Mbuba & another v Mwangi & another (Cause E002 & E003 of 2021 (Consolidated)) [2023] KEELRC 543 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 543 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

CAUSE E002 & E003 OF 2021 (CONSOLIDATED)

ON MAKAU, J

MARCH 3, 2023

BETWEEN

HUMPREY MAINA MBUBA ..... 1ST CLAIMANT

GILBERT KINYUA MWONGO ..... 2ND CLAIMANT

AND

ALBERT MWANGI ..... 1ST RESPONDENT

CHECK MATE LOUNGE ..... 2ND RESPONDENT

JUDGMENT

1. The claimants were employed by the respondents on diverse dates and served in different capacities. The 1st claimant was employed on April 14, 2019 as a steward earning a basic salary of Kshs 7,500.00 per month. The 2nd claimant was employed on December 25, 2018 as a cook earning Kshs 18,000.00 basic salary per month. The hotel they were employed was at Makutano.

2. They brought separate suits alleging that the respondents terminated their services on August 15, 2019 without prior notice, or hearing and without any valid reason. The suit were consolidated in this judgment and they seek the following reliefs:-

    a. Declaration that the termination of their employment was unfair and illegal.

    b. General damages

    c. Compensation for unfair termination

    d. Salary in lieu of notice

    e. Pro-rate leave

    f. costs

3. The respondent filed defence denying the alleged unfair termination and averred that the claimants ran away and deserted work after discovering that a theft syndicate in which they were involved and been cracked and investigations were ongoing. Consequently, they averred that the claimants' are not entitled to the reliefs sought and their suit ought to be dismissed with costs.

4. The suit proceeded by written submissions on the strength of their pleadings and documentary evidence filed.

Evidence

5. The claimants filed written statements on January 19, 2021. The statements reiterates the averments in their statements of claim which I have summarized above. They also filed letter dated September 3, 2019 to prove that immediately upon dismissal they reported the matter to the area Labour office. They also produced respective Bank statements to prove that the respondent was paying them regular salary as pleaded.

6. The respondents filed witness statements from 4 witnesses. The first respondent's statement is dated January 31, 2022. He confirmed that he employed the claimant on May 30, 2019 as a cleaner but on temporary basis. The payment was however on completion of the work assigned because they were allegedly causal employees.

7. He further stated that in July 2019 he discovered that there was theft of meat in the premises by workers and he warned the workers against theft. On August 14, 2019 the claimant and another employee called Nyongesa were caught on CCTV cameras stealing meat from the fridge and hide it in white sack. The claimant took the same to security guard to keep it. The security team was then called to check the CCTV footage but the claimant ran away and deserted work upon discovering that they were under investigation.

8. Later the claimants reported to the Labour officer and who served the respondents with a letter and they responded. The Labour Office found no case and the matter ended. The 1st Respondent therefore prayed that the suit be dismissed with costs.

9. The next witness statement is by Mr Wilfred Muriithi, security supervisor for Pachaz Kenya Limited, which is contracted by the respondents to provide security services. On August 15, 2019 he received a call from the 2nd respondent to go and check CCTV cameras in connection with theft of meat. He checked and saw two workers removing meat from a fridge, put it in white sack and took it to the security guard to keep for them. He then called the security guard Mr John Kirimi but he disappeared.

10. Jackline Muthoni recorded her witness statement also on January 31, 2022. She was employed by the 2nd respondent as a supervisor in 2018. Severally she received report of shortage of meat despite there being enough supply. On August 10, 2019, she received a report from the Account Assistant that 100kg of meat was missing. She immediately notified the 1st Respondent and the CCTV cameras were checked. The claimant was seen with a colleague called Nyongesa removing meat from the fridge and putting it in a white sack. They then took to security guard to keep for them. When they discovered that investigation were underway, they ran away and absconded work.

