



**Ogola v Mimasa Limited (Cause 2016 of 2017)
[2023] KEELRC 374 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 374 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2016 OF 2017
JK GAKERI, J
FEBRUARY 14, 2023**

BETWEEN

BERNARD OKUMU OGOLA CLAIMANT

AND

MIMASA LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a memorandum of claim filed on October 9, 2017 alleging unfair dismissal from employment and non-payment of terminal dues and compensatory damages.
2. The claimant avers that he was employed by the respondent from November 2014 as a Welder and served diligently and dutifully until February 23, 2017 when on reporting to work, he was told by his Supervisor, one Mr Jackson Ouma to go home as there was no work for him and the same script was repeated the following day.
3. The Claimant further avers that no reason was given as to why his services were no longer required.
4. It is the Claimant's case that the Respondent's action of sending him home amounted to an unfair summary dismissal from employment as he had done nothing wrong.
5. That due process was not followed nor was a notice to show cause issued.
6. The Claimant prays for;
 - (i) A declaration that his dismissal by the Respondent was unlawful, unfair and unjustified.
 - (ii) A declaration that the Claimant is entitled to payment of terminal dues and compensatory damages.



- (iii) An order for the Respondent to pay the sum of Kshs.316,875/= comprising; One month's salary in lieu of notice, Kshs 19,500.00 Salary for February 2017, Kshs 19,500.00. Unpaid leave days for 2 years, 3 months Kshs 43,897/= 12 months compensation, Kshs 234,000/=.
- iv. Interest on (iii) above.
- v. Costs of this suit plus interest thereon.

Respondent's case

- 7. The Respondent filed its response on July 31, 2019 admitting that the Claimant was its employee engaged as a fitter at a salary of Kshs 19,500/= per month. It denies the Claimant's version of events on February 23, 2017 stating that on the material day, the Claimant and two of his colleagues were restrained by guards at the Kenya Breweries Ltd site at Ruaraka for attempting to remove copper plates without a gate pass or authorization and when questioned, the Claimant and one of his accomplices run away and the matter was reported at the Kasarani Police Station and booked under OB No 117/23/2/2017.
- 8. The Respondent denies having terminated the Claimant's employment without notice or explanation.
- 9. That the Claimant had not provided a termination letter to demonstrate that his employment was terminated.
- 10. That the Respondent was aware that the police were still looking for the Claimant.
- 11. It is the Respondent's case that the Claimant absconded duty to avoid criminal liability which amounted to gross misconduct under section 44(4)(a) and (g) of the Employment Act, 2007 and was thus not entitled to one (1) month notice, outstanding leave nor salary for the entire month of February but was entitled to pay for the days worked in February 2017. That it was ready to issue a certificate of service.
- 12. Finally, the Respondent denies that the Claimant was entitled to compensation for unfair termination and prays for dismissal of the suit with costs.

Claimant's evidence

- 13. The Claimant testified that he was neither given notice of the alleged theft nor a hearing notice and denied having absconded duty. He testified that his employment was terminated by word of mouth.
- 14. On cross-examination, the Claimant confirmed that he worked for the Respondent for 2 years, three months and had applied for employment. He denied having met KK Security on February 23, 2017.
- 15. The witness confirmed having known one Rueben Ombete. He denied having run away from the site as he had not committed an offence.
- 16. He also denied knowledge of the OB number cited by the Respondent.
- 17. That the Respondent did not look for him and did not apply for reinstatement.

Respondent's evidence

- 18. On cross-examination, the witness confirmed that he was the one who had given the Claimant work to do that morning and he run away from the place of work while his colleague was taken to the control room.



19. He testified that he did not issue a notice to show cause and had no evidence that he called the Claimant.
20. The witness stated that the Claimant was not taken through any disciplinary hearing.
21. RWI further confirmed that he was unaware whether the Claimant was paid terminal dues.
22. On re-examination, the witness testified that he was called to the control room at 3 pm but the Claimant had not been arrested and did not report to the work place thereafter.

Claimant's submissions

23. The Claimant's counsel isolated four issues for determination including costs.
24. As to whether the reasons for termination of the Claimant's employment were justified, it was submitted that the Respondent had given no reason for termination of the Claimant's employment and no investigation was conducted to ascertain what had taken place.
25. Reliance was made on the provisions of section 43 and 45 of the *Employment Act, 2007* to underscore the burden of proof and validity of the reason(s) for termination of employment.
26. The decisions in *Judith Atieno Owuor v Sameer Agriculture & Livestock Ltd* [2020] eKLR and *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR were relied upon to highlight the essence of establishing desertion, if alleged by the Respondent and fair termination of employment.
27. It was urged that the Respondent had neither a valid nor fair reason to terminate the Claimant's employment as provided by section 45 of the *Employment Act, 2007*.
28. As regards the procedure adopted by the Respondent, it was urged that termination of the claimant's employment was unfair as the provisions of section 41 of the *Employment Act* were not complied with. The sentiments of Mbaru, J and Nderitu, J in *Kenya Union of Commercial Food & Allied Workers v Meru North Farmers Sacco Ltd* and *Boniface Musyoka Kyambo v DPL Festive Ltd* [2021] eKLR respectively, were relied upon to underscore the essence of procedural fairness in termination of employment.
29. On the prayers sought, it was urged that the Respondent had not proved that it paid the Claimant terminal dues and the Claimant had established his case to the required standards.
30. On compensation, reliance was made on the decision in *Alphonse Maghanga Mwachanya v Operation 680 Ltd* [2013] eKLR to underline the parameters set out in section 49(4) of the *Employment Act*.

