



**Oibaki v Equator Apparels Company Limited (Cause 163 of 2017)
[2023] KEELRC 985 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 985 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 163 OF 2017
SC RUTTO, J
APRIL 28, 2023**

BETWEEN

SYLVESTER SIANYO OIBAKI CLAIMANT

AND

EQUATOR APPARELS COMPANY LIMITED RESPONDENT

JUDGMENT

1. Through the Memorandum of Claim filed on 31st January, 2017, the claimant avers that he was employed by the respondent with effect from February, 2012 as a general worker. It is the claimant's case that he was turned away on 18th July, 2015 by the respondent's Production Manager and asked to report back on 20th July, 2015 when he was eventually dismissed. According to the claimant, his dismissal was unfair, unlawful and against the tenets of fair labour practices. Consequently, he seeks against the respondent the sum of Kshs 153, 600.00 being notice pay, unpaid leave and compensatory damages.
2. Opposing the Claim, the respondent avers that the claimant absconded his duties without permission and when he was asked by the Production Manager to explain his absence, he stated that he had personal issues that he could not explain hence he was asked to report back on 20th July, 2015. That when the claimant reported back to work on 20th July, 2015, he refused to work and demanded for his certificate of service. It is the respondent's case that the claimant is not entitled to any of the reliefs sought as he deserted duty voluntarily. Accordingly, the respondent has asked the Court to dismiss the Claim with costs.
3. The matter proceeded for hearing on diverse dates being 1st December, 2021 and 9th November, 2022. During the trial, both sides called oral evidence.



Claimant's case

4. At the outset, the claimant sought to rely on his witness statement to constitute his evidence in chief. He further produced the documents filed together with his Claim as exhibits before Court.
5. He testified that on 15th July, 2015, he sought permission verbally from the respondent's Production Manager by the name Mr. Bosire, to collect a parcel from the CBD, Nairobi. The permission was granted and while at home, he fell ill on 16th July, 2015 and had to go to the hospital hence he was incapable of attending to duty the following day. That he called one of his colleagues by the name Mr. Peter, to request for sick off on his behalf. His colleague informed him that the sick off had been granted. He then reported back to work on 18th July, 2015 and was ordered by the Production Manager to go back home and report on Monday being 20th July, 2015. On reporting back on 20th July, 2015, he was dismissed by the said Production Manager.
6. The claimant denied absconding duty and stated that he was not given reasons for his dismissal nor subjected to due process.

Respondent's case

7. The respondent called oral evidence through Mr. Joseph Ndirangu who testified as RW1. He identified himself as the Finance Administration Manager of the respondent. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
8. RW1 denied that the claimant was given permission to be away as alleged. It was his evidence that the claimant absconded duty on 6th July, 2015 and from 9th July, 2015 to Wednesday 15th July, 2015. When asked by the Production Manager, Mr. Bosire to explain where he was, he stated that he had personal issues. The claimant was then advised to go home and report to work on Monday being 20th July, 2015. When the claimant reported back on 20th July, 2015, he demanded for his certificate of service and deserted duty.
9. RW1 closed his testimony in chief by stating that the claimant deserted his employment voluntarily hence his claim should be dismissed with costs.

Submissions

10. It was submitted on behalf of the claimant that for an employee to be considered a deserter, he or she must for at least 7 days fail to report to work for unexplained reasons. It was further argued that the employer must establish that the employee has failed to return to work out of their own volition. In support of these arguments, the cases of *Ronald Nyambu Daudi vs Tornado Carriers Limited* (2019) eKLR and *Judith Atieno Owuor vs Sameer Agriculture and Livestock Limited* (2020) eKLR were cited.
11. In further submission, it was stated on behalf of the claimant that if at all he was guilty of any gross misconduct, the respondent ought to have subjected him to a fair disciplinary process as set out under Section 41 of the *Employment Act*. To this end, reliance was placed on the case of *Kenya Union of Commercial Food and Allied Workers vs Meru North Sacco Limited* Cause No 74 of 2013.
12. On its part, the respondent submitted that the claimant's case is completely lacking in merit and that he is the one who terminated his own contract by absconding duty therefore denying it the right to have the case tried in the usual manner.



Analysis and determination

13. From the pleadings on record as well as the evidentiary material placed before the Court, the following issues stand for determination: -
 - a. Whether the claimant deserted duty or was terminated from employment.
 - b. Whether the respondent subjected the claimant to due process prior to his exit from employment.
 - c. Is the claimant entitled to the reliefs sought?

Desertion or termination from employment?

