



**Kenya Petroleum Oil Workers Union v Bach Enworld Holdings Limited
(Cause E017 of 2020) [2023] KEELRC 563 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 563 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E017 OF 2020
CN BAARI, J
MARCH 2, 2023**

**BETWEEN
KENYA PETROLEUM OIL WORKERS UNION CLAIMANT
AND
BACH ENWORLD HOLDINGS LIMITED RESPONDENT**

JUDGMENT

1. The Claimant's Memorandum of Claim is dated 4th November, 2020, and filed on the similar date. The Claimant seek orders for one month's notice pay, unpaid leave for 1 year 3 months, 20 days worked in the month of February 2019, underpayment arrears, Public Holidays compensation for 13 days, unpaid deduction for 6 months (2018), and twelve months compensation.
2. The Respondent entered appearance on 8th May, 2021, and thereafter on 29th April, 2021, filed a Memorandum of Response to the claim.
3. The Claimant's case was heard on 28th September, 2022. The Claimant presented a Mr. Silverius Luvembe, the grievant herein, to testify in support of its case. The grievant adopted his witness statement and produced documents filed in support of the Claimant's case.
4. The Respondent's case was heard on 22nd November, 2022. A Ms. Edna Momayo testified in support of the Respondent's case, and adopted her statement and produced exhibits filed by the Respondent.
5. Both parties filed submissions.

The Claimant's Case

6. The Claimant's case is that the Grievant was employed by the Respondent as a pump attendant on 19th December, 2017, earning a monthly gross salary of 15,000.00 per month.



7. The Claimant states that on 20th February, 2019, the Respondent terminated the services of the grievant orally without prior notice on allegations of theft by servant at his place of work.
8. It is the Claimant's case that in the course of his employment, the grievant did not take his leave and neither was he paid for the leave earned and not taken. The Claimant further states that the grievant was not paid for 20 days he worked in February, prior to the termination of his employment.
9. The Claimant states that the grievant was equally not paid one-month salary in lieu of notice.
10. It is the Claimant's case that the theft allegations are said to have occurred on 18th February, 2019, and the matter reported to the police, but no conclusive investigations have been conducted on the matter. The Claimant further states that the grievant has never been questioned, arrested, charged or convicted of the alleged offence.
11. It is the Claimant's case that the grievant was threatened that he will lose his job so as to acknowledge responsibility for the loss of a cumulative sum of Kshs.25,952.00, being the amount allegedly stolen and/or missing under his watch.
12. The Claimant further states that as a consequence, the grievant allegedly wrote an admission acknowledging responsibility over the loss, and accepted that the money be recovered from his salary.
13. The Claimant states that on 20th February, 2019, one Bhachu Las, a Manager at the Respondent's Company told the grievant that he does not want to see him again around the business premises, and which directive made the grievant reasonably believed that his contract had been terminated at that point.
14. The Claimant states that the grievant's admission was not voluntary, but was instead, made with the cloud of a job under peril. The Claimant states that the grievant reported the matter to it for purposes representation, and consequently, on 22nd February, 2019, the Claimant wrote to the Respondent seeking audience to discuss and settle the matter amicably.
15. The Claimant states that on 4th March, 2019, its representatives attended a meeting at the Respondent's offices, but the Respondent refused to have audience with them.
16. It is the Claimant's case that it reported the dispute to the Minister of Labour in accordance with the [*Labour Relations Act*, 2007](#). The Claimant further states that the Minister accepted the dispute and appointed Mr. L. Bii to conciliate the matter.
17. It is the Claimant's case that the Conciliator wrote to both parties on 17th June, 2019, inviting them to a meeting scheduled on 17th July, 2019. The Claimant states that it attended the meeting, but the Respondent adamantly refused to attend prompting the Conciliator to issue a report.
18. The Claimant states that the recommendations of the Conciliator contained in the report referred to herein, have not been complied with prompting the lodging of the instant suit.
19. The Claimant prays that this Court awards it the reliefs listed in its Memorandum of Claim.

The Respondent's Case

20. The Respondent's case is that the grievant was their employee, earning a monthly gross salary of Kshs.15,000.00. The Respondent further states that the grievant was employed on 1st April, 2018, and not on 19th December, 2017, as he alleges, and that this is evidenced in the employment contract between the grievant and the Respondent.



21. It is the Respondent's case that on 18th February, 2019, while the grievant was on duty, there was a loss of Kshs.24,953.00, and there was no report of theft or clue of how the money might have been lost from the grievant. The Respondent further states that the grievant while accounting for the transactions carried in his shift, acknowledged the loss, and accepted liability for the lost money as evidenced in the acknowledgment note written and signed by him.
22. The Respondent states that the grievant was ordered to repay the lost money, and he accepted that deductions be made monthly from his salary. It is the Respondent's further case that the grievant failed to appear on duty on February, 19th 2019, and the Respondent attempted by reach him to no avail.
23. The Respondent deny the allegations in the Claimant's claim that it terminated the services of the grievant, and further states that the grievant was never at any time ordered not to report to work nor was he requested to resign from employment. The Respondent states that the grievant failed to report to work the next day after the loss of money for which he acknowledged the liability.
24. The Respondent states that on 23rd February, 2019, it reported the loss of money at their place of work under the watch of the grievant at Kisumu Police Station. It is the Respondent's further case that the complaint was recorded under OB 41/23/02/2019, and which is evidenced in the police abstract dated 23rd February, 2019.
25. The Respondent states that on 23rd February, 2019, it wrote to notify the County Labour Office of the incident, and further informing them that they had reported the incident at the police station as evidenced in the letter dated 26th February, 2019, produced as an exhibit herein.
26. The Respondent states that the grievant being aware of the criminal act, disappeared and efforts by the police to arrest him became futile and is to date still escaping arrest.
27. The Respondent states that the grievant was an employee who was treated fairly, but still chose to abscond duty and steal contrary to the employment contract and the laws of Kenya.
28. The Respondent further states that the Claimant tendered an apology on 7th November, 2018, for proceeding to leave without prior leave and indicating that the treatment notes he had provided were fake. It is the Respondent's case that the grievant on 18th February, 2019, wrote a letter acknowledging the mistake to be his and apologized for it.
29. The Respondent states that the Claimant voluntarily absconded duty after admitting liability in the loss of Kshs.24953.00. The Respondent prays that the suit be dismissed with costs.

The Claimant's Submissions

30. It is the Claimant's submission that this court lacks jurisdiction to determine whether or not or whether the Respondent documents filed in this court constitute admissions of an offence, as those are matters that should be left to criminal procedure. It is the Claimant's further submission that this court must restrain itself from entertaining the question of whether an offence was committed or not.
31. It is the Claimant's submission that the Respondent has not produced any documents to show that they invited the grievant for a hearing where he could be heard on the allegation of absconding duty and have him defend himself. The Claimant submits that this did not happen because it is the Respondent who in fact terminated the employment contract orally by chasing the Grievant away. The Claimant placed reliance in *Belta Mutanu Mwangangi v Style Industries Limited* [2022] eKLR para 25, the court (A.N Mwaure, Judge) to support this position.



32. It is the Claimant's further submission that where the employer fails to comply with Sections 41 and 45 of the *Employment Act*, the termination is unfair. It sought to rely in *Peter Kamau Mwaura & Another v National Bank of Kenya* [2020] eKLR to buttress this position.

The Respondent's Submissions

33. The Respondent submits that the grievant having absconded duty, he cannot be entitled to compensation from employment as prayed for in his memorandum of claim. The Respondent had reliance in the holding in *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR.
34. The Respondent submits that the Claimant provided no evidence on where and how the grievant's termination took place, and does not attribute any wrongdoing on the Respondent. The Respondent further submits that the Claimant suffers the deficit of the essential factual background to support the termination as alleged.
35. The Respondent submits that the Claimant has failed to demonstrate that the grievant was employed on the 19th December, 2017, failed to demonstrate that he was unlawfully and unprocedurally terminated from employment, failed to prove that he ought to be paid for compensation for breach of the terms of the contract of employment, and therefore not merited to be granted the prayers that he is seeking in his Memorandum of Claim dated 4th November, 2020.

Analysis and Determination

36. I have carefully considered the pleadings herein, the witnesses' oral testimonies, together with the parties' submissions. The issues that arise for determination are:
- i. Whether the grievant was unfairly terminated
 - ii. Whether the Claimant deserves the remedies sought
 - iii. Who bears the costs of the suit?

Whether the grievant was unfairly terminated

37. The Claimant's contention is that their member, the grievant herein, was unfairly terminated on the premise that he was not given a hearing and a show cause prior to his termination. The Respondent on its part, denies terminating the grievant. It contends that the grievant; a pump attendant at their station, absconded duty upon loss or failure to account for Kshs. 24,952/- at the end of his shift.
38. A termination is unfair where the employer fails to adhere to the provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007, on procedure and the existence of valid reasons for termination.
39. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right. Further, in *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer, and is entitled to have a representative present.
40. The question is whether an employer is under duty to give an employee who deserts duty a show cause and subsequently a hearing. *Onyango J in Judith Atieno Owuor v Sameer Agriculture and Livestock*



Limited [2020] eKLR, while citing the decision in *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), defined desertion thus: -

“...the employee who deserts his or her post does so with intention of not returning, or having left his or post, subsequently formulates the intention not to return.”

41. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee. It is not enough for an employer to simply state that an employee has absconded duty. In *William Gituma v RAA Limited* [2020] eKLR it was held that it is not enough for an employer to say that an employee has deserted duty, and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts.
42. This position was further amplified in by Abuodha J. in *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR, where he stated: -

“ An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate the efforts made to contact such an employee without success.”
43. Further in *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR, also cited by the Respondent, Nduma J. observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”
44. Although the Respondent pleaded that the grievant deserted duty, no evidence has been placed before court to show that they made effort to reach out to him before reaching the conclusion that he had deserted duty. The occurrence book reports at the Kisumu Police Station are simply reports of an alleged crime, while nothing shows that the Respondent made an attempt at contacting the grievant.
45. The grievant admitted in his oral testimony that he gave a co-worker (an Assistant Manager) Kshs. 1000, without permission from his supervisor. The Court record also carries evidence that the grievant wrote an admission of having lost/failed to account for a total of Kshs. 24,952/- at the close of his shift on 18th February, 2019.
46. These in my view, are valid reasons upon which the Respondent would have fairly terminated the grievant, but it did not put these reasons in a show cause letter, and neither did it show that it allowed the grievant opportunity make representation on the allegations against him.
47. Persuaded by the holding of the court in the decisions cited herein, I find that the grievant was unfairly terminated going by the manner in which he left the service of the Respondent. He was neither issued a show cause letter nor given an opportunity to be heard on the allegations against him.

Whether the Claimant deserves the remedies sought

48. The Claimant sought the following reliefs on behalf of the grievant:
 - a. one month’s notice pay;
 - b. unpaid leave for 1 year 3 months;
 - c. 20 days worked in the month of February 2019;
 - d. underpayment arrears;



- e. Public Holidays compensation for 13 days;
- f. unpaid deduction for 6 months (2018); and
- g. twelve months compensation.

One Month's Notice Pay,

49. The grievant was not given notice of the termination nor paid in lieu of the termination notice. This claim is merited and is hereby awarded.

Unpaid Leave for 1 year 3 months, unpaid deduction for 6 months (2018) and Public Holidays

50. No evidence was led to show that the grievant was owed on account of unpaid leave, deductions and public holidays worked. The Court was not told what the thirteen holidays that the grievant worked and was not compensated for were and the registers were not produced in evidence to demonstrate that the grievant was on duty during public holidays.

20 days worked in the month of February 2019

51. It is not disputed that the grievant left the service of the Respondent on 19th February, 2019. The Respondent did not adduce any prove of payment of the grievant's salary for the days he worked in February, 2019.

52. The claim is merited and is awarded as prayed.

Underpayment arrears

53. The Claimant contends that the grievant was underpaid. The grievant gross monthly salary per his employment contract was Kshs. 15,000/-. The Regulation of Wages Order produced in evidence indicates the monthly salary payable to service workers in the petroleum and service stations for the year 2018, is Kshs. 15383.45. This is evidence that the Claimant was underpaid by Kshs. 383.45/- per month in the 14 months he was in the service of the Respondent.

54. The claim for underpayment succeeds and is hereby awarded.

Compensation for unfair termination

55. The Court has found the grievant's termination unfair. This finding entitles the grievant to compensation in accordance with Section 49(4) and 50 of the *Employment Act*, 2007.

56. The grievant admitted lending out money and failure to account for the Respondent's money that he collected in his capacity as a pump attendant employed by the Respondent. The grievant in my view, though unfairly terminated, largely contributed to his termination. Consequently, I deem an award of one month's salary sufficient compensation for the unfair termination.

57. In whole, I make the following orders: -

- i. That the grievant was unfairly terminated
- ii. One-month salary in lieu of notice at Kshs. 15,000
- iii. 18 days salary for February, 2019 at Kshs. 9000/-
- iv. Compensation for unfair termination at Kshs. 15,000/-
- v. Salary underpayment of Kshs. 5,368.30/-



vi. The Respondent shall bear the costs of the suit.

58. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND
DAY OF MARCH, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Koganga h/b for Mr. Onyony for the Claimant

Mr. Ariho present for the Respondent

Ms. Christine Omolo- C/A

