



Mulwa v Bhachu Industries Ltd (Employment and Labour Relations Cause 489 of 2017) [2023] KEELRC 398 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 398 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 489 OF 2017
JK GAKERI, J
FEBRUARY 15, 2023**

BETWEEN

MICHAEL MWANZIA MULWA CLAIMANT

AND

BHACHU INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum dated March 1, 2017 and filed on March 14, 2017 alleging unfair termination of employment.
2. The Claimant avers that he joined the Respondent in 1998 as a Welder/fitter and was injured at the work place on October 15, 2012, was hospitalized and bed ridden for a long time and resumed duty in June 2016 under doctor's instructions not to undertake heavy tasks.
3. The Claimant further avers that from October 2016, the Respondent allocated him heavy duties that required standing for long which he was unable to perform and as a consequence his employment was terminated by word of mouth.
4. That he served the Respondent diligently, reliably and honestly.
5. It is the Claimant's case that termination of employment was unlawful and unjustified.
6. The Claimant prays for;
 - (i) The sum of Kshs 4,115,904/= being compensation for the 17 years he had till retirement computed as $(17 \times 12 \times 20,176/=)$.
 - (ii) Costs of this suit and interest.
 - (iii) Any other relief as the court may deem fit to grant.



Respondent's case

7. By a response filed on October 10, 2017, the Respondent admitted that the Claimant was its employee from 2000.
8. The Respondent avers that the Claimant absented himself from work between December 15, 2012 and June 2016 without cause despite footing his medical expenses and supporting him.
9. That he used his medical condition as a license not to perform his duties and absconded duty and all dues were paid.
10. The Respondent denies having terminated the Claimant's employment unlawfully or maliciously.

Claimant's evidence

11. On cross examination, the Claimant testified that he had a written contract of employment and filed the same in court which was not true.
12. It was his testimony that he took sick-leave from 2012 to 2016.
13. That his brother used to collect his salary and take it to him and was unaware of the amount he was given as it was in cash.
14. That he recovered fully in 2016 and frequented the Respondent's office for cash to attend the clinic.
15. It was his testimony that he gave the Respondent the doctor's letter on light duties.
16. Although he testified that his employment was terminated by one Barekh, he could not recall when, but later changed his mind and stated it was September, 2006.
17. He denied having been paid anything but admitted having signed a cash payment voucher dated November 17, 2016 for Kshs 252,450/=. That he received the amount on November 17, 2016 and a certificate of service.
18. On re-examination, he stated that his employment was terminated on the ground of ill-health without a hearing.

Respondent's evidence

19. RWI confirmed on cross-examination that the Claimant's employment was terminated for unreliability and absconding duty after he re-joined in 2016 but admitted he had no evidence of desertion or of the invitation or meeting with the Claimant. That the Claimant worked for 16 years and was claiming remaining years and was not on permanent terms.
20. On re-examination, RWI confirmed that the Claimant was taken back after he requested for the same and had been warned for desertion. That he was employed on monthly contracts.

Claimant's submissions

21. According to the Claimant, the issues for determination are whether the Claimant was an employee of the Respondent, whether termination of employment was unfair and the reliefs sought.
22. On the first issue, the Claimant's counsel urged the court to hold that he was a casual labourer or his terms of employment had converted under the *Employment Act, 2007*.



23. Reliance was made on the provisions of Section 37 of the Act on conversion of casual employment to term, to urge that the Claimant's employment had transitioned to term by operation of law. The decisions in [Silas Mutwiri v Haggai Multi-Cargo Handling Services Ltd \[2013\] eKLR](#) and [Kesi Mohamed Salim v Kwale International Sugar Co Ltd \[2017\] eKLR](#) were relied upon to bolster the submission.
24. As regards termination, Counsel urged that since his employment was terminated for inability to perform heavy duties, it was unfair and unlawful in the context of Section 45 of the [Employment Act, 2007](#).
25. The decision in [Kennedy Nyangucha Omanga v Bob Morgan Services Ltd \[2013\] eKLR](#) was cited to highlight the circumstances in which an employer may terminate an employee's employment on account of illness.
26. As regards the reliefs sought, it was urged that since the Claimant was 43 years as at the date of termination, and had 17 years to retirement, he was entitled to the reliefs sought. [Cause No 811 of 2011, Joseph Omwenga v Kenya Revenue Authority](#) was relied upon to buttress the submission.
27. The court was urged to enter judgement for the Claimant for Kshs 4,115,904/= as prayed for.

