



REPUBLIC OF KENYA



KENYA LAW
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**Wangereka v Rupra (Cause 2473 of 2017)
[2023] KEELRC 625 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 625 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2473 OF 2017
BOM MANANI, J
MARCH 16, 2023**

BETWEEN

TITUS MALWEYO WANGEREKA CLAIMANT

AND

GURDRIP SINGH RUPRA RESPONDENT

JUDGMENT

Introduction.

1. Through this claim, the Claimant seeks compensation from the Respondent for alleged unfair termination of his contract of service. The Claimant, who alleges to have been employed by the Respondent in 1976 asserts that in May 2017 or July 2017 the Respondent abruptly and without lawful cause terminated the employment relation between the parties.
2. The Respondent disputes liability. It is the Respondent's case that the Claimant absconded duty after he was confronted about misappropriating funds entrusted to him as service charge for security services at residential blocks owned by the Respondent.

Claimant's Case

3. In the Memorandum of Claim, the Claimant asserts that sometime in 1976 the Respondent hired his services as a painter. However, during his testimony in court, he appeared to state that he was initially engaged by the Respondent's deceased father and only begun working for the Respondent around 2002 after the demise of the Respondent's father.
4. In the Memorandum of Claim, the Claimant asserts that on an unspecified date in July 2017, the Respondent irregularly terminated the contract of service between them. However, this assertion is contradicted by the Claimant's evidence when he insinuated that the contract was terminated on an unspecified date in May 2017.



5. It is the Claimant's case that on the unspecified date in either May or July 2017, the Respondent summoned him to his home and told him that his services were no longer required. That this communication was made to the Claimant in the absence of a third party.
6. The Claimant asserts that the Respondent did not disclose the reason for his decision. Neither did he allow the Claimant the opportunity to ventilate his defense in response to the proposed termination of employment.
7. In the Claimant's view, the Respondent's conduct was in breach of the law. In the premises, the court should declare as unlawful the decision to terminate the contract of service between the parties.

Respondent's Case

8. On his part, the Respondent confirms that the Claimant was indeed his employee but not from 1976 or 1977 as claimed. The Respondent asserts that the Claimant was initially an employee of Continental Builders Ltd, a company that was perhaps associated with the Respondent's late father. That the Respondent only hired the Claimant in 2003 after the company collapsed.
9. It is the Respondent's case that whenever he was away on foreign trips, he would entrust the Claimant with the duty of collecting security service charges from the Respondent's tenants. That at some point, the Claimant begun collecting these funds and diverting them to his own use. That when the alleged fraud was discovered, the Claimant left employment and never returned.
10. The Respondent asserts that the alleged theft was reported to the police for investigations. However, it is not clear whether the police charged the Claimant with any criminal offense. Nevertheless, the Respondent indicates that the fact of the Claimant having diverted the funds in question was confirmed through email correspondence between him and some of the tenants which has been produced in evidence.
11. It is the Respondent's case that because the Claimant deserted duty, it cannot be said that the Respondent unfairly terminated his contract of employment. The Respondent asserts that he tried to confirm the whereabouts of the Claimant without success. Consequently, he should be absolved of liability for the alleged unlawful termination of the Claimant's employment.

Issues for Determination

12. After analyzing the pleadings and evidence tendered by the parties, it is clear to me that the parties agree that they had an employment relation up to the year 2017. Therefore, the only questions for determination are whether the said relation was lawfully terminated and whether the parties are entitled to the reliefs sought in their pleadings.

Analysis and Determination

13. The parties appear to have contrasting versions of the events that led to their separation. Whilst the Claimant avers that the Respondent summoned him to his home and told him that his contract of employment had been terminated, it is the Respondent's case that the said contract came to a close when the Claimant deserted duty.
14. A careful evaluation of the record leads to the conclusion that the Claimant absconded duty as opposed to the Respondent terminating his contract of employment in the manner that the Claimant suggests. I have come to this conclusion because the Claimant was unable to indicate the precise date and month that his employment was terminated. If indeed he was summoned by the Respondent and told that his contract had come to a close as he asserts, why would the Claimant fail to state the date of this event



with a measure of precision? Why would he state in his pleadings that the termination happened on an unknown date in July 2017 only to later change the date of termination to some unspecified day in May 2017 during his evidence?

