave - Kshs 23,853.24/=
 - g. Refund of uniform money - Kshs 1,500.00/=
 - h. Compensation - Kshs 156,355.44/=
- Grand Total - Kshs 715,997.08/=

2. Together with the statement of claim was filed a statement by the Claimant and a bundle of documents in support of the claim.
3. On March 10, 2016 the Respondent through Wachira Wanjiru & Co. Advocates entered appearance and filed a memorandum of response to the claim on April 3, 2017. In their memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. On 17th May, 2019 the Respondent appointed its Advocates on record Githiru & Co. to act for it in this cause.
5. This cause came up in court for hearing on December 8, 2021 when the Claimant (CW1) testified and closed his case.
6. The defence was heard on February 9, 2022 when Agnes Mukami Rutinu (RW1) testified and on March 28, 2022 when Margaret Obegi (RW2) testified and the Respondent's case was closed.
7. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant filed written submissions on May 14, 2022 while Counsel for the Respondent filed on June 14, 2022. The Claimant's Counsel filed supplementary submissions on June 20, 2022.

II. Claimant's Case

8. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel, and the same is summed up as hereunder.
9. In his memorandum of claim, the Claimant pleaded that he was engaged as a night guard by the Respondent in January, 2013. However, during the hearing in court the Claimant admitted that he was actually employed by the Respondent as a night guard on July 9, 2014. He admitted that there was an error in his claim as far as the date of employment is concerned and hence admitted and confirmed that the correct date of his employment is July 9, 2014 as per the letter of employment produced by the Respondent as an exhibit.



10. Although the letter stated that the engagement was temporary it is on the basis of that letter that the Claimant was engaged and remained in employment until November, 2015. The Claimant had applied for the job via a letter dated July 9, 2014. There is no doubt that under Section 37 of the [Employment Act](#) (the Act) the contract between the parties became that of month to month upon expiry of first 30 days of employment or upon expiry of the probation period, and the wages were paid from month to month.
11. The Claimant testified that as at the time of termination his monthly salary was Kshs 7,800/- which he contends was below the gazzetted minimum wage for his category of work.
12. In his testimony the Claimant stated that he was terminated vide a letter dated sometimes in November, 2015. However, neither of the two parties to this cause availed the said letter of termination. What is not in dispute is that the Claimant did not work for the Respondent after November 18, 2015.
13. The Claimant contends that he was unfairly terminated in that he was denied both substantive and procedural fairness. It is on the basis of the foregoing that the Claimant prays as per the memorandum of claim as reproduced in the introductory part of this judgment.

III. Respondent's Case

14. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1 and RW2, and the written submissions by Counsel, as summarized hereunder.
15. The Respondent's case is that the Claimant deserted duty from around November 18, 2015 never to return. In the circumstances, the Respondent argues that it had no time or chance to invite the Claimant for a hearing or to issue him with a notice and as such the Claimant constructively terminated his employment.
16. According to the Respondent, the Claimant is not entitled to the prayers sought and in any event the Claimant was paid all his dues at the time of termination and hence the Respondent prays that this cause be dismissed with costs.

IV. Issues For Determination

17. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
 - a. Was the termination of the Claimant by the Respondent unfair and unlawful?
 - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

V. Termination

18. The terms and conditions of employment of the Claimant by the Respondent are not in dispute. As at the time of termination or desertion, as the case may be, on or about November 18, 2015 the Claimant was in employment of the Respondent as a night guard at a monthly salary of Kshs 7,800/-.
19. It is also not in dispute that no notice of termination was issued to or by the Claimant and it is also agreed that no disciplinary hearing was conducted in whatever form or manner ostensibly for the reasons stated in the preceding part of this judgment.



20. However, the parties are not in agreement on the circumstances under which the Claimant was terminated. The Claimant in his testimony alleged that he was terminated through a letter yet he did not avail the said letter of termination in court. On the other hand, the Respondent alleged that the Claimant deserted duty on or about November 18, 2015. However, the Respondent availed no evidence on any efforts made on its part to trace the Claimant to report back to work.
21. The submissions by Claimant's Counsel did not shed light on this issue and the circumstances under which the Claimant was terminated. On the other hand the Respondent's Counsel submitted that the Claimant deserted duty after receiving a warning on a fuel theft incident in which the Claimant was either involved or complacent in.
22. The warning letter alluded to by the Respondent is dated November 14, 2015 and the Claimant admitted that the same was served upon him.
23. On November 17, 2015 the Claimant reported to the Labour Office, Nakuru, that he had not been paid salary for October, 2015. It is clear from the letter of even date by the labour officer that the Claimant had no other claim against the Respondent and there was no claim for unlawful termination, or at least no such claim was made at that point.
24. In another letter dated December 15, 2015 the Claimant instructed the labour officer to demand for his terminal dues. In that notice the Claimant alleged that he was employed in January, 2013 and that he was terminated on December 14, 2015.
25. The above two letters were produced as exhibits by the Respondent through RW2, a labour officer. Clearly, the contents of those two letters are at variance with the evidence adduced in court by the Claimant and his pleadings. Firstly, the Claimant admitted in his testimony in court that he was employed on July 14, 2014 and not January, 2013 as alleged in the letter written by the labour officer on his instructions and in the demand notice by his Counsel to the Respondent dated December 18, 2015 or as pleaded in his claim as filed in court. Secondly, the Claimant in his testimony alleged that he was terminated by way of a written notice on or about November 18, 2015 yet in the letter alluded to above, written by the labour officer on his instructions, he alleged that he was terminated on December 14, 2015.
26. The contents of the foregoing paragraph casts reasonable doubt on the Claimant's case as the Claimant comes out as uncertain and or unsure of material facts to his case. If the Claimant was terminated by way of a written notice then he did not explain why he could not produce the said notice. He is neither sure and certain of the date when he was terminated nor of the date when he commenced working for the Respondent.
27. In the circumstances, this court is inclined to believing the version of events as presented by the Respondent to the effect that the Claimant deserted duty upon receiving the warning letter of November 14, 2015 in regard to theft of fuel incident in which the Claimant is alleged to have been involved and or complacent.
28. By demanding his final dues through the labour office in the letter dated December 15, 2015 the Claimant signaled that he was neither ready nor willing to resume his duties. In those circumstances it would have been an exercise in futility for the Respondent to make efforts to cajole the Claimant back to work as the Claimant had clearly decided to terminate his services with the Respondent and he clearly did not intend to report back or return to work.
29. However, there is no evidence whatsoever that the Respondent issued a notice of termination or made any efforts to trace the Claimant to report back to work before the letter from the labour officer cited



