



**Sitima v Jokali Handling Services Limited (Cause 1566 of 2017)
[2023] KEELRC 762 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 762 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1566 OF 2017
K OCHARO, J
MARCH 16, 2023**

BETWEEN

JARED ASWANI SITIMA CLAIMANT

AND

JOKALI HANDLING SERVICES LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated the June 7, 2016, the claimant instituted a claim against the Respondent seeking the following reliefs;
 - a. A Declaration that the Respondent’s action of dismissing the Claimant from employment was unlawful, unfair and un-procedural.
 - b. Days worked in December 2016.....Ksh 11,086.
 - c. Salary in lieu of notice.....Ksh 14,460.
 - d. In lieu of leave.....Ksh 10,122.
 - e. Housing allowance.....Ksh 45,549.
 - f. Compensation for unfair termination.....Ksh 173,520.
 - g. Cost of the cause
 - h. Certificate of service.
 - i. Interest at the court rates.

2. The Memorandum of the Claim was filed together with the Claimant’s witness statement and a bundle of documents that he intended to place reliance on as documentary evidence in support of his case.



3. Upon being served with the summons to enter appearance, The Respondent did enter appearance on the July 12, 2017, and filed a Reply to the Memorandum of Claim on the October 3, 2017.
4. At the close of the pleadings, the matter was heard inter-partes on merit. The Claimant's case was heard on the June 2, 2022 while the Respondent's case was heard on the July 14, 2022.

The Claimant's case

5. The Claimant stated that he was employed by the Respondent in April 2015 as a general worker and deployed at the Apex Steel Mills Limited's metal cutting department. He was issued with a contract of employment which he signed but the Respondent retained the signed copy thereof. His starting salary was set at Ksh 422 per day payable at the end of the month in cash.
6. The Claimant averred that he worked diligently for the Respondent without any record of discipline issue [s] until his unlawful and unfair termination from the employment.
7. The Claimant contended that in September 2016 while working with the Respondent, he suffered an injury to his fourth right finger and after treatment he instituted legal proceedings against the Respondent for compensation. This action birthed turbulence in the employment relationship. The Respondent the Respondent started victimizing and frustrating him.
8. It was the Claimant's case that on the December 1, 2016 he reported to work for the night shift as usual whereupon he was transferred to the loading station. Even though he had not recovered from the injury he obeyed and worked until December 18, 2016, while working he suffered pain that he would no longer bear. This prompted him to inform his supervisor of his situation, notwithstanding, the supervisor was insistent that he continues working as assigned.
9. It was the Claimant's position that on December 23, 2016 at around 7.00 pm, he reported to work as usual whereupon he worked until 6.00 am in the morning. That on the December 24, 2016 before leaving work, he met his supervisor and requested to be transferred to any other department where he could work in his condition.
10. The Claimant averred that the supervisor declined the request and informed him that he could only be transferred on condition that he wrote a letter withdrawing the workplace injury suit. Without option, the Claimant was forced to write a letter as demanded by the supervisor and after handing in the letter, he was informed that the Respondent had decided to dismiss him from the employment.
11. The Claimant asserted that he was neither given the reasons for the dismissal nor afforded an opportunity to respond to any alleged accusations that might have been against him, consequently the dismissal was unlawful and unfair.
12. The Claimant stated that at the time of his dismissal he was earning Ksh 484 per day payable at the end of the month. However, he was not being issued with pay slips and that throughout his employment he was neither housed by the Respondent nor paid the housing allowance as provided by the law. There was no agreement for the consolidation of his salary.
13. He further stated that during his employment with the Respondent he was not accorded a chance to proceed for his annual leave or paid in lieu of the unutilized leave days. In his last month of work, he worked for twenty-three days but the Respondent didn't pay him for the same.
14. In his evidence under cross examination the Claimant stated that joined the workforce of the Respondent as a general worker, who would serve in any of its departments therefore. His salary could be paid at the end of the month, with advance salaries being paid, mid-month.



15. He testified that he sustained the workplace injury on the October 16, 2016. The Respondent instructed him to write a letter for withdrawal of the suit, he obliged, gave in the letter for filing by the Respondent at Mavuko Law courts. The case is still active.
16. He further testified that his employment was terminated on the December 24, 2016, verbally. He denied the allegation that on the January 5, 2017, he was at his workplace, and that he picked the salary for December 2017.