Respondent's submissions

28. On termination, the Respondent's counsel urged that due to the Claimant's tendency of deserting duty, he had been warned orally and was terminated from employment due to his adamantness. Reliance was made on the provisions of Section 44(4) of the [Employment Act](#) as was the decision in [Cause No 37 of 2012, Joseph Njoroge Kiama v Summer Ltd](#) to urge that the Claimant had absconded duty. That he was paid in lieu of notice and he acknowledged receipt.
29. As regards the reliefs sought, reliance was made on the decisions in [Robert Kithinji Kiugu v AAA Growers Ltd \[2019\] eKLR](#) and [John Benson Gitthinji v Attorney General & 4 others \[2014\] eKLR](#) to urge that the Claimant was not entitled to the compensation sought and there was no assurance that he would be in the same employment till retirement age and if he was entitled to any relief, it would be limited to 12 months as held in [Sheikh Abubakar Bwanakai Abdallah v Judicial Service Commission \[2017\] eKLR](#).
30. The court was urged to dismiss the claim.

Determination

31. The issues for determination are;
 - (i) Whether the Claimant was a casual employee or permanent employee.
 - (ii) Whether the Claimant absconded duty or termination of his employment was unfair and unlawful.
 - (iii) Whether the Claimant is entitled to the reliefs sought.
32. As to the nature of employment, the parties have adopted opposing arguments. Whereas the Claimant argues that he was a permanent employee, the Respondent's witness testified that the Claimant was employed under monthly contracts.
33. The Claimant, on re-examination testified that he joined the Respondent in 1998 as a casual worker but became permanent in 2000.



34. RWI admitted on cross examination that the Claimant had worked for the Respondent since 2000 and availed no evidence of the one-month contracts, he alleged.
35. From the evidence on record, it is evident that the Claimant was not a casual employee of the Respondent.
36. The Respondent has not availed any material to the court to establish that the Claimant was a casual employee.
37. Even assuming that the Claimant was a casual worker, and worked for the Respondent since 2000 to at least 2012 when he was injured, his employment would have transitioned to term in accordance with the provisions of Section 37 of the *Employment Act* for having met the threshold as explained by Mbaru J in *Silas Mutwiri v Haggai Multi-Cargo Handling Services Ltd [2013] eKLR* as follows;
- ' This kind of employment where the casual employee is not terminated at the end of the day and continues to work continuously for over a month upto until over three months, then the law converts the same into a contract term employment.'
38. Makau J expressed similar sentiments in *Kesi Mohamed Salim V Kwale International Sugar Co Ltd (Supra)*.
39. More significantly, Section 10 (7) of the *Employment Act*, 2007 provides;
- If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
40. To the question whether the Claimant was a casual worker, the court returns that he was not.
41. As to whether termination of the Claimant's employment was unfair and unlawful, or he absconded duty, the starting point is the concept of desertion.
42. According to *Black's Law Dictionary (10th Edition)*, desertion is defined as;
- ' The wilful and unjustified abandonment of a person's duties or obligations.'
43. In *Seabolo v Belgravia Hotel [1997] 6 BLLR 829 (CCMA)*, the court had this to say;
- ' 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.'
44. In the instant case, although RWI confirmed on cross-examination that the Claimant absconded duty, he in the same breath confirmed that he had no evidence of the absconding and when it occurred.
45. Similarly, although the witness testified that the Claimant had been given verbal warnings about the desertion and was accorded a chance to explain himself, allegations the Claimant denied, the witness had no material evidence to buttress the allegations and confirmed as much.



