



**Kenya Union of Commercial Food and Allied Workers v Meera Umoja (K) Limited
(Cause E055 of 2021) [2023] KEELRC 1024 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1024 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E055 OF 2021**

HS WASILWA, J

APRIL 27, 2023

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

MEERA UMOJA (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant, a registered trade Union within the laws of Kenya, sued the Respondent, a registered company, operating wholesale shops within Nakuru Town, *vide* a memorandum of claim dated September 9, 2021, alleging that one of its members, Erick Andati (herein after referred to as the 'grievant') was unfairly terminated without notice or disciplinary hearing. The claimant prayed for the Court to find in its favour and;-
 - i. Declare the termination unfair/ unlawful and unprocedural.
 - ii. Order the Respondent to pay the grievants all his terminal dues as follows;
 - a. One month pay in lieu of notice of Kshs 19,445.
 - b. Salary for 14 days worked in December, 2018 of Kshs 10,470.
 - c. 14 days' pro-rate leave in 2018 of Kshs 18,323.
 - d. Salary underpayment arrears of May, 2017 to April, 2018 of Kshs 4,224 and May, 2018 to November, 2018 of Kshs 8,099.
 - e. House allowance arrears of May, 2017 to April, 2018 of Kshs 28,984.80 and May, 2018 to November, 2019 of Kshs 17,752.
 - iii. 12 months' gross pay as compensation for unfair and unprocedural termination.



- iv. Costs of the suit to the claimant.
- v. Any other relief that the Honourable Court may deem fit to grant to meet the ends of justice.

Claimant's Case.

2. The claimant states that the grievant was employed by the Respondent in November, 2006 as a shop assistant earning a basic salary of Kshs 5,750 which was gradually increased over time to Kshs 15,750 per month, a sum which he earned till his termination.
3. The circumstances that led to the termination is that on the December 14, 2018, the grievant approached the Respondent's managing director, seeking for a salary increase which request was met with a lot of contempt and the said manager chased the grievant out of the Respondent's premises, firing him on the spot by informing him that his services were no longer needed.
4. On May 2, 2019, the grievant approached the claimant and reported the issue, who subsequently wrote to the Respondent proposing for a meeting on the May 9, 2019 to amicably settle the issue. However, on the date of the meeting, the Respondent manager was absent and the meeting could not be proceeding.
5. The issue was escalated to the labour office on July 25, 2019 and on August 8, 2019, Margaret Obegi was appointed the conciliator in this dispute. Meetings were set up by the conciliator vide the invitations of 28th August and December 6, 2019 but the Respondent did not attend. Another meeting was set up for January 24, 2020 which the Respondent sought for it to be rescheduled to February 10, 2020 but still failed to attend on the preferred date.
6. Since the Respondent failed to attend all the meetings, the conciliator issued a certificate of unresolved dispute on the December 2, 2020 informing the filing of this case.
7. The claimant reiterated that the Respondent failed to follow due procedure under the *Employment Act* in terminating the services of the grievant because the grievant was not shown reasons for the termination, neither was he subjected to any disciplinary hearing. He also added that the grievant was underpaid as per the regulations of wages orders subsisting at the time and urged this court to allow the claim as prayed.
8. During hearing the claimant summoned the grievant, Erick Andati, as its CW-1 who adopted his witness statement of September 9, 2021 and in summary stated that he was employed by the Respondent from November, 2006 till December, 2018. He stated that he is a member of the Union as evidenced by the exhibits produced herein. He testified that he was not given any pay on termination.
9. Upon cross examination her testified that on December 14, 2018, he approached the respondent's manger in his office and sought for salary advance. He stated that he was not aware whether the Respondent took the issue to the labour officer or that he deposited any money with the labour officer. He maintained that he was a shop assistant.
10. On re-examination he testified that the Respondent did not inform him that his terminal dues had been deposited at the labour office.

Respondent's Case.

11. The Respondent entered appearance on November 15, 2021 through the firm of Mahida & Maina and Company advocates and filed a defence to claim on November 24, 2021 denying the entire claim,



stating that the claim herein is bad in law, inept and ambiguous as it does not disclose proper particulars of claim and cause of action and the same ought to be struck out.

