



REPUBLIC OF KENYA



KENYA LAW
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**Nyamai v Oshwal Aluminium Industries Limited (Cause 1893 of 2016)
[2023] KEELRC 517 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 517 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1893 OF 2016
AN MWAURE, J
FEBRUARY 23, 2023**

BETWEEN

PAUL KIEMA NYAMAI CLAIMANT

AND

OSHWAL ALUMINIUM INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated the September 02, 2016 on the 14/9/2016 alleging unfair and unlawful termination of employment.

Claimants Case

2. He says he was employed by the respondent as a production executive between July 1, 2014 and March 3, 2016 and was without reasonable cause illegally and unlawfully terminated from employment on account that he had requested for paternity leave. The claimant says he was earning ksh 53,720 at the time of the said termination.
3. He says that during the course of his employment and upon termination the respondent failed, refused and or ignored to pay benefits, emoluments and other entitlements to the claimant.
4. The claimant prays for judgment against the respondent for;
 - a. A declaration that the termination by the respondent was unfair and unlawful.
 - b. Accrued benefits, emolument and or entitlements @ ksh 197,648 together with 12 months' salary as damages at ksh 728,640, a total in the sum of ksh 926,296/=
 - c. Costs of the suit and interests.



Respondent's Case

5. The respondent filed a memorandum of appearance dated the 5th day of October, 2016 on the October 7, 2016. It then filed the memorandum of response on the October 17, 2016.
6. The respondent says that the claimant confronted its management intimating his intention to quit job but declined to write a resignation letter and thereafter absconded duty without any justified or lawful cause. The claimant was never terminated and he is not entitled to any such benefits as alleged.

Claimants Evidence

7. The claimant Paul Kiema Nyamai gave sworn testimony and adopted the witness statement dated the 2/9/2016 as his evidence in chief. He also produced the documents as contained in the list of documents dated the 11/4/2017 as his exhibits in this case.
8. He testified that his basic salary was ksh 52,800/=, house allowance was ksh 7,720/= and was employed on the July 1, 2014 to March 3, 2016 as head of department of production and was terminated on the 3/3/2016 when he asked for paternity leave. He said that the letter dated the 6/3/2016 saying he absconded duty is not correct. He further says that there is NSSF form for only one month and so he is also asking for service pay. The respondent did not give any termination letter and the claimant prays for compensation as per the claim.

Claimant's Submissions

9. The claimant submits that his evidence stands uncontroverted due to the failure by the respondent to adduce evidence. He further says that section 29(8) of *Employment Act* provides that a male employee shall be entitled to two weeks paternity leave with full leave. By dismissing the claimant because of his request for paternity leave under this section, the dismissal was clearly unlawful and the evidence given by the claimant that he was illegally dismissed for requesting paternity leave stands unchallenged.
10. The claimant relied on the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* 2012 e KLR where the court held that:

“ if one is still in doubt as to the legal position reference could be made to the case of *Drappery Empire versus The Attorney General* Nairobi HCCC No. 2666 of 1996 where Rawal, J held that where the circumstances leading to the deliveries of goods are not challenged and stands uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff. The plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiff's are entitled to succeed.”
11. The claimant says he was dismissed orally instead of being given a dismissal letter or a termination notice in writing as required by section 35 (1) (c) of the *Employment Act* 2007 which provides that where a contract is to pay wages or salary periodically at intervals exceeding one month, the contract (shall be) terminable by either party at the end of the period of 28 days next following the giving of notice in writing.
12. The claimant also contends that the respondent never paid him for one month's salary *in lieu* of notice and a certificate of service as required by section of 51 of the *Employment Act*. The claimant says the respondent did not pay any of the farthings of terminal dues.



13. The respondent did not file submissions

Issues for Determination

a. Whether the claimant was unfairly terminated.

b. The remedies, if any, the claimant was entitled to.

