



**Amenya v Apex Steel Limited (Cause 1508 of 2015)  
[2023] KEELRC 609 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 609 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1508 OF 2015  
K OCHARO, J  
MARCH 2, 2023**

**BETWEEN**

**MOCHENGO DOMINIC AMENYA ..... CLAIMANT**

**AND**

**APEX STEEL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Through a Memorandum of Claim dated August 26, 2015, the Claimant instituted a claim against the Respondent seeking the following reliefs;
  - a. A Declaration that the Respondent’s action of sacking the Claimant was illegal and unlawful and the Claimant is entitled to severance pay, terminal benefits, one month’s pay in lieu of notice, salary underpayments all totalling to Ksh 56,750.
  - b. General damages for the wrongful dismissal as the court shall assess.
  - c. Cost of the suit and interest.
  - d. Any other relief this court may deem fit to grant.
2. The Memorandum of Claim was filed together with the Claimant’s witness statement and the list 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 entered appearance on September 23, 2015 and filed his response to the Claimant’s statement on July 18, 2018. In the memorandum of reply, the Respondent denied the Claimant’s cause of action, and his entitlement to the reliefs sought.
4. Subsequent to the close of the pleadings, the matter was heard *inter-partes* on merit on July 21, 2022.



5. At the hearing of the parties' respective cases, the witness statements that they had filed were adopted as part of their evidence in chief and the documents admitted as their documentary evidence.

### **The Claimant's case**

6. The Claimant stated that he was employed by the Respondent on September 1, 2014 and unfairly terminated by the Respondent in June 2015 without any reasonable cause and justification or being given a chance to defend himself.
7. The Claimant testified that he had worked diligently for the Respondent and was not reprimanded even in one single occasion only to be served with a termination letter which was in breach of the employment contract.
8. The Claimant contended that he had worked for the Respondent for a total of one year earning Ksh 12,500 per month all-inclusive and the said sacking caused him loss and damage and thus entitles him to the reliefs as tabulated hereunder:
  - a. One month salary in lieu of notice..... Ksh 12, 500.
  - b. Unpaid leave for year worked.....Ksh 12, 500.
  - c. Service pay.....Ksh 6, 250.
  - d. 3 Months' salary for wrongful termination. Ksh 37, 500.
9. The Claimant stated that on January 14, 2015, he was injured in the course of his duties and was duly taken to the hospital by the Respondent and was allowed to heal at home till June 2015.
10. In his evidence under cross examination, the Claimant stated he worked for the Respondent up to June 2015. He insisted that the latter terminated his employment through a termination letter, however, he didn't have the letter before court. The contract of employment wasn't under any formal letter of employment, or any at all.
11. The Claimant contended that his woes started when he was involved in an accident while in the course of his duties. They had gone to supply metal bars at another company's when metal bars fell on him, fracturing his leg. He further stated that the Respondent facilitated for his hospitalisation, and paid his medical bills.
12. Despite the fact that he was not reporting to work after the injury, the Respondent continued paying him salary up to the month of May 2015. In the month of June 2015, he was given an advance salary.
13. In the month of June, the Respondent instructed him to be reporting to work. He obliged. However, they were not paying him any salary.
14. The Claimant asserted that he lodged a claim with the Labour Officer. However, he was not at any time called by that office for a meeting with the Respondent.

### **The Respondent's case.**

15. The Respondent's case was presented by Mr Abraham Ombogo Ondara, its Human Resource Manager. He stated that the Claimant was employed by the Respondent in September 2014 as a general Labourer earning a net monthly salary of Ksh 11,056.
16. The witness testified that the Claimant never worked for the Respondent for a year as he alleged. His Claim that he was earning a monthly salary of Kshs 12,500 is unfounded.



