



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v KPP Plant Production Kenya (Cause 472 of 2015)
[2023] KEELRC 452 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 452 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 472 OF 2015
BOM MANANI, J
FEBRUARY 23, 2023**

BETWEEN

ESAU NICHOLAS SIANGLA OTIENO CLAIMANT

AND

KPP PLANT PRODUCTION KENYA RESPONDENT

JUDGMENT

1. This is a suit for compensation for unlawful termination. The Claimant, who was an employee of the Respondent until 22nd January 2013, alleges that he was unlawfully relieved of his employment. And hence the action for compensation.
2. The Respondent has denied liability. It is the Respondent's case that the Claimant deserted duty resulting in the loss of his employment.

Claimant's Case

3. The Claimant asserts that he was employed by the Respondent on 4th January 2011 in the position of a pre-entry keeper. He avers that his starting monthly salary was Kshs 8,540/=.
4. The Claimant asserts that he worked in this position until 22nd January 2013 when the Respondent unlawfully terminated his contract of service. That the termination was communicated to him verbally.
5. It is the Claimant's case that sometime around 11th January 2013 he was taken ill and put on bed rest. He states that he promptly notified the Respondent of this development. That however, when he resumed duty around 22nd January 2013, the Claimant was informed by his line supervisor that his contract of employment had been terminated.
6. It is the Claimant's case that he was not informed of the infraction he was accused of before the decision to terminate his employment was reached. Similarly, he asserts that he was not afforded a chance to



be heard before he was relieved of his duties. Consequently, it is the Claimant's case that the decision to terminate his employment violated the principles of natural justice, the [Employment Act](#) and the [Constitution](#).

The Respondent's Case

7. On its part, the Respondent contends that the Claimant absconded duty without lawful cause. In the Respondent's view, the Claimant's act of desertion of duty inevitably and perhaps automatically terminated the contract of employment between the parties.
8. The Respondent denies that the Claimant reported that he had been prevented from reporting to work due to poor health. Further the Respondent denies that the Claimant furnished it with medical records of his alleged poor health.
9. The Respondent avers that before his exit, it computed and paid the Claimant's terminal benefits. That these monies were deposited into the Claimant's bank account. As a result, there is nothing outstanding between the parties.

Issues of Determination

10. The court record does not disclose that a list of joint agreed issues was ever filed. Only the Claimant filed his version of issues dated 12th May 2022. Subsequently, the parties formulated their individual sets of issues at the submissions stage. In the premises, the court is obligated to formulate the issues for determination.
11. The parties do not dispute that at the time that is material to the dispute there existed an employer-employee relation between them. What appears to be in contest is whether the relation was lawfully terminated. In the premises, it is my view that the following are the central issues for determination in the cause:-
 - a. Whether the contract of employment between the parties was lawfully terminated.
 - b. Whether the parties are entitled to the reliefs sought in their pleadings.

Analysis and Determination

12. From the evidence on record, it appears to me that the Claimant was present at work until around 11th January 2013 when he allegedly was taken ill. Thereafter, he failed to report on duty until after 20th January 2013. Although the Claimant contends that he resumed duty after approximately four days, his evidence in this regard was quite hazy. There were significant variances on this issue between his written witness statement and oral evidence.
13. The Claimant alleges that he was prevented from going to work due to poor health. He alleges that he notified his supervisor of this state of affairs. To support the assertion that he was unwell, the Claimant has produced in evidence medical chits from Gatundu hospital.
14. The Respondent has denied knowledge of the Claimant's condition. It is the Respondent's case that it never received the Claimant's report that he was unwell.
15. The Respondent avers that it unsuccessfully tried to establish the whereabouts of the Claimant through telephone calls and other means. However, evidence of these attempts was not presented to court. In the Respondent's view, the Claimant terminated himself through desertion of duty.



16. The evidence on record does not demonstrate that the Respondent took steps to close the contract of employment between the parties in a manner that is verifiable after it formed the opinion that the Claimant's conduct constituted desertion of duty. Although the Respondent's witness alluded to having tried to reach the Claimant through telephone calls, no cogent evidence of this attempt was presented to court.
17. An employer who wishes to terminate an employee's employment on grounds of desertion of duty is in effect relying on the ground of gross misconduct to anchor the decision to close the employment contract. Section 41 (2) of the *Employment Act* provides as follows in respect of the procedure to terminate an employee on account of inter alia, gross misconduct:-

“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
18. The above provision leaves no doubt in my mind that where an employer pleads desertion as a ground for terminating an employee's employment, such employer must accord the employee a chance to be heard in response to the accusation before closing the contract. This is because absconding duty is one of the grounds of gross misconduct under section 44(4) of the *Employment Act*.
19. Where the employer fails to afford the employee the right to be heard as inscribed under section 41(2) of the *Employment Act*, the resultant termination or separation is tainted with illegality in terms of section 45 of the *Employment Act*. The employer will have failed to terminate the contract of employment in accordance with fair procedure as demanded by section 45 (2) (c) of the *Employment Act*.
20. That this is the accepted legal position has now been confirmed in a number of judicial pronouncements. For a discussion on this see *New World Stainless Steel Limited v Cosmas Mbalu Munyasya* [2021] eKLR, *Paul Mwakio v Reliable Freight Services Ltd* [2022] eKLR, *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR and *Milano Electronics Limited v Dickson Nyasi Mubaso* [2021] eKLR.
21. Desertion of duty is a ground for the employer to terminate an employee's contract of service. However, it does not operate to automatically close the employer-employee relation. It only provides a basis for the employer to move to pronounce the relation as closed. And the employer must do this in strict compliance with section 41 (2) of the *Employment Act*.
22. Where desertion is pleaded as a ground for termination of the employment relation, it is not a must that the employer only terminates the employee's contract after conducting the actual disciplinary hearing. It is appreciated that the deserting employee may never show up for such session. However, the employer must demonstrate that he took reasonable steps towards complying with the requirements of section 41(2) of the *Employment Act*. This may be by the employer demonstrating that he: made effort to conduct the absentee employee to ascertain the reason for his absence; issued directions to the employee to resume duty with a warning that continued absence may result into disciplinary action and job loss; and issued the absentee employee a notice to show cause why action should not be taken against him for absenteeism. Where the absentee employee responds to the employer's calls, the employer has to convene a disciplinary session at which the employee is afforded a chance to account for his infractions before a decision to terminate his contract is taken.



