



**Joseph v Menengai Oil Refineries Ltd (Cause 225 of 2017)
[2023] KEELRC 624 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 624 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 225 OF 2017
HS WASILWA, J
MARCH 6, 2023**

BETWEEN

OCHIENG ANOGO JOSEPH CLAIMANT

AND

MENENGAI OIL REFINERIES LTD RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide a Memorandum of Claim dated May 10, 2017, claiming to have been unceremoniously terminate from employment vide a phone call on the February 17, 2017 and now seeks for compensation for the unfair termination. He sought for the following reliefs;
 1. One-month salary in lieu of Notice.
 2. Normal overtime.
 3. Leave for 3 years 6 months.
 4. Compensation based on section 49(1)(c).
 5. Certificate of service.
 6. Cost of the suit to be borne by the Respondent.

Claimant's Case.

2. The Claimant states that he was employed verbally by the Respondent in July, 2013 as a fitter/ welder, earning a daily wage of Kshs 1500 which was paid at the end of every week.
3. He avers that he used to report to work at 7.45 and clock out at 6.45, working a cumulative of 11 hours, which earned him overtime of 2 hours each day which was not paid for. He added that he served a total of 42 hours of overtime which translate to Kshs 558,276.90 in pay.



4. He contends that having served the Respondent continuously for 3 years 6 months, his employment status changed to that of permanent and pensionable employee as provided for under Section 37 of the *Employment Act*.
5. It was his case that he was not granted leave or paid in lieu for the entire duration he served the Respondent which was contrary to the express provisions of Section 28(1) of the *Employment Act*.
6. The circumstances leading to his termination was that, he received a phone call on the February 17, 2017 from his supervisor one Mr. Brinda Singh, informing him that his services were no longer required and on reporting the next day for clarification of the said Phone call, he was barred by the guards at the gate from entering the Respondent's premises. On termination he was not paid any terminal dues.
7. He stated that the termination was not preceded by notice or disciplinary hearing, neither was he informed of the reasons for termination as such the termination was unfair.
8. During hearing the Claimant testified as CW-1 and adopted his witness statement of 10th May, 2017 and in summary stated that he was employed by the Respondent as a welder earning Kshs 1500 per day. He denied deserting duty or receiving any communication from the Respondent searching for him. He also denied lodging any complaint at the labour office and that he was not paid any terminal dues as pleaded by the Respondent.
9. On cross examination by Chepngetich Advocate, the witness testified that he did not receive the cheque produced as Respondent's Exhibit 2. He reiterated that he was paid on daily basis which was given to him at the end of the week. He denied visiting the labour office or receiving any terminal dues therein.

Respondent's case.

10. The Respondent entered appearance and filed a defence dated June 22, 2018 admitting to employing the Claimant but that it employed the Claimant on casual basis as a machine operator between 2014 and 2016 at a monthly salary of Kshs 15,000. That the Claimant served the Respondent well till August, 2017 when he absented himself for a month without any notice and efforts to trace him were in vain. That within the same period, the Respondent had lost money under unclear circumstances.
11. It is stated that after disappearing for one month the Respondent terminated his services and soon after, a dispute was reported at the labour office, which summoned both parties for conciliation and the final finding was for the Respondent to pay the Claimant leave pay as terminal dues which it did.
12. That the Claimant signed a discharge agreement at the labour office, discharging the Respondent from further liability with regard to the employment relationship between them.
13. The Respondent summoned its Senior Human Resource officer, Kanenje Muchibi, as its witness(RW-1). He adopted his witness statement of November 8, 2021 which in summary stated that the Claimant was employed between 2014 and 2016, earning a monthly salary of Kshs 15,525 but that in August, 2017 he deserted work never to be seen only to file a case at the labour office where his terminal dues were computed and a cheque issued to him. He added that the Claimant was paid overtime together with his salary when he earned and on leave pay, he stated that the Claimant took his leave days and on occasion that he did not take leave, he was paid in lieu.
14. He reiterated that the Claimant's salary was paid on a monthly basis but that the terminal dues which was paid was pro-rated leave pay which was paid at the rate of Kshs.1,500 a day. He also testified that the Claimant did not work overtime as the attendance sheet which the Claimant signed does not show any overtime worked.



15. Upon cross examination by Maragia Advocate, the witness testified that there was a meeting at the labour office but did not have any evidence on the same. He also stated that they did not write a letter asking for the Claimant's whereabouts. He testified that there was money that was stolen but could not tell how much was lost. He then confirmed that the Claimant was paid Kshs 1500 per day.

Claimant's Submissions.

16. The Claimant submitted that the case before Court is one of unfair termination and not desertion as pleaded by the Respondent. In this he relied on the case of [*Ronald Nyambu Dandi V Tornado Carries Limited*](#) [2019] eKLR where the Court held that;

“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 (see [*Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited*](#) [2016] eKLR).”