The Respondent's case

17. RW1 Elijah Wanjofu told the court that he was a supervisor at the Respondent's. He urged the court to adopt his witness statement dated the October 3, 2017 and the supplementary witness statement dated February 8, 2022 as his evidence in chief, and the documents filed herein by the Respondent as its documentary evidence. With no opposition by the Claimant, the adoption and admission were respectively allowed.
18. He confirmed that the Claimant was employed in April 2015 as a general labourer at a daily pay of Ksh 484, that was payable at the end of every month. He alleged that the amount paid was inclusive of house allowance. They had a bio-metric check in and out system and had a register where the employees would manually sign.
19. He stated that the Claimant worked up to December 28, 2016 as can be discerned from the attendance register. After the December 28, 2016 he never reported back to work but only appeared on the January 5, 2017 to pick his salary. After the January 5, 2017, the Respondent made frantic efforts to reach the Claimant with no success. The Respondent didn't terminate his employment.
20. When cross-examined he confirmed that the Memorandum of response indicates that the Claimant worked up to December 24, 2016 and that he got back to work on the January 5, 2017. In his witness statement he has asserted that the Claimant was not at work on the 27th and December 28, 2017. He admitted that the Respondent didn't file herein any print out the bio-metric register.
21. The Claimant deserted duty on the December 29, 2016. He reported back thereafter on the January 5, 2017, the Respondent urged him to continue working but he again deserted. Its efforts to reach him thereafter were unsuccessful.
22. The witness stated that the Claimant was not given any show caused letter. He was not sent any letter urging him to report back. There was no disciplinary hearing conducted against him. The efforts to trace him were through phone.
23. The contents of the register clearly indicate that the Claimant was a deserter.
24. The witness testified in admission that the Claimant is entitled to the leave pay that he has sought and that the amount sought has been correctly computed. The Respondent is desirous to pay him. Further that the Claimant was not issued with a certificate of service, it is available for him to pick.

The Claimant's submissions

25. The Claimant presented two issue for determination;
 - a. Whether the Claimant was unlawfully and unfairly dismissed.
 - b. Whether the Claimant is entitled to the reliefs sought.



26. The Claimant submitted that the vital events culminating the separation as were put forth by him were not controverted in any sufficient manner by the Respondent. The evidence that was presented by the Respondent's witness in defence against his case was contradictory and at variance with the Respondent's own pleadings. For instance, while in the statement of response and the witness's statement dated October 3, 2017 [turned evidence in chief] it is admitted that the Claimant worked up to December 24, 2016, the witness's supplementary statement dated 3rd August October 2022, [turned evidence in chief], expresses that he worked till December 28, 2016. Any evidence which is at variance with a party's pleadings must be disregarded. The Respondent's supplementary statement purporting to revise the initial witness statement, should. The Claimant relied on the case of Philip Osore Ogutu vs Michael Onyura Aringo & 2 others (2013)eKLR where the court held;

“It is now opportune to say this. There can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected outright or disregarded.”

And the case of Independent Electoral and Boundaries Commission and Another vs Stephen Mutinda Mule & 3 others (2014)eklr which cited with approval the decision of the court of Nigeria in Adetoun Oladeji vs Nigeria Breweries PLC SC 91/2002 where the court stated as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

27. It was submitted that the Respondent did not demonstrate that it took take any steps towards disciplining the Claimant for desertion, assuming that he deserted duty on December 29, 2019, it was inconceivable that an employee will abscond duty, surface after a week and the employer just pays him salary without caring why he had been away in the first place. Absconding duty was a misconduct for which, disciplinary action would have been initiated, and which would attract a dismissal. The Claimant relied on the case of Richard Maingi vs Wells Fargo Limited 2017 eKLR where the court held;

“Dismissal on account of desertion requires that the Respondent produces evidence showing reasonable steps were taken to contact the employee accused of desertion.”

28. The same holding was expounded in the cases of Chispine Onguso Okinyi vs Devki Steel Mills Limited 2018 eKLR and Joseph Nzioka vs Smart Coating Limited (207) eKLR.

29. It was argued that the Claimant's assertion that he was dismissed from employment because he had filed a workplace injury suit against the Respondent was not challenged. The Respondent didn't deny the existence of the suit. This being so, the Respondent failed to prove that the reason for the termination was valid and fair, as enjoined by the provisions of section 45[2] of the [Employment Act](#).



The termination was automatically unfair by dint of the p of section 46 of the *Employment Act*, which provides;

“The following do not constitute fair reasons for dismissal or for imposition of disciplinary penalty: -

An employee’s initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.....”