14. It is common ground that the claimant was absent from work for some days prior to 20th July, 2015. Whereas the claimant avers that his absence from work was with permission from the Production Manager, the respondent opines otherwise and avers that this was a case of desertion as permission was never sought and granted as alleged by the claimant.
15. It was claimant's case that he sought permission from Mr. Bosire, the respondent's Production Manager and that the said permission was granted. That he later fell ill while at home hence called a colleague to ask for sick off on his behalf. The respondent on the other hand has denied this assertion by the claimant and maintained that the permission was never sought and granted.
16. In view of the credibility contest herein, the Court has to revisit the circumstances leading upto the claimant's exit from the respondent's employment. As stated herein, the claimant testified that upon being granted permission to be away on 15th July, 2015, he fell ill hence had to go to the hospital. He further testified that he asked his colleague by the name Mr. Peter to seek permission on his behalf.
17. If the claimant's version of events is to be believed, then it is rather odd that upon falling sick, he did not deem it fit to call his boss Mr. Bosire directly to request for permission as he had done the previous day. Afterall, he was better placed to grant him permission seeing that he was his supervisor. Why did he have to call his colleague Peter, who had no authority to grant him permission to be away? As a matter of fact, the claimant did not state let alone suggest that he attempted to get in touch with the said Mr. Bosire prior to informing his colleague Mr Peter, to seek permission on his behalf.
18. Coupled with the foregoing, the claimant stated in his testimony before Court that upon falling ill, he had to go to the hospital. Nevertheless, he did not present any medical records and or treatment notes to confirm this fact and back up his case.
19. The gaps in the claimant's case as highlighted above, lends credence to the respondent's version that indeed, he absconded work without permission. This being the case, the respondent had a reason to take disciplinary action against him. In any event, absence from work without permission constitutes one of the grounds for dismissal under Section 44(4) (a) of the [Employment Act](#), which if proved, would render an employee liable to summary dismissal.
20. Having determined that the claimant absconded work without permission, the logical question to ask is what action did the respondent take upon ascertaining the said abscondment of duty? This takes me to consider the issue of fair process.



Fair process?

21. Section 45 (2) (c) of the [Employment Act](#), renders a termination of employment unfair where the employer fails to prove that the termination is in compliance with fair procedure. Under Section 41(1), fair procedure entails notification and hearing prior to an employee's termination from employment.
22. In the instant case, the respondent stated that the claimant deserted duty from 6th July, 2015 upto 15th July, 2015. In this regard, RW1 told Court that when the claimant resurfaced, he was asked to explain his absence to which he responded that he had personal issues he could not explain hence he was asked to go and report on 20th July, 2015. That it is on 20th July, 2015 that the claimant demanded for his certificate of service and absconded work.
23. As stated herein, the respondent had a justifiable reason to take disciplinary action against the claimant for abscondment of duty. One therefore wonders why the respondent did not subject him to due process in line with the requirements under Section 41 of the [Employment Act](#), by putting him on notice that his employment was bound to be terminated if he failed to show cause why he absconded duty.
24. Testifying under cross examination, RW1 confirmed that the claimant was not issued with a notice to show cause and was not subjected to a disciplinary hearing. It was his testimony that the claimant was only told to go and finalize his personal issues. By all means, that was not prudence on the part of the respondent and if anything, it was a rather casual manner to handle an employee who had been away without permission.
25. It is worth noting that the process contemplated under Section 41 of the [Employment Act](#) is mandatory and in absence of any proof of compliance with the said provisions, I cannot help but find that the respondent is at fault. I am therefore led to conclude that the claimant was disengaged unceremoniously and outside the requirements of Section 41 of the [Employment Act](#).
26. The total sum of the foregoing is that the manner in which the claimant was disengaged was not in accordance with fair process hence was unlawful.

Reliefs

27. Having found that the claimant's termination was unlawful, I will award him one month's salary in lieu of notice and compensatory damages equivalent to four (4) months of his gross salary. This award has taken into account the claimant's role in his exit from the respondent's employment and the length of the employment relationship.
28. With regards to the claim for leave days, the contract of employment exhibited by the respondent provides at clause 9 that the claimant shall not be entitled to leave days. This contractual provision is contrary to Section 28 (1) (a) of the [Employment Act](#), which entitles employees to leave with full pay. Besides, it was common ground that the parties were in an employment relationship since February, 2012 albeit on contract for 3 months continuously. It is also notable that there is no evidence that there was a break for the three years, the claimant served the respondent.
29. Therefore, this clause is against the law and is indeed against fair labour practices. To this end, and pursuant to Section 28(4) of the [Employment Act](#), the claimant is awarded leave days for 18 months preceding his exit from the respondent's employment.



Orders

30. To this end, Judgment is entered in favour of the claimant against the respondent and he is awarded: -
- a. Compensatory damages in the sum of Kshs 38,400.00 which sum is equivalent to four (4) months of his gross salary.
 - b. One (1) month's salary in lieu of notice being Kshs 9,600.00
 - c. Leave days in the sum of Kshs 10,080.00.
 - d. The total award is Kshs 58,080.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
 - f. The claimant shall also have the costs of the suit.

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

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Omamo instructed by Mr. Namada

For the Respondent Mr. Gaita

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 15th March 2020 and subsequent directions of 21st 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