17. It was his testimony that the Claimant was injured in the course of his work on January 14, 2015. As a result of it he was taken to the Nairobi West hospital for treatment and after discharge, he was excused from work and granted leave to enable him heal. However, during the period of the absence from duty, he continued drawing his full salary.
18. He further testified that on or about May 2015, the Claimant deserted duties and failed to report to his work station for his usual progress review with the Respondent. Despite invitations and numerous calls, the Claimant failed to turn up, back to work.
19. The Respondent stopped remitting the Claimant's salary in the month of July 2015, when it became apparent that he was no longer reporting to his station nor updating the Company on his recovery from his injuries.
20. The witness stated that the Claimant was on sick off until the month of April. After that, he never turned up for work. The Claimant was being treated on an account of the Respondent. All that he used to do was to pick a voucher from the Respondent then proceed to the hospital. He picked the last voucher in the month of April 2015. This notwithstanding, the Respondent decided to pay him for the month of May and June 2015.
21. There was no termination letter issued to the Claimant. After he received the Payment for June, he disappeared, the Respondent never had of him until it received a letter dated 13.08.2015 from the Labour Officer. The Respondent, responded to the letter on the 19.08.2015. The Officer invited them for a meeting, but the Claimant failed to turn up.
22. Cross-examined, he told the court that the Claimant was being treated at Nairobi West Hospital at the Respondent's expense. He was attended throughout at the hospital, till the end of April. The Respondent didn't tender in evidence the vouchers or treatment notes to demonstrate that indeed the last time the Claimant was seen in hospital was in April.
23. The meeting by the Labour Officer did not proceed due to the non-availability of the Claimant. They never wrote him any letter after the termination. The Claimant never came back after April.
24. The witness stated that the Respondent kept a record of the next of kin of its employees. It did not call any of the next of kin of the Claimant, after he ceased coming to work.
25. The witness that the Respondent did not write any letter to the Claimant after he deserted duty, as it didn't have his postal address.

### **The Claimant's Submissions.**

26. The Claimant filed his submissions identifying two issues for determination, thus;

#### **I. Whether the unlawful termination of the Claimant was merited.**

II. Whether the Claimant is entitled to the reliefs sought.

27. On the first issue the Claimant's counsel submitted that the Claimant was unlawfully terminated from employment without reason or due process being followed. It was further submitted that it was the responsibility and obligation of the Respondent to ensure that the employees were not discriminated at the place of work. The Claimant relied on section 5(2) and 5(3) of the [Employment Act](#) which provides:
  - 2 An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.



- 3 No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
- a on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
  - b in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
- 4 It is not discrimination to—
- a take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;
  - b distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;
  - c employ a citizen in accordance with the national employment policy; or
  - d restrict access to limited categories of employment where it is necessary in the interest of State security.”
28. The Claimant submitted that no reasons were given to him for the termination. It cannot be believed that the Respondent failed to trace the Claimant for issuing him with a termination letter, as it is clear that it didn’t attempt even to reach his next of kin. This notwithstanding that it had the details of the next of kin. Section 43 of the *Employment Act* placed a legal burden on the Respondent to prove the reason for termination, it didn’t discharge this burden.
29. The Claimant submitted that by dint of section 45 of the *Employment Act*, an employer is barred from terminating the services of his or her employee except if there was a valid and fair reason for the same through fair procedure.
- It was the Claimant’s submission that the Respondent acted in total disregard of the provisions of section 41 of the Act which provides the procedure to be followed before dismissal of an employee on account of gross misconduct under section 44 of the Act.
30. In support of his submissions on procedural fairness he placed reliance in the case of *County Assembly of Kisumu & 2 others vs Kisumu County Assembly Service Board & 6 others* (2015) eKLR where the court held:

“Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.”



31. Counsel further relied on the case of *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR where the court held:

“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the *Employment Act*. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

### **The Respondent’s submissions.**

32. The Respondent distilled two issues for determination, thus:

- i. Whether the Claimant absconded duty.
- ii. Whether the Claimant is entitled to the reliefs sought.

