



**Muthiani v Kuber Agencies Limited (Cause 1131 of 2015)
[2023] KEELRC 336 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 336 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1131 OF 2015
L NDOLO, J
FEBRUARY 9, 2023**

BETWEEN

RAPHAEL NZUSYO MUTHIANI CLAIMANT

AND

KUBER AGENCIES LIMITED RESPONDENT

JUDGMENT

1. By his Memorandum of Claim dated June 9, 2015 and filed in court on September 23, 2015, the Claimant proceeds against the Respondent, seeking relief for unlawful termination of employment. The Respondent filed a Statement of Response on October 16, 2015.
2. At the trial, the Claimant testified on his own behalf and the Respondent called one of its directors, Sanket Trivedi. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in September 2013 as a turn boy. He rose to the position of driver as at the time of leaving employment.
4. The Claimant further states that his services were terminated after he was sent to drop and pick goods at Kisumu whereupon the Respondent's Director, Mr. Sinket complained about fuel consumption for the trip.
5. The Claimant's case is that there was no valid reason for the termination of his employment and due procedure was not followed. He therefore claims the following:
 - a. Notice pay.....Kshs. 18,000
 - b. 12 months' salary as damages for wrongful termination.....216,000



- c. Salary for 12 days worked in the month of April 2015.....7,200
- d. Certificate of service
- e. Costs

The Respondent's Case

- 6. In its Statement of Response dated October 14, 2015 and filed in court on October 16, 2015, the respondent admits that the claimant worked as a turn boy and was subsequently elevated to the position of driver, after undertaking a course in driving, through sponsorship by the Respondent.
- 7. The respondent adds that the claimant was not competent in driving and was consequently instructed to revert to his original position of turn boy.
- 8. The respondent denies that the claimant was dismissed from employment and states that on being instructed to carry out the work of turn boy, the claimant declined and deserted employment. The Respondent therefore concludes that the Claimant is not entitled to the remedies sought.

Findings and Determination

- 9. There are two (2) issues for determination in this case:
 - a. Whether the Claimant had made out a case of unlawful termination;
 - b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

- 10. In denying the Claimant's claim of unlawful termination of employment, the Respondent states that it is the Claimant himself who deserted duty. While desertion of duty is a serious administrative offence which may lead to summary dismissal, it must be proved.
- 11. In its decision in *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR this court stated the following:

“Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”
- 12. The respondent did not demonstrate any efforts made to reach out to the claimant, if he had indeed deserted duty. Moreover, the action of demoting the Claimant from the position of driver to that of turn boy, which in itself was a disciplinary action was not preceded by any disciplinary process as required under section 41 of the *Employment*.
- 13. If it is true the Claimant had exhibited incompetence as a driver, the right thing to do would have been to point out the shortcomings and allow him reasonable time to improve. It is only after this effort failed that the employer would be justified in either demoting the Claimant or terminating his employment altogether (see *Kenya Science Research International Technical and Allied Workers Union v Stanley Kinyanjui & another* (Cause No 273 of 2010)).



14. On the whole, I find and hold that the respondent failed to establish a case of desertion against the claimant and therefore did not dislodge the claimant's assertion that his employment was unlawfully terminated.

Remedies

15. I therefore award the claimant four (4) months' salary in compensation. In making this award, I have considered the claimant's length of service as well as the respondent's unlawful conduct in the termination transaction.

16. I further award the Claimant one (1) month's salary in lieu of notice.

17. The claim for salary for 12 days worked in April 2015 is admitted and is payable.

18. Cumulatively, I enter judgment in favour of the Claimant as follows:

- a. 4 months' salary in compensation.....Kshs. 71,800
- b. 1 month's salary in lieu of notice.....17,950
- c. Salary for 12 days in April 2015.....7,180
- Total.....96,930

19. This amount will attract interest at court rates from the date of judgment until payment in full.

20. The Claimant is also entitled to a certificate of service and costs of the case.

21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

LINNET NDOLO

JUDGE

Appearance:

Ms. Kittony h/b Mr. Nyasimi for the Claimant

Mr. Musili for the Respondent