12. It is stated that the grievant was indeed employed by the Respondent as a general worker and worked until December 11, 2018, when he failed to report to work without any excuse or notice.
13. That they communicated this to the labour officer *vide* their letter of December 17, 2018 notifying the labour officer of the desertion by the grievant. That the labour officer had a discussion with the Respondent and calculated the terminal dues payable to the grievant and a cheque was issued to the grievant through the labour office who issued them with an official receipt of January 30, 2019.
14. The Respondent denied terminating the services of the grievant as pleaded and maintained that the grievant deserted work without any excuse as such the allegation of termination is without basis and the suit herein ought to be dismissed with costs.
15. During hearing the Respondent called its manager Viren Rakesh Gudka, as its RW-1. He adopted his witness statement of June 23, 2022 which reiterated the Respondent's defence and produced the document which were marked as Exhibits 1-6 respectively.
16. Upon cross examination, he testified that the grievant had worked for the Respondent for 13 years until December 11, 2018 when he deserted duty. He told this court that they tried calling him but his phone was not going through. He admitted that they never wrote any letter to him or invited him to any disciplinary hearing. He also admitted that the record shows that the grievant worked till December 14, 2018 and not December 9, 2019 as they pleaded. He also testified that as per the letter written to the labour office, he wrote that the arrears dues is Kshs 8,287 being 15 days pay worked in December, 2018.

Claimant's Submissions.

17. The claimant submitted on three issues; whether the grievant was unfairly terminated, whether the grievant absconded duty, and what remedies are available.
18. On the first issue it was submitted that the grievant was employed in November, 2006 as a shop assistant earning a monthly basic salary of Kshs 15,456 and house allowance of Kshs 2,318 as per the muster roll exhibited by the Respondent witness. He argued that the grievant was terminated on December 14, 2018 for requesting for a salary advance, which request cannot be a reason for termination. Therefore, the termination was contrary to the dictates of section 41 of the *Employment Act*. To support this, they relied on the case of *Walter Ogal Anuro V Teacher Service Commission* [2013] eKLR where the Court held that; -

“for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

19. Similarly, that since the grievant was verbally terminated, the termination fell short of procedural and substantive fairness contemplated under section 41, 43 and 45 of the *Employment Act* and therefore should be declared unfair by this Court.
20. On the second issue, whether the grievant absconded duty, it was submitted that the Respondent through RW-1 alleged that the grievant absconded duty from December 10, 2018 however that the muster roll produced shows the grievant was in attendance till December 14, 2018, affirming the narrative by the Claimant that the grievant was fired on December 14, 2018. He argued that even if the said grievant had absconded duty, the Respondent was duty bound to trace him as was held in *Joseph Nzioka V Smart Coatings Limited* [2017] eKLR and subject him to disciplinary procedure as provided for under section 41 of the *Employment Act*. To give more emphasis to this argument, they



relied on the case of *Florence Audiab Adhiambo V Kenjap Motors Limited* [2018] eKLR where the Court held that ;

“The employer has the duty to address the provisions of section 44(4) (a) read together with section 41(2) of the *Employment Act*, 2007 where an employee is of gross misconduct and has absconded duty to issue notice and hear the employee in the defence. Where the employee is notified and invited to attend and fails to do so, the notices issued by the employer can be submitted as evidence to vilify the employer in accordance with section 10(6) and (7) of the *Act*.”

21. They also relied on the case of *Felistas Acheba Ikatwa V Charles Peter Otieno* [2018] eKLR where the Court held that;-

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

22. On the remedies sought, it was submitted that the claimant has proved its case to the required standard and urged the Court to allow the claim as prayed.

Respondent’s Submissions.

23. The Respondent also submitted on the three issues identified by the claimant which are; whether the grievant was unfairly terminated, whether the grievant absconded duty, and what remedies are available.

24. The Respondent submitted on the first issue that the termination of the grievant was fair both procedurally and substantively as dictated by section 45 of the *Employment Act*. In this they relied on the case of *Walter Ogal Anuro V Teachers Service Commissions* [2013] eKLR where the Court held that;

“for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

25. On substantive fairness, it was submitted that the employer under this head, has to prove that the reason for termination is valid, fair and related to the employee's conduct, capacity or compatibility as stated in section 43(2) of the *Employment Act*, these reasons are matters that the employer at the time of termination genuinely believed to exist.