15. There is evidence that the Claimant had been entrusted with the duty of collecting service charge to pay for security services at the blocks of flats owned by the Respondent. This fact is confirmed by the email correspondence between the Respondent and his tenants which were produced in evidence. The same emails confirm the fact that the Claimant did not remit these funds to the Respondent.
16. There is evidence that the Respondent took up this issue with the police by making the appropriate report. Whether the police processed the complaint to its logical conclusion was not for the Respondent to determine.
17. In his evidence, the Claimant did not controvert the truthfulness of the Respondent's evidence in this respect. All that the Claimant did was to make bare denials in his pleadings.
18. Faced with this evidence, the court finds that it is more probable than not that the Claimant opted to stay away from his place of work as indicated by the Respondent. Reporting to work would have meant the Claimant coming face to face with his accuser with the inevitable challenge of accounting for the lost funds and perhaps addressing the matter with the police a fact that he may have liked to avoid. I therefore believe the Respondent's evidence that the Claimant absconded duty when he was confronted with the aforesaid facts. I reject the Claimant's assertion that the Respondent summoned the Claimant to his home only to relieve him of his employment.
19. That said, whichever way one looks at it, the law now provides for the grounds and the manner in which a contract of employment may be brought to a close. In relation to termination on grounds of incapacity, poor performance and physical incapacity, section 41 of the *Employment Act* sets out a clear pathway for terminating a contract of service.
20. The employer is required to inform the affected employee of the grounds for the proposed termination and allow the employee the opportunity to respond to the grounds. In addition, the employer is required to accord the employee the right to be accompanied by a fellow employee or a trade union representative of his choice during this process if the employee so desires.
21. Section 44 of the *Employment Act* recognizes the employer's right to terminate a contract of service on account of gross misconduct on the part of the employee. This provision sets out a list of acts that constitute gross misconduct. However, this list is neither exhaustive nor closed (see *Bamburi Cement Limited v Kioko Joseph* [2016] eKLR). Applying the ejusdem generis rule, any misconduct that fits in the items listed in the section will be considered as gross misconduct.
22. Gross misconduct is deemed to happen when, inter alia, an employee absents himself from duty without lawful cause and without the permission of the employer. Whilst mere absenteeism from work may not of itself constitute desertion, an employee who leaves employment without permission of the employer and with no intention of returning is considered as having deserted. Such employee is considered as having committed an act of gross misconduct under section 44 of the *Employment Act*.
23. Whichever ground the employer cites as informing the decision to terminate an employee's contract of service, the employer is bound to hear the employee before rendering the decision to terminate. This includes where the employee is accused of misconduct including desertion of duty. This requirement is founded on section 41 (2) of the *Employment Act* which provides as follows:-

“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3)



or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

24. It is therefore not enough for the employer to contend that the employee lost his employment through desertion if the employer cannot demonstrate that he accorded the employee a chance to rebut the accusation of desertion against him in terms of section 41 (2) of the *Employment Act*. As has been observed elsewhere, the employer must take steps to close the contract of service of the deserting employee in line with the procedure stipulated in law.

25. As was observed in *Luka Mbuvi v Economic Industries Limited* [2020] eKLR, the employer must demonstrate the effort made in ensuring compliance with the requirements of section 41 (2) of the *Employment Act*. Given that the law entitles such employee the right to be heard before closure of the employment relation, the employer ought to demonstrate that he has made effort to find out where the employee is and required him to account for his absence from work. The court in the Luka Mbuvi case had this to say on the issue:-

“In this sense, the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.....

.....Under the statutory framework in our jurisdiction, a deserting employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through colleagues or contact details in the employee’s file (records).....

An employer can also issue an ultimatum such as through a show-cause letter addressed to the employee’s contact details on its records.”

26. Under section 43 of the *Employment Act*, the employer has the overall duty of justifying the validity of the decision to terminate a contract of service in terms of the strictures set out under section 45 of the Act. The employer must prove that the reason for the termination was valid and that the employment was terminated in accordance with fair procedure.

27. Although section 47 of the Act places the burden of proving the unlawfulness of the decision to terminate employment on the employee, this burden is considered discharged once the employee places before the court prima facie evidence pointing to the unlawfulness of the decision. The burden then shifts onto the employer to justify the impugned decision.