30. The Claimant submitted that it is clear from the material on record that his dismissal from employment was without adherence to the statutory provisions of section 41 of the *Employment Act*. He was not given the reasons for the dismissal and or granted an opportunity to defend himself on any accusations that might have been against him. Consequently, the Respondent’s action of dismissing him was procedurally unfair. To buttress this submission, he cited the holding in the case of Patrick Abuya vs Institute of Public Accountants of Kenya (ICPAK) & another (2015)eKLR where it was held:

“Because of the conclusion, and considering the mandatory nature of the requirements of section 41 of the *Employment Act*, 2007, it is not necessary, in the view of the Court to consider whether the Respondents have discharged the burden placed on employers by sections 43 and 45 of the *Employment Act*, 2007.”

31. On the last issue the claimant submitted that he was entitled to the reliefs sought. He submitted that he was unlawfully dismissed from employment and thus entitled to one month pay in lieu of notice. He relied on section 35(1) and 49(1) (a) of the *Employment Act 2007*.
32. On the claim for pay in lieu of leave, it was submitted that the Respondent’s witness made an admission on it, consequently it should be granted.
33. Section 31 of the *Employment Act* places an obligation on the employer to provide his or her employees with housing accommodation at or near the place of work or pay the employee[s] sufficient sum of money as rent in addition to the wages or salary of the employee[s] as will enable the employee[s] to obtain reasonable accommodation. Section 31[2] exempts the application of sub-section [1] where the basic salary with an element to be used for housing or where a collective bargaining agreement addresses the issue of housing. The Claimant’s claim was for house allowance was not rebutted. In a dispute like is herein, the Respondent was under an obligation to tender documentary evidence showing that indeed it discharged its obligation under sub-section 1.
34. To support the above point, reliance was placed on the holding in *Lawi Wekesa Wasike vs Mattan Contractors Limited* (2016)eKLR that:

“The practice of an employer failing to keep a record of its employees, causal or permanent, on contract terms or open contracts is an act against its interests. Such a practice works against such an employer. It is contrary to the law. Such a record should be maintained at all material times pursuant to Part X of the *Employment Act* and particularly at section 79 [sic]these provisions are set out in mandatory terms. They are to be adhered to without exception..... to keep such a record would vilify the Respondent and or help the court assess the exact relationship between the claimant and respondent. The court is left with the evidence of the claimant and the respondent without any record, the evidence of the claimant is to be believed.”

These provisions are set out in mandatory terms. They are to be adhered to without exception.”



Respondent's submissions.

35. The Respondent submitted two issues for determination thus:
- a. Whether the Claimant was terminated from employment or absconded duty.
 - b. Whether the Claimant is entitled to the reliefs sought.
36. The Respondent submitted that the evidence on record is sufficient to demonstrate that Claimant's employment was never terminated, but he absconded duty. Section 47[5] of the Act, placed a duty upon the Claimant to first prove that there was a termination which was, and that it was unfair or wrongful before the Respondent could be called upon to demonstrate that the termination was justified. Considering the evidence on record, the Claimant didn't discharge this burden. To fortify this submission, reliance was placed on the case of Julius Kyalo Malonza vs Ruth Osolo t/a Eraeva Catering Services (2021) eKLR where the court held;
- “The Claimant provided no evidence on where and how the termination took place and does not attribute any wrongdoing to the Respondent. The claim suffers the deficit of the essential factual background to support the termination as alleged.”
37. The Respondent argued that the Claimant's assertion that his employment was terminated because of the injury claim that he filed against the Respondent, cannot be believed. He didn't tender in evidence the letter that he alleges he was forced to write. Further, the process of withdrawing a matter that is in court can only be done by the owner of the matter, therefore it cannot be true that the Respondent was to move the process. The Claimant didn't explain how he managed to work up to December 28, 2016, yet injury case was filed in the month of October 2016.
38. There is no doubt that the Claimant absconded duty. He cannot be heard to allege that his employment was unfairly terminated. To bolster this submission, the Respondent cited the case of Daniel Mueke vs Bhogas Auto World (2014) eKLR where the court held as follows:
- “By leaving the work station and not returning, the Claimant repudiated his employment contract. He was in breach of contract. The Claimant abandoned work. The Claimant has not discharged the very low threshold placed upon an employee in a complaint of unfair termination by section 47(5) of the *Employment Act, 2007*.
18. It is not necessary therefore to embark on an inquiry as to whether the Respondent complied with sections 41, 43, 45 and 47(5) of the *Employment Act, 2007*. The question as to whether there was unfair termination of services is therefore not necessary.”
39. As regard the reliefs sought by the Claimant, it was submitted that the Claim for 23 days worked in the month of December 2016, is fallacious, he picked his December salary on the January 5, 2017 and never worked in January 2017. Further his employment having not been terminated, notice pay cannot be availed to him.
40. It was submitted that the claim for house allowance had no basis as the claimant was being paid a consolidated salary. The Respondent admitted the unpaid leave days and the same remained unchallenged.