23. The Respondent may have had valid reason to consider terminating the Claimant's employment. However and in view of my observations in the preceding sections of this decision, the Respondent failed to follow the right procedure to close the employment relation between the parties.
24. There is no evidence that the Respondent issued a demand to the Claimant to explain his absence from duty. There is no evidence that the Claimant was subjected to a disciplinary process as required under section 41 (2) of the *Employment Act*.
25. Although the Respondent's witness stated that he attempted to reach out to the Claimant, no cogent evidence in support of this assertion was provided. There was no evidence of a notice to show cause having been issued to the Claimant through his last known address. There was no proof of the alleged phone calls to the Claimant having been made. Consequently, this court declares the Claimant's termination as unfair and unlawful.
26. Finally on this issue, I must say that I have carefully studied the decision by this court (differently constituted) in the case of *Vincent Keya & another v D M Enterprises Limited* (2020) eKLR. In the case, I note that the learned judge did not consider whether an employee who is accused of desertion is entitled to the procedural strictures provided under section 41 (2) of the *Employment Act* in the process towards his discharge. The decision is therefore of no assistance to the court in addressing the question of the right to due process for an employee accused of desertion of duty.
27. The second issue for consideration is whether the parties are entitled to the reliefs sought in their respective pleadings. Having reached the finding that the Claimant's employment was unfairly terminated, it is clear that the Respondent is not entitled to the prayers sought in its Memorandum of Response.
28. The Claimant has prayed for a number of reliefs. In determining whether he is entitled to any one or more of them, I will be guided by sections 35, 36 and 49 of the *Employment Act*.
29. In respect of notice to terminate, sections 35 and 36 of the *Employment Act* require a party that wishes to terminate a contract of service to issue the other with the requisite notice. Although the Respondent invoked section 44 of the *Employment Act* to justify the decision to terminate the employment between the parties, this has been declared as invalid. Had the fact of summary termination been upheld, the question of notice would not arise. However, since the purported summary termination has been invalidated, it is expected that any intention to terminate the contract ought to have been preceded with issuance of the requisite notice to terminate.
30. There is no evidence that the Respondent complied with either section 35 or 36 of the *Employment Act*. Section 49 of the *Employment Act* empowers the court to require the employer to pay the employee "the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under the Act or his contract of service".
31. Clause 10 of the contract of employment between the Claimant and Respondent obligated either party wishing to terminate the contract to serve the other with a notice of one month or pay a sum of money that is equivalent to the employee's salary for one month. As the Respondent failed to issue the Claimant with the requisite notice to terminate, I award the Claimant Kshs 8,540/- being equivalent to his salary for one month.
32. There is evidence that the Claimant worked up to 11th January 2013. He is therefore entitled to be remunerated for the days worked during this period. However, I note from the evidence by the Respondent that the schedule of the Claimant's terminal benefits covers the days he worked in January



2013. A sum of Kshs 4430.72 was deposited into the Claimant's account to cover this head of claim. I will therefore decline the prayer.
33. The Claimant has prayed for service pay for the two years that he served the Respondent. However, the pay slips produced in evidence show that he was a registered contributor to the National Social Security Fund (NSSF). By virtue of section 35 (6) of the *Employment Act*, the Claimant being a registered contributor of the NSSF is not entitled to claim service pay. This claim is therefore declined.
34. In respect of leave, the Respondent produced a number of leave application forms bearing the Claimant's details. The same were not cogently challenged by the Claimant. In any event, there is evidence that the Claimant was paid leave that was outstanding when the Respondent made some payment towards the Claimant's final dues. I am therefore reluctant to award him pro-rata leave as claimed. The same is declined.
35. In respect of compensation for unfair termination, I reckon that section 49 of the *Employment Act* allows the court to award the aggrieved party a maximum of the employee's salary for one year. However, the Court of Appeal has consistently observed that an award under this subheading must be justified by reference to the guidelines under the law. The court should issue the maximum award only in exceptional and deserving cases (see *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR and *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR)).
36. Having regard to the foregoing, I award the Claimant compensation equivalent to his salary for five (5) months. In making the award, I have considered the fact that the contract of service between the parties was still young having lasted for approximately two (2) years only. The award under this heading totals Kshs 42,700/=.
37. I award the Claimant interest on the amounts awarded at court rates.
38. I award the Claimant costs of the case.
39. The award aforesaid is subject to the applicable statutory deductions.

Summary of the Award

- a. Termination of the Claimant's contract of service is declared unlawful.
- b. The Claimant is awarded salary for one month in lieu of notice, that is to say, Kshs 8,540/=.
- c. The prayer for salary for the days worked in January 2013 is declined.
- d. The prayer for service pay is declined.
- e. The prayer for pro-rata leave is declined.
- f. The Claimant is awarded compensation for unfair termination equivalent to his salary for five months totaling Kshs 42,700/=.
- g. The Claimant is awarded interest on the amounts awarded at court rates.
- h. The Claimant is awarded costs of the case.
- i. The award aforesaid is subject to the applicable statutory deductions.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF FEBRUARY, 2023

B. O. M. MANANI



JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B. O. M MANANI