28. I have carefully analyzed the evidence on record both on account of the reason and procedure for termination of the Claimant. On the material before me, I have no doubt in my mind that the Respondent had valid grounds to sever his socio-economic relation with the Claimant. As I indicated earlier, I am convinced on the basis of the evidence on record that the Claimant abused the trust the Respondent had placed on him by redirecting the Respondent’s funds meant for security service fees and which came into Claimant’s possession by reason of his employment. This conduct without more constitutes gross misconduct.

29. It is also evident that the Claimant chose to stay away from duty when he was confronted with the aforesaid facts. In terms of section 44 of the *Employment Act*, staying away from work without the permission of the employer is yet another ground to terminate an employee for gross misconduct. Consequently and in my view, the Respondent was entitled to rely on the fact of the Claimant’s unauthorized absence to close the employment relation between the parties.



30. However, the law as indicated did not entitle the Respondent to treat the Claimant's unauthorized absence as automatically terminating the employment relation between the parties. It was necessary for the Respondent as the innocent party to bring the contract to a close by notifying the Claimant that he intended to terminate the Claimant's services on account of his unauthorized absenteeism. This, as has been explained required the Respondent to take deliberate steps to try and reach out to the Claimant and draw his attention to the impending decision. The essence of this was to allow the Claimant the opportunity to dissuade the Respondent from effecting the decision to terminate the contract of service.
31. The Respondent's testimony that he tried to find out the whereabouts of the Claimant to no avail appeared to me to have been an afterthought. I say so because this evidence is not anchored on the Respondent's Statement of Defense. The document contains no plea that the Respondent followed the procedure outlined in law in processing closure of the contract between the parties.
32. Further, even though the Respondent suggests that he tried to get to the Claimant to no avail, there was no cogent evidence of the efforts made in this respect. No evidence of phone call data was availed. No evidence of written communication to the Claimant in the form of a notice to show cause or otherwise was presented to court.
33. Without this evidence, it is difficult for the court to arrive at the conclusion that the Respondent tried to close the contract of service in the manner provided for under section 41 (2) of the [Employment Act](#). Having listened to the parties testify in court, I am convinced that the Respondent considered the Claimant as having automatically lost his job on account of the act of desertion of duty without more. Consequently, I declare that the Claimant's employment was not terminated in accordance with the requisite procedure.
34. Having reached the above conclusion, the next issue for determination is whether the parties are entitled to the remedies pleaded. In addressing this question, I will be guided by section 49 of the [Employment Act](#).
35. Whilst it is appreciated that the section gives the court a wide range of remedies to grant to an aggrieved employee, the court is alive to the fact that it is under no obligation to grant all or indeed any of the remedies. Whether any of the various reliefs should be granted is a matter that is left to the court's discretion. Similarly, the court has discretion to determine the quantum of compensation for wrongful termination up to a maximum of an employee's gross annual salary. This discretion is to be exercised judiciously taking into account: the evidence on record; the guidelines under the Act; and judicial precedent (see *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR and [National Bank of Kenya v Samuel Nguru Mutonya](#) [2019] eKLR).
36. Of significance to the dispute before me is the requirement that in determining the reliefs to grant to the Claimant, the court considers, among other factors, "the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination."
37. I take note of the Claimant's conduct of failing to account for funds which were entrusted to him by the Respondent's tenants. I take cognizance of the fact that it is this conduct that directly resulted into the separation of the parties. I note that the Claimant absconded from duty immediately he was confronted with evidence of this misconduct. The Respondent's only fault was that he failed to invite the Claimant to a disciplinary session before closing the employment relation between the parties.
38. Taking all these factors into consideration, I am of the view that the Claimant is morally undeserving of any compensation whatsoever. However, the law recognizes that the Claimant's right to due process was infringed by the Respondent's failure to invite him for a disciplinary hearing. And for this, the law



requires that the Claimant be compensated in some way. It is for this reason alone that I will order that the Respondent pays the Claimant compensation for wrongful termination limited to the Claimant's gross salary for three (3) months only, that is to say Ksh. 29,649/=. The Claimant shall have interest on the sum aforesaid at court rates from the date of filing the case till payment in full. The Claimant shall have half costs of the case. For the avoidance of doubt, I decline to make any other awards as prayed by the Claimant.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF MARCH, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