Analysis and Determination

41. From the pleadings by the parties, their respective evidence and submissions by their counsels, the following issues present themselves for determination, thus:
 - a. How did the separation in the employment relationship between the Claimant and the Respondent occur?
 - b. If through termination, was the termination procedurally and substantively fair?
 - c. Whether the Claimant is entitled to the reliefs sought?
 - d. Who should bear the cost of the cause.

How did the separation in the employment relationship between the Claimant and the Respondent Occur?

42. As regards when and how the separation occurred there is no agreement between the combatants herein. Regarding when and how, it was the Claimant's position that his employment was terminated on the December 24, 2016, verbally. On the other hand, the Respondent had a conflicting position as regards when. In its pleadings, and the initial witness statement [adopted as evidence in chief], it stated that the Claimant worked until December 24, 2016. In the supplementary witness statement referred to hereinabove, which was equally adopted as part of its witness's evidence in chief, it asserted that he worked on December 28, 2016, disappeared until January 5, 2017, when he picked his salary and left never to return. On how, it was the Respondent's position therefore that the Claimant absconded duty, his employment was never terminated by it.
43. In a situation like is here where the rival parties take positions that are uncompromisingly at conflict as regards a pivotal aspect of the case, the court remains not helpless, it finds aid in the pleadings of the parties, bearing in mind that it is in them that they set the agenda of the case, and delineates for themselves and the court, their respective cases. Often, the happenings at the cross-examination points during trial comes in handy too.
44. The Respondent at paragraph 10 [a] of its statement of response dated October 3, 2017, pleaded that the Claimant worked with it up to the December 24, 2016. The statement was not amended at any time. So that the purpose for which parties file and serve pleadings, and even get leave to amend them at any time before judgement, is not eroded, parties are forbidden to present evidence that is at variance with their pleadings, and if evidence is presented of such a character, such should be disregarded. The case of Independent Electoral and Boundaries Commission & Anor v. Stephen Mutinda Mule & 3 others [2014]eKLR, inspires this thought.
45. The Position expressed in the above stated pleadings agrees with the Claimant's as was brought out in his pleadings and evidence. Consequently, I conclude that the separation occurred on the December 24, 2016.
46. The Respondent's assertions in its witness's supplementary affidavit that the Claimant deserted duty on the December 28, 2016, which assertion I have not been persuaded to agree with, seems to have anchor on the on some document that was filed contemporaneously with the statement. The document was just thrown to court, it is not filed under any list of documents, it wasn't explained in the supplementary statement dated March 8, 2022. In his oral testimony, the witness in chief, stated a register. In his evidence under cross examination, on why the alleged attendance register was not filed



early enough before the matter was set down for hearing, the witness stated that the same was with the Labour Officer.

47. The explanation makes no sense to this Court, it is noted that under cross examination, the witness went ahead to state that the same was with the Officer up to 2018. The question that then lingers is, why was the document not filed immediately after the pretrial conference which took place on the January 17, 2018, with leave of court. Why wasn't the Court a printout from the Bio-metric check in -check out system filed, when the pay roll printout was, or at all? This places a constraint on this Court not to find otherwise than that the purported register was an afterthought. The supplementary witness statement too.
48. Section 43 of the *Employment Act* placed an obligation on the Respondent as an employer to discharge, prove the reason for dismissal. A legal burden is discharged by a party, by adduction of sufficient evidence. Having found as I have hereinabove, concerning the Respondent's position on the alleged date of desertion, its pleadings, its documentary evidence and the variance between its witness's evidence and the pleadings, I am not convinced that the Respondent has managed to prove the reason for the separation as desertion of duty by the Claimant.
49. Conjoined with the legal burden of the employer to prove the reason for the termination of an employee's employment, is the statutory duty under section 45[2] of the Act to prove that the reason was valid and fair. In my view, validity and fairness of a dismissal or termination on account of an alleged desertion and as supported by the line of authorities cited by the Claimant, is gained from the manner the employer alleging desertion as the account, handled the alleged situation. Gaining must be from sufficient evidence laid before Court by the employer.
50. Dismissal of an employee from employment or termination of an employee's employment on account of absconding duty must be preceded by failed reasonable attempts by the employer, to contact the employee and get to know why he or she isn't reporting for work, and or get him or her to show cause why disciplinary action shall not be attracted on the account that he or she had deserted duty. Though, the Respondent's witness stated that attempts were made, I see no evidence supporting the statement, it was just bare.
51. By reason of the premises, I find that the separation occurred in the manner described by the Claimant and not by the Respondent. Further, that the termination of the Claimant was substantively unfair.

