



**Atieno v Mombasa Aviation Training Institute (Cause 119 of 2018)
[2023] KEELRC 984 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 984 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 119 OF 2018**

**AK NZEI, J
APRIL 20, 2023**

BETWEEN

OLIVIA MILYCENT ATIENO CLAIMANT

AND

MOMBASA AVIATION TRAINING INSTITUTE RESPONDENT

JUDGMENT

1. The claimant's suit herein was filed on March 9, 2018 vide a Memorandum of Claim dated February 26, 2018. An amended Statement of Claim, dated July 9, 2018, was subsequently filed on 11th July, 2018. The claimant pleaded that she was employed by the respondent as a Lecturer on June 1, 2007 pursuant to an evenly dated confirmation, at a starting monthly salary of Kshs. 13,000. The claimant further pleaded that in 2015, she was sent to the respondent's Malindi Branch in the capacity of Head of Department and her salary was enhanced to Kshs. 15,000 per month, and that the claimant was subsequently appointed to act as an administrator at a salary of Kshs. 17,000.
2. It was the claimant's further pleading that within a period of eight months of working in Malindi, the claimant was on July 13, 2016 dismissed without a notice, via telephone call by the respondent's Principal, Mr. Joshua Rume. That the Claimant was given a recommendation letter dated August 1, 2016.
3. The claimant further pleaded:-
 - a. that the claimant was never provided with accommodation and was not paid housing allowance in lieu thereof during the entire seven years' period of employment.
 - b. that the claimant was not paid salary arrears for June and July, 2016 amounting to Kshs. 20,633 and Sacco deductions in the sum of Kshs. 36,209.



- c. that termination of the claimant’s employment was unfair, unlawful and unjustified, not based on valid reasons and that the claimant was not given a fair and/or any hearing pursuant to section 41 of the Employment Act.
 - d. that in terminating the claimant’s employment, the Respondent did not act in accordance with justice and equity, taking into consideration the circumstances of the case as provided by section 45 of the Employment Act.
 - e. that the respondent did not issue the claimant with a letter of employment and a certificate of service, and did not remit some of the claimant’s NSSF monthly contributions, which the respondent should pay to NSSF to the claimant’s account.
 - f. that the claimant is entitled to an award of compensation for unlawful and unjustifiable termination, equivalent to twelve (12) months’ salary pursuant to the Employment Act.
4. The claimant set out her claim against the respondent as follows:
- a. Salary arrears for June and July, 2016 ----- Kshs. 20,633.
 - b. Sacco deductions ----- Kshs. 36,209.
 - c. House allowance at 15%.
 - i. June, 2007 – May, 2015
(13,000 x 15% x 8 x 12) ----- Kshs. 187,200
 - ii. June, 2015 – November, 2015
(15,000 x 15% x 6) ----- Kshs. 13,500
 - iii. December, 2015 – June, 2016 (17,000 x 15% x 8) ----- Kshs. 20,400.
 - Total House Allowance ----- Kshs. 221,100.
 - d. One month’s notice ----- Kshs. 17,000.
 - e. 12 months’ compensation ----- Kshs. 204,000.
 - Total ----- Kshs. 498,942.
5. Other documents filed along with the claimant’s amended statement of claim were a verifying affidavit sworn by the claimant on July 9, 2018, an amended list of witnesses and the claimant’s written witness statement dated July 9, 2017, and an evenly dated list of documents listing some eleven documents. The listed documents included the claimant’s Identity Card No. 20690389, confirmation and appointment letter dated June 1, 2007, an undated confirmation and appointment letter, the claimant’s payslip for July 2008, employment card, payslips for October and November, 2015, recommendation letter dated August 1, 2016, a letter from Kituo Cha Sheria dated January 11, 2017, Sacco statements for September 2016 and November 2017, the Respondent’s letters dated June 8, 2009 and December 3, 2010 to Equity Bank and NSSF respectively, and the claimant’s NSSF statement.
6. The recommendation letter dated August 1, 2016, written on the respondent’s letter head, reads in part:-

“To Whom It May Concern

Dear Sir/Madam



RE: Olivia Milycent Atieno – Id No. 20690389

This is to confirm that Olivia Atieno was our member of staff for six years between January, 2007 and June, 2016.

During her stay, she worked as a tutor in the Aircraft Department and Acting Administrator in our Malindi branch where her roles included ...

For more information about Ms. Olivia or the College you may contact us.

Thank you.

Yours faithfully,

Joshua Rume

Principal.”

