



REPUBLIC OF KENYA



**Makanda v Inter Security Services Limited (Cause 2065 of 2017)
[2023] KEELRC 969 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 969 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2065 OF 2017
JK GAKERI, J
APRIL 25, 2023**

BETWEEN

MARTIN TITO MAKANDA CLAIMANT

AND

INTER SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim alleging unfair and unlawful termination of employment and non-payment of terminal benefits and accrued dues.
2. The Claimant was employed by the Respondent on 1st July, 2007 as a Security guard at a consolidated salary of Kshs.6,500/= per month.
3. That he was arrested on 16th December, 2011 on allegations of theft and charged but was acquitted on 20th August, 2015 and when he reported to the work place, he was verbally dismissed without cause or notice and had not been paid the salary for December 2011.
4. It is the Claimant's case that he worked for the Respondent for 5 years 5 months and the Respondent did not pay salary in lieu of notice, accrued dues and severance benefits.
5. That the dismissal was devoid of procedure.
6. The Claimant prays for;
 - a. A declaration that the termination was unlawful, untimely and an order that the Claimant be paid Kshs.306,948.31 as dues and benefits comprising;
 - i. Salary for the month of December 2011 Kshs.12,221.00.
 - ii. One month's salary in lieu of notice Kshs.12,221.00



- iii. Compensation for unfair termination Kshs.146,652.00
- iv. Severance for 6 years Kshs.42,303.46
- v. Underpayment for 6 years Kshs.34,326.00
- vi. Annual leave for years worked Kshs.59,224.85.
- b. Costs of the claim plus interest.

Respondent's case

- 7. It is the Respondent's case that the Claimant left employment abruptly and without notice on or about December 2011 after being charged with the offence of stealing and it was not the first time he had absconded duty having done it in 2009 and a warning issued.
- 8. That he was guilty of misconduct which warranted summary dismissal but the Respondent did not do so.
- 9. The Respondent denies owing the Claimant any dues.
- 10. That the Claimant was employed under a 3 years renewable contract.
- 11. The Respondent avers that the Claimant's suit is statute barred by virtue of Section 90 of the *Employment Act, 2007*.
- 12. The Respondent seeks a declaration that Claimant (incorrectly indicated as Respondent) absconded duty and dismissal of the suit with costs.

Claimant's evidence

- 13. The Claimant's undated and unsigned written statement rehashes contents of the Memorandum of Claim.
- 14. The Claimant testified that when he reported to work in 2015, one Wanja, Secretary of the Respondent company informed him that he had been dismissed but had no evidence of the dismissal.
- 15. The witness confirmed that he was a member of the NSSF and contributions were paid.
- 16. The witness confirmed on cross-examination that he did not report to the work place after December 2011 as he had been arrested and did not work from 2011 to 2015 as he was in remand as confirmed on re-examination.

Respondent's evidence

- 17. RWI, Mr. Isaac Okwiri confirmed on cross-examination that the Respondent employed the Claimant on 1st July, 2007 as a casual and his employment status did not change.
- 18. It was his testimony that the Claimant was arrested by the police after the alleged theft was reported to the police and he was summarily dismissed but no dismissal letter was issued. That the Claimant was not given an opportunity to be heard and no attempts were made to contact him.
- 19. The witness could not recall the date of dismissal or whether the Claimant reported to the workplace after acquittal.
- 20. On re-examination, RWI testified that the theft occurred around 15th December, 2011 and the Claimant did not report to the workplace after he was arrested and charged.



Claimant's submissions

21. According to the Claimant's counsel, the Claimant served the Respondent diligently until 16th December, 2016 when he and a colleague were arrested for stealing and remained in remand throughout the trial (3 years 8 months) until 20th August, 2015 when they were acquitted for lack of evidence.
22. According to the Claimant's counsel, the issues for determination are;
 - i. Whether the Claimant absconded work.
 - ii. Whether the Claimant was unlawfully dismissed from employment on 20th August, 2015.
 - iii. Whether the Respondent paid the Claimant terminal dues.
 - iv. Whether the Claimant is entitled to the reliefs sought.
23. As regards the 1st issue, counsel cited the decision in *Alex Siboi Masinde v K K Security* [2020] eKLR for the definition of absconding duty which relied on the South African case in *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA).
24. Counsel urged that the terms desertion and absconding were used interchangeably, as held in *Philip Olang v Guaranty Trust Bank* [2020] eKLR.
25. Counsel submitted that the Respondent was aware of the Claimant's charge and remand in custody and thus the Claimant did not desert his work wilfully and absented himself with lawful cause as the Respondent was aware of his whereabouts.
26. On dismissal, counsel relied on the provisions of Section 41 of the *Employment Act* to urge that the Claimant was not accorded a fair hearing before dismissal. Counsel submitted that the Respondent was duty bound to subject the Claimant to a disciplinary process.
27. Reliance was made on the decision in *Olute v County Government of Siaya & another* [2022] KEELRC.
28. On fair termination of employment, counsel urged that termination of the Claimant's employment lacked substantive and procedural fairness.
29. As regards terminal dues, counsel submitted that even if the Claimant's employment was terminated when he was in remand, the Respondent should not be allowed to deny him his right to terminal dues.
30. On reliefs, counsel submitted that the Claimant was entitled to all the reliefs claimed as he was not paid for the month of December 2011, was not given a notice, unpaid leave days and compensation for unlawful termination and underpayment.