above that signaled the Claimant's intention not to report back to work. There was no disciplinary hearing or invitation thereto by the Respondent to the Claimant. However, in the considered view of this court the Claimant was equally liable to issue a notice of termination of his services once he had made up his mind not to return to work.

30. Section 43 of the *Employment Act* (the Act) provides as follows-
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair with the meaning of Section 45.
 2. The reason or reasons or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
31. Sections 35, 40, 41, 43, 44, 45, 46, 47, and 48 of the *Act* provide for various aspects of substantive and procedural fairness in the various forms of termination including redundancy and summary dismissal.
32. What this court is saying in so many words is that the Claimant failed to follow the law by failing to issue notice in terminating his services by deserting duty. The Claimant failed to prove that the Respondent terminated him and hence the Respondent was under no obligation during the trial to prove that the reason(s) for termination was justified in accordance with Section 43 of the *Act*. The Claimant decided to desert duty and therefore terminated his services without notice and hence on the other hand the Respondent had no obligation to issue a notice of termination or conduct disciplinary hearing as the Claimant was no longer in employment and or under the authority, direction, or supervision of the Respondent or its agents.

VI. Reliefs

33. Having held that the Claimant without notice deserted his employment and therefore terminated his services, this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
34. Prayer (a) is for underpayment in the sum of Kshs 138,233.70. The Claimant has availed evidence to demonstrate that he was underpaid as pleaded in his claim. He was denied house allowance and his pay was below the recommended minimum wage for his cadre of employment. Counsel for the Claimant has however not demonstrated how the figure above is arrived at but has cited the relevant gazette notices on the applicable pay and the said notices have not been disputed by Counsel for the Respondent. In any event, the said figures in the Claimant's Counsel submissions have not been disputed and or dislodged in evidence by the Respondent and or submissions by Counsel for the Respondent.
35. However, only the sum of Kshs 74,943.04 as per the submissions by Claimant's Counsel is awarded as that is the only sum that has been authenticated by the Claimant.
36. Under Section 10 of the *Act* it is the duty of an employer to keep employment records for the employees. Failure by an employer to avail and produce employment records leaves the court with no option other than to adopt the position as testified by the Claimant as unchallenged. The Respondent did not produce attendance records to disprove the allegations by the Claimant that he worked overtime, on holidays, and that he did not take annual leave or off-duty days.



- 37. In that regard the Claimant is awarded Kshs 99,953.84 in overtime pay, Kshs 88,847.85 in off-duty pay, Kshs 15,538.42 in public holidays pay, Kshs 9,690.63 in leave pay, and Kshs 3,000/- for refund of money spent on uniform.
- 38. For the reasons advanced in an earlier part of this judgment on the circumstances under which the employment contract was terminated, that the Claimant deserted duty, the notice pay and compensation is denied.

IV. Costs

- 39. The Claimant is awarded costs of this cause.

V. Disposal

- 40. In final disposal of this cause, this court issues the following orders: -
 - a) A declaration be and is hereby issued that the Claimant deserted duty culminating in termination of his employment relationship with the Respondent.
 - b) However, the Claimant is awarded a total of Kshs 291,973.78 together with interest thereon from the date of this judgment less statutory deductions. The said sum is made of-
 - i. Under payment.....Kshs 74,943.04
 - ii. Overtime pay.....Kshs 99,953.84
 - iii. Off-duty pay.....Kshs 88,847.85
 - iv. Public holidays pay.....Kshs 15,538.42
 - v. Leave pay.....Kshs 9,690.63
 - vi. Refund for uniform.....Kshs 3,000.00
 - Total.....Kshs 291,973.78
 - c) All the other claims are denied.
 - d) The Claimant is awarded costs of this cause.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 19TH DAY OF JANUARY, 2023.

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DAVID NDERITU
JUDGE