Was the termination procedural and fair?

53. Section 41 of the Act provides the procedure that an employer contemplating to terminate the employee's contract has to follow. Any deviation from the procedure shall render the termination or the dismissal unfair, even if there were substantive justification for the termination.
54. The provision requires in a mandatory manner, that the employee to be affected by the contemplated action by the employer shall be informed of the intention and the grounds prompting the intention, be given adequate time to prepare and be heard on the grounds, lastly the employer shall have to consider the representations made by the employee before making a decision. Considering the circumstances of the instant matter as expressed in the evidence by the parties, there is no doubt that adherence to the procedural requirements of the provision were absent. Consequently, this court holds that termination of the Claimant's employment was procedurally unfair by dint of the provisions of section 45[2] of the Act.



Whether the Claimant is entitled to the reliefs sought.

One month's salary in lieu of notice.

55. The Claimant's employment was one in character terminable by a 28 days' notice in pursuance to the provisions of section 35 of the Employment Act. No doubt, the employment was terminated without notice. This coupled with the fact that I have found the termination was both procedurally and substantively unfair, leads me to a conclusion that the Claimant is entitled to notice pay and is hereby awarded salary in lieu of notice as hereunder;

482 X 30 Days =Ksh 14,460

Salary for the days worked in December

56. It is evident that the claimant had worked for 23 days before he was terminated on the 24th December 2016. The Respondent contended that the claimant was paid the December salary on the 5th January 2016 which was vehemently denied by the Claimant. I have considered that the Respondent placed a printout of the payroll in respect of the December salary, and that the Claimant didn't challenge it in any manner or at all. Consequently, I am persuaded that the Claimant did pick his salary as alleged by the Respondent. The Claimant's claim under this head fails.

Leave days

57. The Claimant is hereby awarded leave allowance of Ksh 10,122 as the same was admitted by the Respondent.

House allowance.

58. The Claimant also sought for house allowance of Ksh 45,549. Section 31 of the Employment Act provides:

- (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service-
 - (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
 - (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph.

59. It was the Respondent's testimony that the Claimant was being paid a consolidated salary inclusive of the house allowance. The Respondent didn't tender any sufficient evidence to support the assertion. Section 20 of the Employment Act places a duty upon the employer to issue the employee with an itemised pay statement. In absence of the itemised statement of the Claimant's pay in this matter, the Respondent was bound to establish its anchor for the assertion. This it didn't do. The averment



that the consolidated salary was inclusive of house allowance is baseless and consequently rejected. I therefore allow the Claimant's claim at 15% of the monthly salary as tabulated hereunder:

$14460 \times 21 \text{ months} \times 15/100 = \text{Ksh } 45,549.$

SUBDIVISION - Compensation for unfair termination.

60. The authority to grant this award flows from section 49 of the *Employment Act* and the circumstance of each case influence the award. Considering that the termination of the, Claimant's employment was without adherence to the procedural prescripts of the law, was substantively unjustified, appears retaliatory, and the length of period the Claimant was in the employment of the Respondent, I conclude that the claimant is entitled to the compensatory relief and to the extent of 6 months gross salary, thus $14460 \times 6 = \text{Ksh } 86,760.$
61. The Respondent is hereby ordered to issue certificate of service to the Claimant.

Who should pay the cost of the Claim?

62. The cost of this Claim to be borne by the Respondent.
63. In upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:
- a. A declaration that the termination of the Claimant was both procedurally and substantively unfair.
 - b. Salary in lieu of notice.....Ksh 14,460.
 - c. Pay for unused leave days.....Ksh 10,122.
 - d. Housing allowance.....Ksh 45,549.
 - e. Compensation pursuant to the provisions of section 49[1][c] of the Act.....Ksh 86,760
 - f. Cost of the suit.
 - g. Interest on the sums awarded above at court rates from the date of this judgment till full payment.
 - h. The Respondent to issue the Claimant with a certificate of service within 30 days of the day of this judgement.

Read, Signed and Delivered Virtually at Nairobi this 16th Day of March 2023.

OCHARO KEBIRA

JUDGE.

In the presence of

Mr. Muli for the Claimant

N/A for the Respondent

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 **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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE.

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