Respondent's Submissions

31. The Respondent's counsel address two issues, namely; whether the Claimant is entitled to the reliefs claimed and whether the suit is statute barred.
32. As regards reliefs, counsel submitted that the Claimant had failed to prove his case and it should be dismissed.
33. That the Claimant confirmed that he did not work for the Respondent from December 2011 to August 2015 and alleges to have been dismissed on 20th August, 2015.



34. That from the evidence on record, the Claimant absconded duty on 16th December, 2011.
35. Counsel submitted that since the Claimant alleges to have been dismissed in August 2015, he should be claiming notice pay for August 2015 and salary for 2012 – 2015.
36. That the Claimant deliberately refused to report to work and thus absconded duty and the claim of summary dismissal was an afterthought.
37. Counsel further submitted that the Claimant’s suit was time barred by virtue of the provisions of Section 90 of the Employment Act, 2007 as he last worked for the Respondent on 15th December, 2011 and should have sued by December 2014 and the current suit was filed on 16th October, 2017.
38. Counsel relied on the decision in Jackson Kabingu Gichobi v Attorney General [2020] eKLR for the proposition that criminal proceedings do not enlarge time.
39. In conclusion, the Respondent’s counsel submitted that the Claimant acted in bad faith by filing the instant suit having absconded duty and was claiming compensation for summary dismissal.

Findings and determination

40. The issues for determination are;
 - i. Whether the Claimant absconded duty in December 2011 or was summarily dismissed on 15th August, 2015.
 - ii. Whether the Claimant’s suit is time barred?
 - iii. Depending on the answer to (ii) above, whether the Claimant is entitled to the reliefs sought.
41. As regards desertion/termination of employment, while the Claimant alleges that he was summarily dismissed by the Respondent by word of mouth on 20th August, 2015, the Respondent maintained that the Claimant absconded duty on 16th December, 2011.
42. According to Black’s Law Dictionary (10th Edition), 2010, desertion means:

“The wilful and unjustified abandonment of a person’s duties or obligations.”
43. The South African decision in Seabolo v Belgravia Hotel (Supra) is often cited for the distinction between desertion and unauthorised absence as follows;

“. . . an 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.”
44. The evidence on record reveal that the Claimant did not return to the work place after arrest and charge in court in mid-December 2011 and rendered no services to the Respondent from December 2011 to August 2015.
45. The Claimant’s counsel acknowledges that the Claimant was out of employment for 3 years 8 months following the arrest and as the Respondent submitted he had no just cause to be away.
46. It is decipherable that the Respondent was aware of the Claimant’s whereabouts and did not bother contacting him to appreciate why he was not reporting to work as required by law. See Felistas Acheba Ikatwa v Charles Peter Otieno [2018] eKLR on the duty of an employee who pleads that an employee had absconded. The provisions of Section 41 of the Employment Act, 2007 must be complied with.



47. The Claimant and his counsel's admission that he was away for 3 years and 8 months is unequivocal evidence that he indeed deserted the workplace and anticipated that the Respondent would await his indefinite return for continuation of the employment contract.
48. The Respondent was duty bound to take the Claimant through a disciplinary process and ought to have done so as required by law. It ought to have notified him of the meeting and outcome of the hearing.
49. The fact that there was no dismissal letter would appear to suggest that the Respondent did not terminate the Claimant's employment formally.
50. Section 47(5) of the *Employment Act*, 2007 provides that;
- 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.
51. The elements of a fair termination of employment were aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR as substantive justification and procedural fairness.
52. From the evidence on record, it is the finding of the court that the Claimant has demonstrated on a balance of probabilities that the Respondent unlawfully or unfairly terminated his employment contract.
53. As regards the Claimant's suit being statute barred, evidence on record show that the Claimant is claiming for rights that accrued on or before December 2011.
54. Although the Claimant alleges to have been summarily dismissed on 20th August, 2015, he, as submitted by the Respondent's counsel has no claim for any salary arrears from January 2012 to July 2015, an explicit acknowledgment that he did not render any service and was therefore not entitled to remuneration.
55. On cross-examination, the Claimant testified that he was claiming for the salary for December 2011, severance pay, annual leave and underpayment for the duration worked i.e July 2007 to December 2011 as well as pay in lieu of notice.
56. The court is in agreement with the respondent counsel's submission that the Claimant ought to have filed the suit by December 2014 but filed the same almost 6 years later rendering the suit statute barred.
57. Section 90 of the *Employment Act*, 2007 provides that;
- Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act*, (Cap 22), no civil action or proceedings based or arising out of this Act, or a contract of service in general shall lie or be instituted unless it is commenced within three (3) years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof.
58. It requires no belabouring that the foregoing provision is couched in mandatory terms and in the negative for emphasis.
59. From the evidence on record, the Claimant's cause of action arose in December 2011 but he did file a suit until 16th October, 2017 long after the three (3) year limitation period.



60. There is sufficient judicial authority for the proposition that time starts running from the date the cause of action arises. See ELRC Misc. App. No. 99 of 2015 *Fredrick Otieno Onono v Attorney General* where the court held inter alia that;

“... Criminal proceedings is not a bar to the commencement of civil proceedings particularly with regard to employment and labour relations claims based on the application of the *Employment Act*, 2007. Such claims should be lodged 3 years from the time the cause of action arose. In this case, the cause of action under the *Employment Act* was the summary dismissal of the Claimant on 27th August, 2011, and not his criminal discharge in February 2015.”

61. The foregoing sentiments apply on all fours to the circumstances of the instant suit.

62. For the foregoing reasons, it is the finding of the court that the suit herein is statute barred and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF APRIL 2023

DR. JACOB GAKERI

JUDGE

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 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 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.

DR. JACOB GAKERI

JUDGE