33. On the first issue, Counsel for the Respondent submitted that the Claimant in the month of June wilfully with no justification abandoned his obligations. Despite numerous calls made seeking explanation of his absence, the Claimant didn’t avail any. The Counsel relied on definition of desertion as per the *Black’s Law Dictionary* (Ninth Edition) thus:

“The wilful and unjustified abandonment of a person’s duties or obligation.”

Further submitting that in the south African case of *Seabolo vs Belgravia Hotel* (1997)6 BLLR 829 (CCMA) the court sought to distinguish desertion from unauthorized absence from duty as follows:

“...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.”

34. The counsel further relied on the case of *Richard Koech Kiplimo vs Yako Supermarket Limited* (2015) eKLR where the court held:

“Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to section 41 of the *Employment Act*, 2007, a hearing is necessary.

48. And in my view, it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or effort to reach the employee and seek any explanations to excuse itself from the application of section 41 of the *Employment Act*, 2007. A prudent employer and an employer such as the Respondent will invariably keep contact details of its employees.”

35. It was the Respondent’s position that the Claimant wilfully and without explanation abandoned his obligations with the hope to continue being paid notwithstanding that he wasn’t working. It was



further argued that there nothing to demonstrate that the Claimant’s employment was terminated, the Claimant didn’t put forth the alleged letter of termination.

36. On the second issue the Respondent submitted that the Claimant having not proved his case, the reliefs sought cannot be availed to him. The Respondent relied on the case of *Kennedy Maina Mirera vs Barclays Bank of Kenya Limited* (2018) eKLR where it was held:

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

19. Therefore, the Plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment.”

37. It was further submitted that the Claimant didn’t tender any evidence that can form basis for a conclusion that he never at all proceeded for leave, to justify compensation for unutilized leave days. On his claim for service pay, it was contended that ample evidence was placed before this court showing that the Respondent used to remit NSSF dues for the Claimant, therefore by dint of section 35 of the Act, he is not entitled to the pay.

#### **Analysis and determination.**

38. From the pleadings by the parties herein, their evidence on record as well as the submissions by their Counsels, the following issues present themselves for determination thus:
- i. What was the nature of the Claimant’s employment with the Respondent?
  - ii. Whether the termination of the Claimant was substantively and procedurally fair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
  - iv. Who should bear the cost of the suit.

#### **What was the nature of the Claimant’s employment with the Respondent?**

39. The Claimant contended that he first came into the employment of the Respondent as a general labourer. This evidence was confirmed by the Respondent. He worked for the Respondent for a period amounting to four months and two weeks before he sustained an injury in the course of his duties on January 14, 2015. The Claimant had worked continuously in the said employment. Section 2 of the *Employment Act* explicitly defines a casual employee as a person whose terms of employment provides for his employment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.
40. By dint of section 37 of the *Employment Act*, casual employment may be converted to a term contract if the work has been continuous for a month or the work performed by the casual cannot be completed within a period of three months. In summation, where a person engages in casual labour continuously for a month, the law considers the labourer as an employee with a term contract, whose wages are deemed to be paid monthly in accordance with section 35(1) (c) of the *Employment Act* 2007.
41. There is no doubt that the Claimant’s employment was converted by operation of the law, availing him all the protection and the expansive rights obtaining in the *Employment Act*.