Respondent's submissions

31. By December 21, 2022 when the court retired to prepare this judgement, the Respondent had not filed its submissions.

Determination

32. The issues for determination are:
 - (i) Whether the claimant absconded duty or termination of employment was unfair.
 - (ii) Whether the claimant is entitled to the reliefs sought.



33. As to whether the claimant deserted the work place or was dismissed by respondent unfairly, the starting point is an explanation of the concept of desertion.
34. According to *Black's Law Dictionary*, 10th Edition, desertion means;
- “The wilful and unjustified abandonment of a person’s duties or obligations.”
35. In the often cited South African case in *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), the court had this to say about desertion,
- “... 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.”
36. The court is guided accordingly.
37. The Respondent’s witness, Mr Jackson Ogola, the Claimant’s supervisor, testified that the Claimant deserted the workplace on February 23, 2017 after he and his colleagues attempted to steal copper plates owned by the Kenya Breweries Ltd but under the custody of the Respondent, that he run away while one of his colleagues was arrested by guards.
38. The Claimant’s testimony was that the supervisor informed him to go home even before he could start his work that morning.
39. Evidently, both persons were present on the material day but are worlds apart as to what transpired. The evidence on record reveal that the alleged theft incident was reported to the police as evidenced by the OB No 117/23/2/2017. There is no reason to doubt the authenticity of the OB No. It is the number given by the police as evidence of the complaint whose details can only be ascertained from the police.
40. RWI testified that he had given the Claimant work that morning and the alleged attempted theft took place in the afternoon.
41. The court is satisfied that the events of February 23, 2017 contributed to the separation.
42. It is trite that an employer who alleges that an employee has deserted the work place must demonstrate the steps it took to ascertain his or her whereabouts so as to resume duty.
43. This position finds support in in *Felistas Acheha Ikatwa v Charles Peter Otieno* [2018] eKLR where Onyango, J stated as follows;
- “The law is therefore 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.”
44. The Respondent’s witness in the present case was categorical that no notice to show cause was issued to the Claimant and adduced no evidence that he called the Claimant as he had alleged.



45. In *Judith Atieno Owuor v Sameer Agriculture and Livestock Ltd* (*supra*), relied upon by the Claimant's counsel, Onyango, J held:

“Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in section 41 of the *Employment Act, 2007*. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court that it did accord the claimant a fair hearing prior to termination.”

46. These sentiments apply on all fours to the facts of the instant case.

47. The Respondent's witness testified as much.

48. Both the relevant provisions of the *Employment Act, 2007* and case law lay it bare that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as judiciously articulated by Ndolo, J in *Walter Ogal Anuro v Teachers Service Commission* (*supra*) as follows;

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

49. In the instance case, the Respondent adduced no evidence that the Claimant was taken through a disciplinary hearing after he allegedly deserted the work place or the steps it took to ensure that he resumed duty. A notice to show cause to his last known address would have demonstrated that indeed the Claimant had absconded.

50. In the absence of material evidence of a desertion and a fair termination of employment, the court is left with no option but to find that termination of the Claimant's employment was unfair.

51. As regards the reliefs sought, the court proceeds as follows;

(a) Having found that termination of the Claimant's employment was unfair, a declaration to that effect is merited.

(b) One month's salary in lieu of notice

52. The Claimant is entitled to one (1) month's salary in lieu of notice by dint of section 36 of the *Employment Act, 2007*, Kshs 19,500/=.

(c) Payment for the Salary of February 2017

53. RWI testified that he was unaware of payments made to the Claimant, if any. The Claimant is awarded salary for the days worked in February 2017.

(d) Untaken leave for the entire duration of 2 years, 3 months

54. Regrettably, neither the Claimant's written statement dated October 9, 2017 nor the oral evidence adduced in court made reference to the alleged untaken leave and how many days they were.

55. In the absence of evidence and the relevant particulars, the claim is disallowed.



(e) Compensation

56. 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 subject to the provisions of Section 49(4) of the Act. Consistence with these provisions, the court has considered the following;

- i. The Claimant was an employee of the Respondent for about 2 years 3 months which is a fairly short time.
- ii. The Claimant had no previous record of acts of indiscipline or warning letter.
- iii. The Claimant did not demonstrate any wish to continue working for the Respondent. He did not appeal the decision and testified as much.
- iv. The circumstances in which the termination of employment took place show that the Claimant contributed to the separation.

57. In the circumstances, the court is satisfied that the equivalent of two (2) month's salary is fair.

(f) Certificate of service

58. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act.

59. In the end, judgement is entered for the claimant against the respondent as follows;

- a. Declaration that termination of the claimant's employment was unfair.
- b. Salary for the days worked in February 2017.
- c. One (1) month's salary in lieu of notice.
- d. Equivalent of two (2) month's salary.
- e. Costs of this suit.
- f. Interest at court rates from date of judgement till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH 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 March 15, 2020 and subsequent directions of April 21, 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

