



REPUBLIC OF KENYA



**Njaaga v Waweru (Cause 2372 of 2017) [2023] KEELRC 273 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 273 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 2372 OF 2017**  
**SC RUTTO, J**  
**FEBRUARY 3, 2023**

**BETWEEN**

**ISAAC NJOROGE NJAAGA ..... CLAIMANT**

**AND**

**PAUL KAMAU WAWERU ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a statement of claim dated November 30, 2017 against Paul Kamau Waweru, the respondent herein. The claimant avers that on or about July 1, 2012, he was engaged by the respondent as a caretaker/security guard. That he served with loyalty and diligence until June 4, 2015 when the respondent wrongfully and unlawfully terminated his services. His claim against the respondent is for the sum of Kshs 620,800.00 being salary in lieu of notice, leave for 3 1/2 years, unfair deduction from his April, 2015 salary, service pay for 3 years and overtime pay.
2. The respondent filed a statement of defence dated 24<sup>th</sup> January, 2018 through which he averred that the claimant was employed as a caretaker and not a security guard. The respondent further denied terminating the claimant's services unlawfully. Consequently, he asked the Court to dismiss the claim with costs.
3. The matter proceeded for hearing on December 1, 2021 and subsequently on July 25, 2022 when the defense side closed its case.

**Claimant's Case**

4. The claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He also produced his bundle of documents filed together with the claim as his exhibits before Court.
5. The claimant told Court that initially, he was earning a monthly salary of Kshs 15,000/= which was later increased to Kshs 20,000/=. That he was not issued with an appointment letter. He further



testified that he was terminated from employment when he went the hospital having been unwell for sometime.

6. It was his further testimony that he used to work as a cleaner and a security guard during the day. That he used to work from 6 am to 7 pm depending on the time the night watchman would come in. That during his employment with the respondent, he never proceeded on leave and was not paid any money in lieu thereof.

### **Respondent's Case**

7. The respondent testified in support of his case. Similarly, he adopted his witness statement to constitute his evidence in chief. He told the Court that he employed the claimant from July 1, 2012 on a monthly salary of Kshs 15,000/= and by the time he left, he was earning the sum of Kshs 20,000/= as salary per month. He stated that on 4<sup>th</sup> June, 2015, the claimant deserted work without giving any reasons and he never saw him again.
8. He told Court that the claimant is not entitled to any terminal dues since he deserted work.

### **Submissions**

9. Both parties filed written submissions which I have considered. The claimant urged the Court to rely on testimony on oath where documentary evidence does not exist. That the claimant doubled up as a caretaker and watchman hence he is entitled to overtime pay. The claimant relied on the case of *Kuliba vs Sandu & another* (2022) KEELRC 4127(KLR). Citing the provisions of section 19 of the *Employment Act*, the claimant submitted that the law criminalizes unlawful salary deductions.
10. On its part, the respondent submitted that the claimant deserted duty hence is not entitled to one month's salary in lieu of notice. That with regards to the claim for leave, he used to pay the claimant leave either at the end of the year or at the beginning of the year. That further, the claimant did not prove the claim for overtime. To this end, the respondent placed reliance on the case of *Patrick Lumumba Kimuyu vs Prime Fuels (K) Limited* (2018) eKLR.

### **Analysis and determination**

11. Upon considering the pleadings, the evidentiary material before me as well as the opposing submissions, in my view the singular issue for determination is whether the claimant is entitled to the reliefs sought.

### **One month's salary in lieu of notice**

12. The respondent was categorical that the claimant deserted duty never to be seen. On the other hand, the claimant states that he was terminated from employment when he fell sick hence had to go to the hospital. To start with, it is worth noting that the burden of proving the reason for termination lies with an employer, who in this case is the respondent. In that case, having alleged that the claimant deserted duty, the respondent was bound to prove the same. This was not done hence the burden remained undischarged.
13. In addition, the respondent did not tell the Court what action it took upon realizing that the claimant had deserted duty. Being the claimant's employer, the respondent had a right to commence disciplinary action against him if indeed he deserted duty. What's more, abscondment of duty constitutes gross misconduct under Section 44(4) (a) of the *Employment Act* and renders an employee liable to summary dismissal. Therefore, the respondent was required to comply with the provisions of section 41 of the *Employment Act* by issuing the claimant with a notice to show cause why disciplinary action should



not be taken against him for desertion of duty. In other words, he was required to give the claimant an opportunity to state his side of the story prior to separating from him.

14. On this issue, I concur with the sentiments of the Judge in the case of *Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme* [2015] eKLR where the Court found as follows: -

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”

15. In the circumstances, I find that the respondent is at fault as it did not demonstrate before Court that it acted fairly towards the claimant by allowing him to render an explanation for the alleged desertion of duty. In other words, it failed to subject the claimant to a fair process prior to dismissing him from employment. Therefore, the claimant’s termination was unlawful and he is entitled to one month’s salary in lieu of notice.

### **Unpaid Leave**

16. In its defence, the respondent stated that it paid the claimant leave pay at the end of every year or at the beginning of every year. He gave an example of the claimant’s salary for the month of January, 2015 where he paid him the sum of Kshs 28,000/= which amount was over and above his monthly salary. The bank statement exhibited by the claimant indicates that in the month of January, 2015, he was paid salary in the sum of Kshs 28,000.00. This position was confirmed by the claimant during cross examination.
17. Therefore, I am inclined to find that the amount paid by the respondent in excess of the claimant’s monthly salary was payment for leave. This claim is therefore denied.

### **Service pay**

18. The claimant has prayed for service pay for 3 1/2 years. Section 35(5) of the *Employment Act* provides for service pay in the following manner:
- (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
19. As the court has found that the respondent is at fault for not complying with the requirements of fair process thus rendering the termination unlawful, the claimant is entitled to service pay for the period served.
20. Besides, there is no evidence that he fell within the exclusions under section 35(6) (d) of the *Employment Act*.



## Overtime

21. The claim for overtime is declined for want of particularization and proof. In declining to award this relief, I am fortified by the determination in the case of *Rogoli Ole Manadiegi vs General Cargo Services Limited* (2016) eKLR, where the Court expressed itself as follows: -

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

## Unfair deduction from the April, 2015 salary

22. The claimant has prayed for salary deduction in respect of the month of April, 2015. The claimant's bank statement indicates that he was paid Kshs 18,000/= in the month of April, 2015, which is Kshs 2,000/= less than what he was entitled to earn per month. The respondent did not give a justification for paying the claimant less salary than what was due to him. He is therefore entitled to the sum of Kshs 2,000/= being the difference of what was paid to him against what he was supposed to earn.

## Orders

23. In conclusion, I enter judgment in favour of the claimant against the respondent and he is awarded: -
- One (1) month's salary in lieu of notice, being the sum of Kshs 20,000.00.
  - Service pay for 3 ½ years being Kshs 30,000.00.
  - Salary deduction being Kshs 2,000.00.
  - The total award is Kshs 52,000.00
  - Interest on the amount in (d) at Court rates from the date of Judgment until payment in full.
24. The respondent shall also bear the costs of this claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

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**STELLA RUTTO**

**JUDGE**

### Appearance:

For Claimant Ms. Mugo holding brief for Mr. Wambugu

For the Respondent Mr. Chege

Court assistant Abdimalik Hussein

## 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 had 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.

**STELLA RUTTO**

**JUDGE**