### **Whether the termination was substantially and procedurally fair.**

42. The *Employment Act* 2007 provides for the procedure to be followed by an employer before terminating an employee's employment or summarily dismissing the employee. By dint of section 41 of the Act the procedure is mandatory and any deviation from it renders the termination unfair even if there were substantive justification. The said section states:
- 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.”
43. By dint of the provisions of section 45(2), the duty to prove that there was procedural fairness in the termination or the summary dismissal lies on the employer. Looking at the material placed before this court, one cannot find difficulty in being persuaded by the evidence of the Claimant that the Respondent did not follow the basic and required prescript of the Employment law and the rules of natural justice.
44. The Claimant was not given any termination letter nor accorded a chance or an opportunity to defend himself before the termination. There was no hearing availed to the Claimant before effecting the termination and with this the Respondent flawed the procedural fairness and I am left with no other reason rather than concluding that the termination was procedurally unfair.
45. On the substantive justification of the dismissal, section 43 of the *Employment Act* 2007 commands that whenever there is a dispute regarding the termination of an employee's employment, the employer bears the duty to prove the reasons for termination. Section 45 places a further burden on the employer, of proving that the reasons for the termination was valid and fair. Where the employer fails to discharge the first burden, no doubt, it is possible to discharge the second limb under section 45 of the Act.
46. The Respondent alleged that the separation between the Claimant and it, occurred when the latter deserted duty. I have carefully, considered the evidence of the Claimant as regards how the separation occurred. I find the evidence unconvincing, and contradictory. The contended that his employment was terminated through a letter. He however, did not place the letter before court, or satisfactorily explain the Court why it was not availed in evidence even considering the position that was taken by the Respondent.
47. In this circumstance, I am persuaded by the Respondent's submission that the Claimant didn't discharge his duty under section 47[5], that of demonstrating that the termination was without a valid and fair reason. I am convinced that the Claimant left the Respondent's employment in the circumstances as explained by the Respondent.
48. There was a valid reason obtaining upon which the Respondent would terminate the Claimant's employment. However, its approach was deficient. An employer alleging that he or she terminated an employee's employment on account of desertion of duty, the employer must demonstrate that after the desertion he brought it to the attention of the employee that his desertion was an act that could attract



a disciplinary sanction against him or her, and thereafter, if it deems it necessary, proceed to conduct disciplinary proceedings in accordance with the statutory procedure hereinabove brought out. The Respondent didn't place any evidence before me to establish that it communicated to the Claimant as above or that it attempted to trace the Claimant for the said purpose.

49. Having found that the Claimant's termination was procedurally unfair but substantively justified, I now turn to consider whether the Claimant is entitled to the reliefs sought.

**One month salary in lieu of notice.**

50. Section 36 of the *Employment Act* provides that either of the parties to a contract of service to which section 35(5) applies may terminate the contract without notice upon payment to other party the remuneration which would have been earned or paid by him as the case may be in respect of the period of notice required to be given under the said section. The Claimant was not issued with the 28 days' notice contemplated under section 35(1) (c) of the Act, and in view of this, the Claimant is entitled to Ksh.11,056. Imperative to state that the Claimant didn't place forth any reliable evidence to demonstrate that he was earning a monthly salary Kshs. 12,500, as he alleged.

**Unpaid leave for one year.**

51. An employee is entitled to leave and any leave not taken should be compensated for by pay in lieu thereof. The Respondent did not present to this court from which one would discern the contrary to what the Claimant asserted. The Claimant having not worked for a whole year, he can only get a pro-rated amount, under this head, 2,902.20.

**Service pay.**

52. The prayer under this head is hereby declined as the Respondent paid and remitted the NSSF for the Claimant herein. The Claimant falls under the category of those employees identified under section 35 of the Act, as not entitled to service pay, therefore.

**Compensation for the unfair termination.**

53. The Claimant sought a three months compensation for the unlawful termination. The authority to grant the relief flows from the provision of section 49 of the Act. The authority is discretionary, exercised depending on the circumstances of each case. Considering that liability against the Respondent herein only attaches on the ground on procedural unfairness, and the length of time the Claimant was in the employment of the Respondent, I find that one month's gross salary as compensation, suffices, Kshs.11,056.

54. In the upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

- a. One month's salary in lieu of notice.....Ksh 11,056.
- b. Unpaid leave.....Ksh 2 902.20.
- c. one Month's gross salary compensation.....Ksh 11,056.
- d. Interest on the sums awarded above at court rates from the date of this judgment till full payment.
- e. Costs of the suit.



**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MARCH 2023**

**OCHARO KEBIRA**

**JUDGE**

**In the presence of**

**Ms Mwangi for the Claimant.**

**Ms Kimani for Mr Gakangu 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 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 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**