14. Section 43 of the *employment Act* provides that in every legal proceeding challenging the termination of employment of an employee the employer shall be required to prove the reason for the termination and where he fails to do so the termination shall be deemed to have been unfair within the meaning of section 45 of the *Act*.
15. The respondent never called evidence in this case. There is no document adduced in evidence as to how the claimant was terminated from his employment. The claimant in the adopted witness statement says that he was terminated for claiming for paternity leave. This *ipso facto* evidence is uncontroverted and it demonstrates unfairness in the termination, which the court is constrained to accept as the true account on how the claimant left the employment.
16. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the Court of Appeal held that: -
- “There can be no doubt that the *Act*, which was enacted in 2007, places heavy legal obligations on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for the termination/dismissal (section 43); prove that the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5) of *Employment Act* 2007.
17. Having considered the un rebutted evidence by the claimant, the court finds and holds that the respondent has failed to prove that the alleged absconding of duty did occur. It did not call any witnesses in this suit and it also did not tender evidence to prove the desertion/absconding of duties by the claimant.
18. It is trite law that an employer alleging desertion or absconding of duty must show efforts made to reach out to the deserter. It is indeed not sufficient to allege an employee deserted duty.
19. The employer must also demonstrate that the employee deserted employment with no intention to go back to work. This can only be confirmed by showing prove that the employer made efforts to reach out to the employee and there was consistent no show from the said employee.
20. In the case of *Boniface Nkubu Karagania v Protective Custody Limited* case No 243 of 2017 the court observed that:
- “Whereas this desertion is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal the respondent failed to produce any evidence that the claimant deserted duty. It was only averred in the respondent’s defence which remained mere allegations as the correspondence alluded to by the respondent’s demonstration of the absence of intention to resume work was not produced in evidence.”



The court further stated:

“In my considered view having failed to establish there was desertion the respondent is bound to meet the reliefs sought.”

21. Equally in this case there is no evidence tendered by the respondent to support the allegation of abscondment which is a serious offence capable of calling the employer to summarily dismiss an employee. But the same must be proved and not mere allegation.
22. The respondent having failed to show the efforts made to look for the deserting employee the court finds there is therefore no proof that the claimant abandoned his employment.
23. The respondent failed to call any evidence and to file submissions. That therefore meant the claimants evidence was uncontroverted. The explanation given by the claimant pertaining to his termination from employment is that he asked for paternity leave and was dismissed. There is no evidence to show how the claimant left his employment since none of the parties produced any written evidence to assist the court to establish how this termination happened.
24. The only certain thing is that the claimant was employed by the respondent from January 1, 2015 as per the letter of appointment of the same date.
25. It is also not in doubt that the claimant was terminated from the employment. The respondent in his response says the claimant absconded from duty. The court has already demonstrated why allegation of absconding work cannot hold water in the absence of any proof by the respondent on efforts made to trace the claimant and his adamant refusal to report back to work.
26. In the absence of any such evidence the court is of the doubtless view that the claimant was terminated from his employment without due regard to employment laws and in particular sections 41, 45 and 47 of the *Employment Act* 2007. The court enters judgment in favour of the claimant due to unlawful and unprocedural termination of employment.

Remedies

27. The claimant under the circumstances is awarded the following remedies:-
 1. Service pay for 2 years is declined as there is some payslips in court which indicate statutory deductions were deducted. In absence of evidence from NSSF that the same were not remitted the court find the prayer is not proved and so is declined.
 2. Untaken leave days is however awarded as the respondent did not bother to establish whether he gave the claimant any leave or not. He is awarded Kshs 75,208/-.
 3. The claimant worked for the respondent for about 1^{1/2} years and there is no evidence adduced that he contributed to his termination. Compensation of 2 month's equivalent of his salary being Kshs 107,440/- is awarded. He is also awarded costs of the suit and interest at court rates from the date of judgment until full payment. The total effect of the award is kshs 182,648/-.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23TH DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