17. Accordingly, it was submitted that the allegation of deserting employment was not justified because no evidence of follow up calls or letter was tabled before Court to ascertain that indeed the Respondent followed up on the alleged disappearance of the Claimant. Further that the allegation that money was stolen soon before the Claimant purportedly deserted work was not backed up with any evidence, showing clearly that their grounds of terminating the services of the Claimant was not proved.

18. To reinforce its case, the Claimant relied on the case of [*Judith Atieno Owuor V Sameer Agricultural and Livestock Limited*](#) [2020] eKLR , where the Court held that;

“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 her termination. In the case of *Felistas Acheha Ikatwa v Charles Peter Otieno* (2018) eKLR it was held:“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.”

19. He also relied on the case of [*Walter Ogal Anuro v Teachers Service Commission*](#) (2013) eKLR the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

20. On whether the Claimant was paid terminal dues, it was submitted that the allegation by the Respondent that a cheque was issued to the Claimant and an agreement signed in the labour office was not substantiated by way of evidence, further that if indeed the Claimant was paid, the Respondent ought to have exhibited a bank statement showing that the Claimant was paid his terminal dues.



21. On the reliefs sought, the Claimant submitted that his termination was abrupt and done without notice and therefore should be paid notice pay together with compensation for the unfair termination in accordance with section 49(c) of the *Employment Act*. On overtime, he argued that the Respondent failed to produce the muster roll and the pay slips in support of the argument for overtime pay save for an attendance sheet that was limited to the duration between January 18, 2017 to January 20, 2017 for two days. He argued that he worked for overtime which was not paid for and also leave which was not granted for the duration he served the Respondent.

Respondent's Submissions.

22. The Respondent submitted from the onset that before termination of an employee is effected, the employer must comply with the requirement of section 41 and 43 of the *Employment Act* on substantive and procedural fairness. On this they cited the case of *David Gichana Omuva v Mombasa Millers Limited* [2014] eKLR and the case of *Kenfreight (EA) Limited V Benson K Nguti* [2016] eKLR.
23. Based on the foregoing, it was argued that the Claimant's termination was justified because he deserted work without reason or notice. He then argued that since the Claimant deserted work without cause, he is not entitled to the reliefs sought.
24. He submitted that because the Claimant was paid on daily basis, he doesn't deserve any notice pay. On overtime, the Respondent submitted that the evidence, marked as Exhibit 1 before Court demonstrate that indeed the Claimant was paid overtime when earned and to allow further payment of overtime would be unfairly enriching the Claimant. On compensation, it was submitted that to allow for payment of salary for 12 months which the Claimant has not worked for would amount to unfair enrichment and in this they riled on the case of *Elizabeth Wakanyi Kibe V Telkom Kenya Limited* [2014] eKLR.
25. In conclusion, the Respondent submitted that the process of terminating the Claimant's services was done in accordance to the law and the reliefs sought are not warranted in the circumstances. He urged this Court to dismiss the claim with costs to the Respondent.
26. I have examined all evidence and submissions of the parties herein. The Claimant's contention is that he was unlawfully terminated by the Respondents who locked him out of the work premises.
27. The Respondent on their part aver that the Claimant absconded duty never to be seen again.
28. The RW1 admitted that the Claimant was their employee and they were paying him 1,500/= per day. The Respondents further admitted that they terminated the services of the Claimant when he disappeared from work for 1 month.
29. The Respondents have not produced any evidence before this Court that after the Claimant absconded duty they tried searching for him. There is no Email or letter or even text message sent to him to explain why he should not be terminated for absconding duty.
30. The Claimant was also not subjected to any disciplinary hearing. It is therefore evident that the Claimant was terminated without due process.
31. The Respondents also submitted that the Claimant and Respondent held a meeting at the Labour Office and the Claimant signed a statement discharging the Respondent from any liability.
32. The Claimant denied this and no discharge form to this effect was submitted before this Court as evidence.



33. Having found as above, it is my finding that indeed the Claimant was terminated by the Respondent without any due process.
34. The termination was therefore unfair and unjustified as under Section 45 (2) of the [Employment Act, 2007](#) which states as follows:-

“ 45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility;

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

35. In terms of remedies sought, I find for the Claimant against the Respondent as follows:-

1. 1 Month's salary in lieu of notice = 36,000/= as prayed
 2. Leave for 1 year = 36,000/= rest of years not payable
 3. Compensation equivalent to 8 months salary = 8 x 36,000/=288,000/=
- Total = 360,000/=
- Less statutory deductions
4. Issuance of certificate of service



5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF MARCH, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