7. The respondent entered appearance on July 27, 2018 and subsequently filed reply to the claimant’s amended statement of claim on August 17, 2018. The respondent admitted having employed the claimant, but denied her claim. The respondent further pleaded:-
 - a. that the claimant was indeed at one time employed by the respondent as a Part-Time Lecturer, but absconded duty in February 2011, resumed in May 2015, and thereafter absconded again in July, 2017.
 - b. that all the claimant’s dues, viz, Sacco remittance and salary emoluments were duly and fully settled by the respondent on both occasions when she absconded.
 - c. that the claimant’s first engagement with the respondent in 2007 was on contract basis, which contract ended in the year 2010, and that the claimant’s subsequent engagement with the respondent was on ad hoc basis.
 - d. that the claimant’s ad hoc engagement with the respondent was purely as a Relief Lecturer, on part-time basis.
 - e. that all documentation in respect of the claimant’s confirmation and appointment have been falsified for obvious reasons on the face thereof.
 - f. that the claimant has never been terminated by the respondent, lawfully or otherwise.
8. The claimant filed a reply to the respondent’s response, dated August 22, 2018, and denied having falsified her documents, and put the respondent to strict proof of its averments/allegations.
9. On October 2, 2018, the claimant filed a supplementary list of documents, listing and annexing a bundle of copies of the claimant’s bank statements. On January 31, 2019, the claimant filed a further supplementary list of documents and listed what she referred to as Bank Statements for the period July 16, 2007 to September 15, 2018.
10. On March 13, 2019, the respondent filed a written witness statement of one Joshua Rume, dated the same date (March 13, 2019).
11. Vide a Ruling dated July 25, 2019, this Court (Ndolo, J) dismissed with costs the Respondent’s application dated May 23, 2019 seeking to have some of the claimant’s listed documents submitted to the Directorate of Criminal Investigations, Forensic Document Examiner’s office, for investigation



into their authenticity, and for stay of any further proceedings herein pending such examination. The court rendered itself thus:

- “ 10. It would appear that the respondent wants the court to assist it in the discovery process. As held in *Rafiki Microfinance Bank Ltd v Zenith Pharmaceutical Ltd* [2016] eKLR, the purpose of discovery is to level the litigation field and expedite the determination of disputes. This cannot be achieved by ordering a general investigation such as envisaged in the Respondent’s application. If indeed the documents in issue did not emanate from the Respondent, this is a matter to be canvassed and determined in full trial.
 11. That said, the court finds and holds that the respondent’s application dated May 23, 2019 is without merit and proceeds to dismiss it with costs to the claimant.
 12. It is so ordered.”
12. When trial opened on July 12, 2021, the claimant adopted her filed witness statement dated July 9, 2018 as her testimony and produced in evidence the documents referred to in paragraphs 5 and 6 of this Judgment. The claimant’s said filed witness statement basically replicates the averments made in the amended Memorandum of Claim. The claimant further testified that on July 22, 2017 she received a call from the Ag. Administrator, Mulongo Robinson, telling her that the respondent’s Principal, Mr. Joshua, had instructed that the claimant should not report to work on July 27, 2017. That the claimant was not taken through any disciplinary process, and was not given any hearing. That her salary per month was Kshs. 17,000 per month without house allowance, and that her salary for June was paid, while that for July was not paid. The claimant told the court that she was abandoning her claim for June salary and Sacco deductions as the same had been paid.
 13. The claimant further testified that she was seeking compensation, house allowance and notice pay. It was the claimant’s further testimony that her first contract was from 2007 to 2011, while the 2nd contract was from 2015 to 2016. That from 2011 to 2015, she was not working for the respondent. That her claim was based on the 2nd contract; and that she was abandoning the claim for house allowance for June, 2007 to 2015.
 14. It was the claimant’s further testimony that whereas she left of her own volition in 2011, by issuing a resignation letter, she did not decide to leave in 2016, but was verbally dismissed by Joshua; and that the dismissal started on 17th July 2016. It was the claimant’s evidence that she worked full time and her salary was paid monthly.
 15. The respondent called one witness, Joshua Rume Onyango (RW-1), who adopted his filed witness statement dated 13th March 2019, which replicates the averments made in the respondent’s response to the claimant’s amended statement of claim as his testimony. RW-1 further testified that he had not filed any (evidential) documents, and therefore had none on record. The witness further testified:-
 - a. that instructors are paid depending on the lessons taught, and are not paid house allowance.
 - b. that the claimant was provided with housing in the building where the College is.
 - c. that the respondent did not terminate the claimant’s employment, but the claimant stopped going to work and did not respond to SMS messages, and abandoned her job; hence she is not entitled to notice pay.