11. Mary Njeri and Stephen Wachira Mwangi, both employees of the respondents, also filed statement dated January 31, 2022 and February 16, 2021 respectively. The statements basically reiterated the statements by the other witnesses summarized above. The respondents also filed a letter dated September 4, 2019 by which they responded to the County Labour Officer's demand.

Submissions

12. It was submitted for the claimants that desertion is different from absenteeism because it means that the deserting employee has no intention to return to work. It was further submitted that where an employer alleges that an employee has deserted, he must show that he made efforts to reach out to the employee with a view of notifying them that termination of their employment was being considered for absconding work.

13. Reliance was placed on the case of *New World Stainless Steel Limited v Cosmas Mbalu Munyasya* (2021) eKLR where the court held that the employer did not adduce evidence to prove that the employee had absented himself and thereafter absconded duty. In the instant case it was submitted that the alleged investigation of a theft crime has not been proved by evidence, like an OB Report.

14. It was further submitted that the respondent did not comply with section 41, 43 and 45 of the *Employment Act* before terminating the claimants' employment. It was therefore concluded that the termination was unfair because the employer has failed to justify the reason for the termination as required by section 43 and 47 of the Act and to prove that they accorded the claimants a fair hearing as required by Section 41 of the Act. Further the employer failed to give the claimants notice as required by Section 35 of the Act.

15. For emphasis reliance was placed on the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, *Francis Mbugua Boro v Smartchip Dynamics Ltd* (2017) eKLR and *David Njoroge Muiru v Elsa Limited* (2014) eKLR where the courts underscored that termination is unfair if the employer had no valid reason for the termination or did not follow a fair procedure.

16. In conclusion the court was urged to award the reliefs set out in the claimants' respective pleadings.

17. On the other hand, it was submitted for the respondent that the claimants have not adduced evidence to prove the manner in which they were dismissed. It was submitted that the defence witnesses stated in their written statement that the claimants were caught by CCTV camera stealing meat from the fridge, putting it in a white sack and gave it to the security guard to keep it for them.

18. Further when the claimants discovered that investigations were being carried out against them they disappeared and never reported back to work. It was again submitted that the respondents learned about the alleged termination when the Labour Officer wrote a demand letter. It was admitted that the respondent did not reach out to the claimants after they absconded duty.

19. It was submitted that the claimants were only hired on temporary basis, as and when the need for their services arose. It was argued that the claimants did not adduce sufficient evidence to prove that the respondents terminated their services wrongfully as required by Section 47 (5) of the *Employment Act*. Consequently, they are not entitled to the reliefs sought.

Determination

20. The issues for determination herein are

    a. Whether the claimants deserted employment or they were dismissed by the respondents.

    b. If they were dismissed, whether the same was justified by valid reason.

    c. Whether fair procedure was followed.

    d. Whether the reliefs sought are merited.

Desertion or dismissal

21. Desertion of employment generally refers to a situation where an employee absents himself from duty with no intention of reporting back. I gather support of South African case *Seabo v Belgravaia Hotel* (1997) 6 BLLR 829 (CCMA) where it was held that:-

> " ...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand... an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider".

22. In the instant case the employer contends that the claimants ran away and deserted work after discovering that there were investigations going on about theft of meat that was caught by CCTV camera. The employer made no effort to reach out to the claimants to know their whereabouts. No show cause notices were sent to the employees after the alleged desertion, warning them that they would be dismissed from service for their absence.

23. On the other hand the claimants contend that they were dismissed for no reason and without a hearing or prior notice as a consequence of which they lodged a complaint at the Labour Office. The employer admitted that the report was made to the Labour Office, and a demand letter was addressed to them to pay the claimants terminal dues. The court has seen the letter by the Labour Officer dated September 3, 2019 and response by the respondents dated September 4, 2019.

24. Having considered the evidence and submission filed, I find and hold that the respondents have not proved on a balance of probability that the claimants deserted employment. They did not show what steps they made to reach out to the claimants to explain their absence.

