



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyabiba v Apak Company Limited (Cause 2005 of 2017)  
[2023] KEELRC 672 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 672 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2005 OF 2017  
JK GAKERI, J  
MARCH 21, 2023**

**BETWEEN**

**ROBINSON ONSOMU NYABIBA ..... CLAIMANT**

**AND**

**APAK COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant initiated this claim by a memorandum of claim filed on October 6, 2017 alleging unfair/unlawful dismissal from employment and non-payment of terminal dues.
2. The claimant avers that he was employed by the respondent in November 2015 as a general labourer and his last salary was Kshs 15,900/= (being 530/= per day) and served dutifully and diligently.
3. That on January 16, 2017 when he reported to work, he was requested to report to the contactor's office where one Michael and Audi jointly alleged that he had been underperforming in his duties and they had received a letter from his advocates on compensation for injuries sustained at the work place and was told not to report to work thereafter.
4. That he had not taken nor been paid leave or house allowance.
5. It is the claimant's case that the respondent's act of sending him home was unlawful and unfair dismissal from employment.
6. That no warning letter was issued and there was no disciplinary hearing.
7. The claimant prays for;
  - i. A declaration that the dismissal from employment was unfair/unlawful and unjustified.
  - ii. A declaration of entitlement to payment of terminal dues and compensatory damages.



- iii. Payment of Kshs 254,930/= as terminal dues and compensatory damages.
- iv. Interest on (iii) above from date of judgement till payment in full.
- v. Costs of the suit plus interest thereon.

### **Respondent's Case**

8. The respondent denies and admits that it employed the claimant as alleged but denies having terminated his employment and avers that the claimant absconded duty from January 16, 2017 and considered him its employee as it did not dismiss him from employment and did not owe him any sum of money.
9. That the claimant had not been taken through the internal disciplinary process and the action was premature.
10. The respondent prays for dismissal of the suit with costs.

### **Claimant's Evidence**

11. The claimant adopted the written statement dated September 14, 2017 which rehashes the contents of the memorandum of claim.
12. On cross-examination, the claimant confirmed that his identity card No was 9738595.

### **Respondent's Evidence**

13. The respondent neither filed a witness statement nor tender oral testimony. Counsel informed the court that the respondent had no witness.

### **Claimant's Submissions**

14. According to the claimant's counsel, the issues for determination were whether termination of the claimant's employment was fair and justified and whether he was entitled to the prayers sought.
15. On the first issue, it was submitted that the claimant's employment was terminated on January 16, 2017 and had not absconded duty as the respondent had not called him to resume duty.
16. It was urged that the respondent had no justifiable reason to terminate the claimant's employment.
17. The decision in *Joseph Sitati Nato v Kenya Ports Authority* (2010) eKLR was relied upon to urge that employers should ensure substantive and procedural justice in termination of employment.
18. On due process, reliance as made on the provisions of section 41 of the *Employment Act* as well as the decisions in *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR as well as *Evans Ochieng Oluoch v Njimia Pharmaceutical Ltd* (2016) eKLR to urge that desertion had to be established by the respondent.
19. Similarly, the decisions in *Boniface Francis Mwangi v BOM Iyego Secondary School* (2019) eKLR and *Simon Mbiti Mbane v Inter Security Services Ltd* (2018) eKLR were relied upon to urge that the respondent had not demonstrated the reasonable steps it had taken to contact the claimant to resume duty.
20. Reliance was also made on the decision in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR on the essentials of fair termination of employment.



21. As regards the reliefs sought, the court was urged to award the prayers as enumerated by the claimant as the respondent had failed to prove desertion and no records had been availed to show that the claimant took leave.