26. Accordingly, it was submitted that the grievant deserted employment without permission on December 11, 2018 as evidenced by the letter addressed to the labour officer, Nakuru after efforts to trace him were futile. He added that the Respondent tried contacting the grievant on his mobile number but the same was no longer in service. On that basis it was argued that since the grievant absconded duty without any lawful cause, his termination was rightly done in accordance with section 44 of the *Employment Act*.

27. On procedural fairness, it was submitted that since the grievant absconded duty and their effort in tracing him never bore any fruits, they involved the labour officer to assist them in tracing the grievant which officer was also unable to. They then calculated the dues owing to the grievant and deposited the same with the labour office for onward transmission, showing their good faith and action taken in seeking to subject the grievant to the required procedure.



28. On whether the grievant absconded duty, the Respondent relied on the case of *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR, where the Court relied on *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA) to give the difference between desertion and absence without leave where the Court stated 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.”
29. He also relied on the case of n *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that
- “Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer 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.”
30. To reinforce its case, they cited the case of *Boniface Francis Mwangi v BOM Iyego Secondary School* [2019] eKLR
- “It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”
31. In line with these cases, the Respondent submitted that reasonable efforts were put in place in contracting the grievant without success. He argued that the Respondent first called him through his mobile phone was not in service, then contracted the labour office for assistance to no avail. He also added that the discrepancies in the muster roll was brought about by the grace period the Respondent gave the grievant to report back to work and only declared him to have deserted employment after employing all efforts to trace him.
32. On whether the grievant worked as a shop assistant, the Respondent submitted that the grievant was employed as a general worker to help the customer around the shop and not transact any business for the Respondent. In this he relied on the case of *Amwata Mutabi Nicolus & another v Ukwala Supermarket Nakuru & Kericho Branch* [2016] eKLR, where the Court stated the duties of a shop assistant to include;
- “the duties carried out by the 1st Claimant do not qualify him as a shop assistant. He did not prove that he was responsible for sales. Getting change from the bank and confirming price tags and expiry dates do not primarily involve transacting business with customers/shoppers.”
33. On the remedies sought, the Respondent submitted that the grievant was paid the 14 days worked in December as reflected in the muster roll extract. Also that the grievant has exhausted all his leave days as evidence by the muster roll.
34. On the claim for underpayment, the Respondent submitted that the allegation of underpayment is based on the presumption that the grievant was a shop steward which was not the case therefore is not entitled to any underpayment both for basic salary and house allowance.



35. In conclusion, the Respondent submitted that the separation of the grievant from the Respondent's employ was not instigated by the Employer but by the employee for deserting duty, therefore the claim of unfair termination and the compensation sought should be dismissed with costs to the Respondent.
36. I have examined all evidence and submissions of the parties. The claimant contends that he was unfairly terminated when he went to ask for a pay rise.
37. The respondents on their part aver that the claimant absconded duty and they reported the matter to the labour officer.
38. From the evidence on record, the respondent reported to the labour officer on December 17, 2018 that the claimant had not reported to work from December 11, 2018.
39. The documents produced by the respondents however indicate that the claimant was on duty up to December 14, 2018.
40. There is also no evidence that the respondents sought after the claimant after the alleged absenteeism and indicated their intention to terminate him for absenteeism.
41. The respondents contend that they tried to reach him on his telephone No and the same couldn't be reached. No call logs have been submitted to this court as proof of this allegation.
42. What remains is the evidence that the claimant was terminated by the respondents without due process even if it was due to abscondment. The termination or dismissal was therefore unfair and unjustified and I declare it so.
43. I therefore find for the claimant and I award him as follows:-
1. 1 month's salary *in lieu* of notice = 19,445/=.
 2. Salary for 14 days worked in December 2018 of kshs 10,470/=
 3. 14 days pro-rate leave in 2018 of kshs 18,323/=
 4. Salary underpayments as pleaded = 12,323/=
 5. House allowance not paid as pleaded = 46,736/=
 6. Six months salary as compensation for unfair and unprocedural termination = 6 x 19,445/= = 116,670/=
- TOTAL = 223,967/=
- Less statutory deductions
7. The respondent to pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muendo for Claimant - present

Mwenda for Respondent – present