25. There is no evidence of the alleged investigations into the theft of meat. The alleged CCTV camera footage was not adduced as evidence. Consequently finds the evidence by the two claimants more weighty and tilting the scale of justice towards a finding that the respondents dismissed the claimants from their employment on August 15, 2019.

Reason for the Dismissal

26. The reason cited for the dismissal was stealing of 100kgs of meat from the employer's fridge by the 1st claimant and accumulated shortages of Kshs 24,000.00 resulting from direct orders from customers and receiving payment by the 2nd claimant. The claimants have denied the said offences. The respondents produced no CCTV footages to prove the alleged theft of 100kgs of meat. Without such evidence there is no evidence to prove the alleged theft because none of the witnesses saw the meat being stolen. Besides there is no evidence tendered by the respondent to prove that indeed there was 100kgs of meat in the fridge.

27. As regards the alleged shortages by the 2nd claimant, there is no evidence to substantiate the same. One would have expected the respondent to table some report from an Auditor or a statement from an Accountant to prove the alleged shortages. There is further no evidence to prove that the claimant received orders directly from customers and received payment as alleged in the letter to the Labour officer dated September 4, 2019.

28. In view of the foregoing gaps in the respondents' evidence, I find that the reasons relied upon to dismiss the claimants from employment were not valid and fair so as to justify a dismissal. Consequently, I hold that the respondents have failed to discharge the burden of proof under Section 43 and 45 (2) of the *Employment Act*.

Procedure followed

29. Section 41 of the *Employment Act* provides that:-

> "(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (2) 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."

30. The claimants alleged that they were dismissed without a fair hearing or the requisite termination notice. The respondents maintained that the claimants ran away and absconded upon learning that investigations were underway regarding theft allegations against them.

31. I have made a finding of fact that the alleged desertion has not been substantiated. Whereas the claimant sought help from the Labour office, the respondents did nothing to invite the claimants to a disciplinary hearing or even warn them that disciplinary action would be taken against them for absconding.

32. Again, no letters were served on them to show cause why disciplinary action should not be commenced against them for the alleged theft and clandestine dealings with customers. All this gaps, in my view suggest that the procedure followed by the respondent to dismiss the claimants was not fair and therefore contrary to Section 41 of the *Employment Act*.

Reliefs

33. Having found that the employer has failed to prove a valid reason for dismissing the claimants, and further failing to show that fair procedure was followed, I declare that the dismissal of the claimants was unfair and unlawful within the meaning of Section 41 of the *Employment Act*.

34. Accordingly, I award each claimant one month salary in lieu of notice. The 1st claimant worked for only 3 months and therefore I award him 15 days gross pay as compensation for the unfair dismissal. The 2nd claimant worked for about 8 months and therefore I award him one month salary as compensation for the unfair termination.

35. Further the claimants are awarded pro-rated leave based on their respective period of service as there is no evidence that they were compensated for the same. By this award I dismiss the allegation by the respondents that the claimants were not in continuous service for the period served. Besides the bank statements they filed as evidence reflect that they were indeed in continuous service.

36. The claim for the unpaid salary for July, 2019 and 15 days worked in August 2019 is also granted since there is no evidence to show that the same was indeed paid.

37. The claim for General Damages lack merits and it is dismissed.

38. In conclusion judgment is entered for the claimants against the respondents as follows:-

1st Claimant

Leave .....Kshs 1,514.42

Notice..... .Kshs 7,500.00

Compensation.....Kshs 3,750.00

Unpaid salary.....Kshs 11,250.00

Kshs 24,014.42

2nd claimant

Leave .....Kshs 9,692.30

Notice..... .Kshs 18,000.00

Compensation.....Kshs 18,000.00

Unpaid salary.....Kshs 27,000.00

Kshs 72,692.30

The claimants will have costs based on the Lower court scale, plus interest at court rates from the date hereof because that is where they should file the suits. The awards will also be subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF MARCH, 2023.

ONESMUS N MAKAU

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 15th April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE