



**Kinyanya v Searite Holdings Limited (Cause 722 of 2017)  
[2023] KEELRC 986 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 986 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 722 OF 2017**

**SC RUTTO, J  
APRIL 28, 2023**

**BETWEEN**

**FREDRICK KINYANYA ..... CLAIMANT**

**AND**

**SEARITE HOLDINGS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent with effect from February 5, 2008. It is his case that he was arbitrarily and unfairly terminated from employment on January 25, 2017 and to this end, he seeks against the respondent the sum of Kshs 1,692,740.00 being notice pay, accrued leave days, severance pay, unpaid rest days and public holidays. The claimant has further sought damages for wrongful termination.
2. The Claim was opposed through the respondent's Response which was subsequently amended on November 18, 2019. According to the respondent, the Claim is misconceived and lacking in merit. The respondent contends that the claimant absconded duty sometimes in January, 2017 hence he left employment without notice. The respondent further lodged a counterclaim against the claimant and urged the Court to allow the same and dismiss the Claim.
3. The claimant filed an Amended Reply in response to the Amended Response in which he denied the respondent's averments that he absconded duty. He maintained his claim that he was arbitrarily dismissed from employment without notice.

**Claimant's case**

4. During the trial which took place on October 10, 2022, each side called oral evidence. The claimant testified in support of his case and at the outset, sought to adopt his witness statement and bundle of documents to constitute his evidence in chief.



5. It was his evidence that he was initially employed by the respondent as a guard then later promoted to the position of Supervisor. He further rose in rank to hold the position of Operations Manager but due to personal reasons, he requested the respondent's management to consider engaging him as a Supervisor, which position was lower in rank. His request was approved and he was engaged as a Supervisor, a position, he held until January 25, 2017 when he was arbitrarily and unfairly dismissed from employment.
6. The claimant's testimony was that he was not given notice or invited to show cause why his employment should not be terminated. He further stated that during his tenure with the respondent, he worked without going on leave for the whole 9 years and did not get weekly rest days and was not compensated for working on public holidays.

### **Respondent's case**

7. The respondent called oral evidence through three witnesses being George Chege, Grace Nyambura and Joseph Kanja who testified as RW1, RW2 and RW3 respectively.
8. George Chege who testified as RW1 was the first to go. To start with, he adopted the Amended Response, witness statement, initial bundle of documents and further list of documents to constitute his evidence in chief.
9. RW1 introduced himself as the respondent's Operations Manager. It was his evidence that the claimant absconded duty and left his employment without notice. He denied the claimant's allegations that he was not allowed to proceed on leave and was forced to work during holidays and weekends.
10. It was his evidence that the claimant was summoned to report to the respondent's offices on February 2, 2017 to offer explanations on complaints of his poor attitude at work. The claimant attended the respondent's offices on the said February 2, 2017 as summoned and surrendered his identification badge and announced that he had quit employment then stormed out of the office threatening to institute these proceedings.
11. RW1 testified that initially, the claimant discharged his duties as assigned but progressively developed arrogance and engaged in criminality and acts of fraud. That for instance, he was entrusted with recruitment of guards and he deliberately misdirected the respondent on the bank account details of the said guards. He would later withdraw the money and pay the guards having deducted a percentage from their salaries.
12. It was his further evidence that the claimant was reckless and negligent in that he caused the respondent immense loss in its business. He cited an incident in which the claimant recruited a guard in December, 2015 but failed to submit his credentials as required and thereafter, there was a robbery at Good Shepherd School Junior Buruburu where the said guard had been assigned. The claimant declined to disclose the identity of the said guard who went into hiding and the respondent suffered losses as it had to pay the client Kshs 509,922.00 for the negligence of the guard recruited by the claimant.
13. It was RW1's further testimony that the claimant caused the respondent to lose a lucrative contract with its client "Enchanting Africa Limited" due to the negligence of the claimant whose work entailed coordination of the guards and security matters. The claimant's negligence cost the respondent many contracts and business opportunities and he was always rude or totally responsive when asked to take his duties more diligently.
14. RW1 further testified that the claimant was unable to retain his roles as Assistant Operations Manager due to his poor attitude towards colleagues at the work place and his defiance to instructions given



- to him by officers ranking higher than him. The claimant was issued with several warning letters and warning statements but he declined to improve on his shortcomings and when he was called to discuss his conduct, he declined to collect his show cause letter and instead, returned the badge and stormed out of the office. Therefore, the claimant was not dismissed from service as he voluntarily left.
15. RW2 similarly adopted her witness statement to constitute her evidence in chief. She identified herself as the Secretary at the respondent's office and stated that she had worked for the respondent since 2013.
  16. It was her testimony that on or about February 2, 2017, she was working at the respondent's office at Kiambu when the claimant went and immediately gave her his work identification badge and stormed out of the office without holding any discussion with anyone. She stated that the claimant was generally rude to his colleagues including herself and there were numerous complaints about his arrogance, rudeness and abrasiveness in the manner he was treating people. Some customers complained on various occasions about the claimant's conduct and poor communication. She had shared the information with the management.
  17. RW3 also adopted his witness statement to constitute his evidence in chief. He described himself as the Operations Manager of the respondent and stated that he had worked for the respondent since 2015. It was his evidence that on or about February 2, 2017, he was working at the respondent's office at Kiambu. He saw the claimant give out his work identification badge at the reception and stormed out of the office without holding any discussion with anyone.
  18. RW3 further stated that he was working directly with the claimant and he knows for a fact that he was generally rude to his colleagues including himself and there were numerous complaints about his arrogance, rudeness and abrasiveness in the manner he was treating people. On several occasions, many customers complained to him about the claimant's conduct and poor communication. He routinely shared the information with the respondent's and directors who told him they were taking up the issue with the claimant.

## Submissions

19. It was submitted on behalf of the claimant that the respondent did not provide any letter to show cause as proof that he had been summoned. In further submission, it was stated that the respondent failed to discharge its evidentiary burden of proof that the claimant had absconded duty rather than being summarily dismissed. It was contended that the claimant had worked for the respondent for almost 10 years and if indeed his conduct had been as displeasing as the respondent is claiming it was, it makes no sense that it would not only retain but keep promoting him from a guard, to a supervisor, to an assistant operations manager and later an operations manager. In support of the claimant's submissions, the cases of *Joseph Mwaniki Nganga v United Milers Limited* (2022) eKLR, *Malachi Ochieng Pire v Rift Valley Agencies* (2013) eKLR and *Pius Machafu Isindu v Lavington Security Services Limited* (2017) eKLR were cited.
20. On the part of the respondent, it was submitted that the claim for leave days, unpaid rest days and unpaid public holidays dating back 9 years before the date of the suit are time barred in accordance with Section 90 of the *Employment Act* and the Court has no jurisdiction to deal with the same. To buttress this argument, the respondent relied on the cases of *Joseph Wanderi Kabiga v Nyoro Construction Company Limited* (2017) eKLR, *Peter Ndungu Kabogo v John Mctough t/a Securite Security International* (2015) eKLR and *John Mugalla Mwaduma v Braeburn Schools t/a Braeburn International School Mombasa* (2015) eKLR.



21. Citing the case of *Peter Mutune v Yalfa Cargo Logistics* (2018) eKLR, the respondent argued that it would be both unreasonable and unjust to require it to defend against claims that have not been pleaded with any specificity or clarity.
22. It was the respondent's further submission that the claimant's actions of abandoning work in January, 2017 and storming out of its office on February 2, 2017 to avoid any discussion on his conduct, amounts to resignation hence the burden of proving any wrongful dismissal rests on him and he has failed to discharge the burden.
23. The respondent further submitted that the claimant owed it a fiduciary duty of care to exercise reasonable care and skill while performing his duties. It was further submitted by the respondent that the losses it suffered are entirely caused by the negligence of the claimant and he ought to meet the damages incurred.

### **Analysis and determination**

24. From the pleadings and the evidentiary material placed before me, I find the issues falling for determination as being: -
  - a. Whether the claimant absconded duty or was unlawfully terminated from employment.
  - b. Is the counterclaim justified?
  - c. Is the claimant entitled to the reliefs sought?

### **Abscondment of duty or unlawful termination?**

25. The main issue in contention is the date and manner in which the employment relationship was severed. Whereas the claimant states that he was verbally dismissed on January 25, 2017 by RW1 and asked to handover everything, the respondent avers that it is the claimant who left work on his own volition on February 2, 2017 when he handed over his identification badge and stormed out of its offices.
26. It is notable that all the respondent's witnesses testified that the claimant handed over his identification badge on February 2, 2017 and stormed out of the respondent's offices. Be that as it may, it happened that at the time of the hearing, the claimant had the identification badge and indeed, following an Application by the respondent, he was ordered by the Court to surrender the same within 7 days. This fact alone, casts doubt on the version of events presented by the respondent's witnesses.
27. Instructively, it is only at the submission stage that the respondent stated that the claimant had never surrendered his badge of Operations Manager and that the badge he handed over on February 2, 2017 was in respect of his position as supervisor. This was not pleaded at all and did not come out during the hearing. If anything, the impression given was that the claimant was in possession of one identification badge. I must also add that this is an issue of evidence and should have been addressed during the trial and not at the submission stage. It is trite law that submissions is not evidence. I therefore take the respondent's submissions that the claimant was in possession of two identification badges at the material time, as an afterthought.
28. Still on the events that allegedly transpired on February 2, 2017, it is apparent that at the time, the claimant was the respondent's employee hence it had control over him. Therefore, if indeed the claimant stormed out of the respondent's offices in protest and acted in the manner it is alleged he did, then it had a right as an employer to put him on notice that that he was liable for summary dismissal on account of his alleged behavior.



29. It is also noteworthy that the *Employment Act, 2007*, has placed the heaviest responsibility on the employer in terms of proving that an employee's termination was fair. Therefore, the respondent had the heaviest burden in this case to prove that the claimant's termination was fair, valid and related to his conduct capacity or compatibility or its operational requirements and that such an employee was subjected to a fair process prior to termination.
30. I must also add that it is not sufficient for an employer to allege abscondment of duty on the part of an employee. In this regard, the employer must still prove the said abscondment of duty and more importantly, that it notified the employee that it was considering terminating his services on that account.
31. In this case, despite the respondent stating that the claimant absconded work without notice, there was no concrete evidence to support this fact and what's more, there was no evidence that it subjected him to the process contemplated under Section 41 of the *Employment Act*.
32. As stated herein, the claimant was still within the respondent's control at the material time but seemingly, it let him go without much ado. Prudence required that the respondent subject the claimant to the process under Section 41 of the *Employment Act*. This process entails notification and hearing. There is no evidence that this was done hence the respondent is at fault.
33. It is against this background that I find that the evidence on record tilts in favour of the claimant that he was unfairly terminated and that the said termination was outside the parameters established under Section 45 of the *Employment Act, 2007*.

### **Counterclaim**

34. The respondent has counterclaimed against the claimant, a sum of Kshs 500,922.00 in respect of a burglary at Good Shepherds Academy; a sum of Kshs 41,000.00 in respect of the deduction by Apple Wood Complex and loss of business thereof; a sum of Kshs 34,800.00 in respect of deduction by enchanting Africa Limited and loss of business thereof as well as one month's salary in lieu of notice.
35. The respondent did not lead evidence to prove that the loss it sustained as a result of lost business and deductions from its clients, is directly or indirectly attributable to the claimant. In addition, it is evident from the record that some of the losses occurred when the claimant was still in the respondent's employment. The question then is, why didn't the respondent surcharge the claimant for the same if at all it was of the view that he was responsible for the loss?
36. Granted, the respondent may have sustained the losses it claims it did, but for the counterclaim to succeed, it was required to lead evidence to prove that the claimant was responsible for the loss either directly or indirectly. In other words, it had the burden to prove the loss and that the same was occasioned by the claimant. This, it failed to do.
37. In the circumstances, the counterclaim against the claimant collapses and the same is dismissed in its entirety.

### **Appropriate reliefs**

38. As the Court has found that the claimant's dismissal was unfair, he is awarded one months' salary *in lieu of* notice and six (6) months' salary as compensatory damages. This award is informed by the length of the employment relationship and the circumstances surrounding the claimant's termination from employment.



39. As the respondent did not exhibit any leave records in line with its obligation under Section 74(1) (f) of the Employment Act, to demonstrate the leave days taken by the claimant and those outstanding, he is entitled to payment in respect of untaken leave days. However, pursuant to Section 28(4) of the Act, this will be limited to 18 months preceding his termination.
40. The claim for rest days and unpaid public holidays is denied for want of proof and specificity. My position is fortified by the determination by the Court of Appeal in Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] eKLR, where the learned Judges cited with approval the case of Rogoli Ole Manadiegi v General Cargo Services Limited (2016) eKLR, thus: -

“Addressing a similar issue this Court in its decision in Rogoli Ole Manadiegi v. General Cargo Services Limited (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

41. I will arrive at a similar finding that the claimant has not proved and established the public holidays and rest days he alleges he was required to work without being compensated accordingly.
42. The claim for severance pay is declined as the same is only awarded pursuant to Section 40(1) (g) of the Employment Act, in instances where termination has occurred on account of redundancy, which was not the case herein.

## Orders

43. In the end, I enter Judgment in favour of the claimant against the respondent and he is awarded: -
- One month’s salary *in lieu of* notice being the sum of Kshs 33,000.00.
  - Compensatory damages in the sum of Kshs 198,000.00 which sum is equivalent to 6 months of his gross salary.
  - Unpaid leave in the sum of Kshs 34,650.00.
  - The total award is Kshs 265,650.00.
  - Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
44. The claimant shall have the costs of the Claim.
45. The Counterclaim is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2023.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Kiama

For the Respondent Mr. Waithaka

Court Assistant Abdimalik Hussein

**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 had 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 *Civil 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.

**STELLA RUTTO**

**JUDGE**