46. The absence of evidence of the actions the Respondent took after the Claimant absconded duty as alleged is fatal to the defence. This position finds support in *Felistas Acheba Ikatwa v Charles Peter Orieno [2018] eKLR* where the court expressed itself 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.'
47. Similar sentiments were expressed in *Boniface Mwangi v BOM Iyego Secondary School [2019] eKLR* and *Simon Mbitshi Mbane v Inter Security Services Ltd [2018] eKLR* among others.
48. From the foregoing, it is the finding of the court that the Respondent has on a balance of probabilities failed to establish that the Claimant absconded duty.
49. As regards termination of employment, the provisions of the *Employment Act* and case law are unambiguous that for a termination to pass muster, it must be substantively justifiable and procedurally fair, as aptly put by Ndolo J in Walter *Ogal Anuro v Teachers Service Commission [2013] eKLR* and the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd [2017] eKLR*.
50. In essence, the employer must demonstrate that it had a valid and fair reason to terminate the employee's employment and conducted the same in accordance with fair procedure.
51. The Claimant testified that he was neither given a warning nor termination letter and was not informed why his employment was terminated. In addition, RWI confirmed on cross-examination that the Claimant's employment was terminated on account of his absconding duty.
52. Finally, the witness confirmed that he had no evidence that the Claimant was invited for a disciplinary hearing and what transpired at the alleged meeting.
53. In sum, the court finds no evidence of absconding duty by the Claimant or fair termination of the Claimant's employment. It is the finding of the court that termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness.
54. Finally, although the cash payment voucher dated November 17, 2016, which the Claimant signed and admitted having received the cash contains the words in full and final settlement, it did not extinguish or waive his rights to pursue other claims against the Respondent nor was it an agreement and nothing turns on it.

Reliefs

1. Sum of Kshs 4,115,904/=
55. This prayer is grounded on the fact that the Claimant was at the time of termination of service aged 43 and had 17 years before retirement at the age of sixty (60).
56. Without belabouring the issue, the Claimant is seeking anticipatory earnings on the assumption that he would have worked for the Respondent until retirement.



57. In *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014]eKLR*, the Court of Appeal dismissed the claim for anticipatory earnings and cited the sentiments of Rika J with approval in *Engineer Francis N Gachuri v Energy Regulatory Commission [2013] eKLR* where the learned judge stated as follows;
- ' There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word permanent employment.'
58. Finally, in *DK Njagi Marete v Teachers Service Commission [2020] eKLR*, the Court of Appeal held that;
- ' Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law and we therefore decline to review the judgement of the trial court on these terms.'
59. From the foregoing, it is clear that the claim for compensation for the 17 years to retirement is unsustainable and is accordingly dismissed.
60. Significantly, having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007.
61. Although the Claimant made no specific prayer for compensation, prayer (c) encompasses the relief under the foregoing provision.
62. Consistent with the provisions of Section 49(4) of the *Employment Act*, the court has considered the following;
- (i) The Claimant served the Respondent well from 2000 and until 2012 when he was injured at the work place. It is clear that he was out of the work place from October 15, 2012 to June 2016.
 - (ii) The Claimant provided no indication of his wish to continue working for the Respondent as he did not appeal the decision to terminate his employment.
 - (iii) The Respondent treated the Claimant in a human and caring manner, in particular during the 4 years he was not rendering any service and absorbed him in June 2016 when he requested to be employed. The Claimant does not appear to have reciprocated the Respondent's gesture. The allegation by the Claimant that the doctor's letter dated May 3, 2016 which made reference to occurrences in 2012 and 2013 was not established. The Respondent denied having received the letter.
 - (iv) The Respondent paid all the Claimant's dues as evidenced by the payslip dated November 2016 and issued him with a certificate of service.
63. In the circumstances, the court is satisfied that equivalent of one (1) month's salary is fair, Kshs 24,377.00.
64. In conclusion, judgement is entered for the Claimant against the Respondent as follows;
- a. Equivalent of one (1) month salary.



b. Costs of this suit.

c. Interest at court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 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