### **Respondent's Submissions**

22. By December 21, 2022 when the court retired to prepare this judgement, the respondent had not filed submissions.

### **Determination**

23. The issues for determination are;
- i. Whether the claimant's employment was unfairly terminated or he absconded duty.
  - ii. Whether the claimant is entitled to the prayers sought.
24. As to whether termination of the claimant's employment was unfair or he deserted the work place, the starting point is an explanation of the term desertion as used in this context.
25. According to *Blacks' Law Dictionary*, 10<sup>th</sup> Edition, desertion means;
- “The wilful and unjustified abandonment of a person's duties or obligations.”
26. The term was also explained in the South African case of *Scabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) where according to the court, desertion takes place when a person leaves the work place with no intention of returning or having left decides not to return to the work place.
27. Evidently, desertion or absconding of duty is a deliberate act of the employee and typically catches the employer unprepared and could lead to disruption. It thus behoves the employer to take reasonable steps to contact the employee to ascertain his/her whereabouts so as to resume duty.
28. It is thus the duty of the employer to demonstrate that it took steps to ensure that the employee resumed duty but failed.
29. This position finds support in the decision in *Felistas Acheba Ikatwa v Charles Peter Otieno* (supra) where Onyango J. stated 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.”
30. From the evidence on record, the claimant maintains that his employment was terminated by the respondent on January 16, 2017 when he was told not to report to the work place by one Mr Michael and Mr Audi and was not contacted thereafter.
31. Although the respondent admitted that the claimant was indeed its employee, it denied having terminated his employment and alleged that he deserted the work place.
32. Puzzlingly, the respondent adduced no evidence to controvert the claimant's evidence that he was dismissed from employment on January 16, 2017 nor the reasonable steps it took to ensure that the claimant resumed duty or subjected him to a disciplinary process or issued a notice to show cause.



33. As held in *Evans Ochieng Oluoch v Njimia Pharmaceuticals Ltd* (supra) cited by the claimant’s counsel, desertion which is a form of gross misconduct must be proved by the employer. The employer is required to establish the fact of desertion by availing evidence of the steps taken to appreciate the employee’s circumstances and why he was not reporting to work.
34. Relatedly, the court is in agreement with the sentiments of Onyango J. in *Judith Atieno Ouwor v Sameer Agriculture and Livestock Ltd* (2020) eKLR as follows;
- “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 it did accord the claimant a fair hearing prior to termination . . .”
35. These sentiments apply on all fours to the facts of the instant case.
36. While the claimant maintained that termination of his employment was unfair for want of a justification and a fair procedure, the respondent adduced no evidence to disprove the allegations or demonstrate that the termination of employment was indeed fair.
37. As exquisitely put by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (supra),
- “For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness . . .”
38. In the instant case, the respondent did not adduce evidence of either desertion of duty by the claimant or fair disciplinary process.
39. Flowing from the foregoing, it is the finding of the court that termination of the claimant’s employment was both substantively and procedurally unfair and thus unfair within the meaning of section 45 of the *Employment Act*, 2007.
40. As to the appropriate reliefs available to the claimant, the court proceeds as follows;
- i. Having found that termination of the claimant’s employment was unfair, a declaration to that effect is hereby issued.
  - ii. One month’s salary *in lieu* of notice, Kshs 15,900/=
41. The respondent adduced no evidence to show that it accorded the claimant the requisite notice which entitles him to the one month’s salary *in lieu* of notice, Kshs 15,900/=.

**Housing Allowance for 13 months, Kshs.31,005/=**

42. Although housing allowance is a statutory right under the provisions of the *Employment Act*, it is not payable in certain circumstances, for instance where the salary is consolidated.
43. In this case, the claimant averred that his daily wage was Kshs 530 per day translating to Kshs 15,900/= per month.
44. Under the *Regulation of Wages Order (General) Regulations, 2015*, the minimum daily wage was Kshs 527.10 inclusive of housing allowance.



45. Granted that the claimant's daily wage was Kshs 530/= above the minimum wage and housing allowance was included, the claimant is not entitled to housing allowance.

The prayer is disallowed.

### **Unpaid Untaken Leave**

46. The claimant testified that he did not proceed on leave nor was he paid in lieu of leave and is awarded prorated leave for the duration served.

### **12 Months Compensation**

47. 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.

48. In this case, the court has considered the following;

- i. The claimant was an employee of the respondent for about 13 months which is a fairly short time.
- ii. The claimant did not demonstrate any wish to continue serving the respondent.
- iii. The claimant did not contribute to the termination of employment.
- iv. The claimant served the respondent dutifully and diligently and had no previous record of misconduct.
- v. The claimant did not appeal the decision of Mr Michael and Mr Audi.

49. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair, Kshs 47,700/=.

50. In conclusion, judgement is entered for the claimant as against the respondent in the following terms;

- a. Declaration that termination of the claimant's employment was unfair.
- b. Pay *in lieu* of notice, Kshs 15,900/=.
- c. Untaken/unpaid leave.
- d. Equivalent of 3 month's salary, Kshs 47,700/=
- e. Costs of the 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 21<sup>ST</sup> DAY OF MARCH 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 15<sup>th</sup> March 2020 and**



subsequent directions of 21<sup>st</sup> 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