- d. that the claimant's July salary, Kshs. 17,000, was not paid but she is not entitled to it because she did not give any notice.
16. Cross-examined, RW-1 testified that the respondent Institute had two buildings in Malindi, with 19 employees. That there is a two bedroomed apartment in one of the buildings, and that not all the employees were housed. RW-1 further testified that the Respondent had not exhibited a written contract with the claimant, and that the claimant's payslip did not show that her salary included house allowance. The respondent (RW-1) further testified that the respondent did not issue the claimant with any show cause letter, and did not take any disciplinary action against her for allegedly absconding duty. That the claimant did not complain about house allowance during her employment.
17. From the pleadings filed and evidence adduced by both parties, it is evident that the claimant worked as an employee of the respondent in two phases. The first phase of employment was from June 2007 to February 2011 when the claimant voluntarily left employment. In her evidence, the claimant told the court that she resigned. The second phase was from May 2015 to July 2016. Indeed, the claimant pleaded as follows in paragraphs 5 and 6 of the amended statement of claim:-
- “ 5. that the claimant continued to work for the respondent diligently upto February 2011 when she left for full attachment at Jomo Kenyatta Airport in Nairobi for additional skills.
6. that in May 2015, the respondent recalled the claimant back to mombasa to continue with her lecturing lessons in Cabin Crew, Tourism and travel, air cargo services and airport operations among others.”
18. As already stated elsewhere in this judgment, the claimant abandoned her claim relating to her first phase of employment; and regarding the second phase of employment, she abandoned the claims for June 2016 salary and Sacco deductions. She opted to pursue the claims for July 2016 salary, unpaid house allowance, notice pay and compensation for unfair termination of employment.
19. As it was a common ground that the claimant was employed by the respondent in May 2015 and left in July 2016, issues that fall for determination, in my view, are:-
- a. whether the claimant's employment was terminated by the respondent, and if so, whether the termination was unfair.
- b. whether the claimant is entitled to the reliefs sought.
20. Before delving into the foregoing issues, it is worthy noting that the claimant's basic monthly salary at the time of termination of her employment was ksh. 17,000. This fact is clear from the claimant's payslips for October and November 2015.
21. On the 1st issue, the claimant pleaded and testified that her employment was orally terminated by the respondent. The Respondent, on the other hand, pleaded and testified that the claimant absconded. The respondent (RW-1) however, told the court that the respondent did not take any disciplinary action against the claimant for absconding, that no show cause letter was issued to the claimant, and no disciplinary action was taken against her.
22. Under section 44(4) (a) of the *Employment Act*, an employee who without leave or other lawful cause absents himself from the place appointed for the performance of his work commits gross misconduct and becomes liable for summary dismissal. An employer alleging absconding of duty on the part of an employee who denies the allegation must, as a matter of fact, demonstrate what action and/or



disciplinary action he took or initiated after the employee absconded duty. Although the respondent (RW-1) alleged to having send SMS messages to the claimant after she allegedly absconded duty, no evidence was presented in that regard. The allegation remained just that, an allegation.

23. In *Godfrey Anjere v Unique Supplies Limited* [2015] eKLR, it was held as follows:-

“... the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work.”

24. Similarly, in *Stanley Omwoyo Onchiweri v Bom Nakuru YMCA Secondary School* [2015] eKLR (cited in *Jane Ashimbina Mayi v Menengai Oil Refineries Ltd* [2016] eKLR) it was stated that:-

“the employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances and a hearing may be necessary.”

25. I find and hold that the claimant’s employment, the second phase of it, was terminated by the respondent in July 2016.

26. As to whether the termination was fair, the respondent did not demonstrate that it complied with the mandatory provisions of section 41 of the *Employment Act*, which is the statutory test of fairness or otherwise of termination of an employee’s employment by an employer. Section 41 of the *Employment Act* provides as follows:-

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

27. The Court of Appeal stated as follows in *Kenya Ports Authority v Mary Saru Mwandawiro* [2017] Eklr:-

“An employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. That applies in a case for termination as well as in a case that warrants summary dismissal (see *CMC Aviation Limited v Mohammed Noor* [2015] eKLR). The burden on the employee is limited to asserting that unfair termination has occurred, leaving the burden to show that termination was fair on the employer. (see *Kenfright EA Limited v Benson K. Nguti* [2016]eKLR....”



28. It is my finding that termination of the claimant's employment by the respondent was unfair; and I award the claimant the equivalent of 9 months salary being compensation for unfair termination of employment.
29. Turning to the second issue, the respondent admitted in evidence that the claimant's salary for July 2016 was not paid. I award the claimant ksh. 17,000 being the unpaid salary for July 2016.
30. On the claim for house allowance for the period June 2015 to July 2016, the claimant claimed a total of 33,900. The claimant produced in evidence copies of her payslips, on which it was indicated that her monthly salary indicated therein was her basic pay. The respondent did not exhibit any written contract to show that the salary paid to the claimant included house allowance, was consolidated or that the claimant was housed. Section 10(7) of the *Employment Act* provides:-

If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

31. I award the claimant Ksh. 33,900 as claimed being unpaid house allowance for the period June 2015 to July 2016. The claim and award are anchored on Section 31 (1) of the *Employment Act*.
32. On the claim for one month salary in lieu of notice, the claimant pleaded and testified that her employment was terminated by the respondent without notice. The respondent did not demonstrate that any notice was issued. The claim is allowed and I award the claimant ksh. 17,000 being payment in lieu of notice. The claim for issuance of a certificate of service is allowed.
33. In sum, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the claimant against the respondent for:-
 - a. Unpaid salary for July 2016.....ksh.17,000
 - b. Unpaid house allowance.....ksh.33,900
 - c. Compensation for unfair termination of employment (ksh. 17,000 X9)
ksh.153,000
 - d. One month salary in lieu of noticeksh. 17,000

Total ksh.220,000
34. The awarded sum is subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
35. The respondent shall issue the claimant with a Certificate of Service pursuant to Section 51 of the *Employment Act* within 30 days from the date of this judgment.
36. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

Appearance:



.....for Claimant

.....for Respondent

