



**Mondo v United Millers Limited (Cause 379 of 2018)
[2023] KEELRC 925 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 925 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 379 OF 2018
CN BAARI, J
APRIL 20, 2023**

BETWEEN

SHEM GOGO MONDO CLAIMANT

AND

UNITED MILLERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant's Memorandum of Claim is dated October 16, 2017, and filed in Court on October 31, 2017. The Claimant seeks orders for payment of 3 months' salary in lieu of termination notice, refund of medical expenses, full salary for 30 days and half salary for 20 days when he was admitted in hospital and terminal benefits per CBA.
2. The Respondent entered appearance through the Federation of Kenya Employers on November 30, 2017, and thereafter, filed a Memorandum of Response dated August 2, 2019, and filed on August 23, 2019.
3. Attempts to settle the matter out of Court failed, culminating in the hearing of the Claimant's case on December 5, 2022. The Claimant testified in support of his case. He sought to adopt his witness statement and produce documents filed as exhibits in his case. The Claimant's case closed on this first hearing.
4. The Respondent's case was partly heard on December 5, 2022 and concluded on February 1, 2023. The Respondent presented Mr Philip Dawo, their Human Resources Officer to testify in support of its case. Mr Dawo adopted his witness statement and produced documents filed in support of the Respondent's case.
5. The Respondent closed his case on February 1, 2023, paving way for filing of submissions. Both parties filed submissions.



The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent in February, 2003, as a lorry driver at a pay of Kshs 500.00 per day. It is his case that the payment was made to him on a weekly basis.
7. It is the Claimant's case that he served the Respondent regularly on every day of the month for 13 years and 6 months. The Claimant further states that he was paid for annual leaves when he did not go for such leaves.
8. It is his case that he worked for the Respondent from February, 2003, driving the Respondent commercial lorries until August, 2015, when he became ill and was admitted in hospital for meningitis and malaria. It is his further case that upon being discharged from hospital on December 18, 2015, he received a phone call from the Respondent's workshop supervisor on January 29, 2016, asking him to report to work the following day.
9. The Claimant states that on January 4, 2016, when the Claimant was on official duty transporting the Respondents goods to Nairobi, the vehicle he was driving, a Mitsubishi F H lorry Reg No KBS 667T, was involved in an accident and all the goods carried (156 bales of flour) therein were stolen.
10. It is his case that the motor vehicle examination test, indicated that the vehicle's braking system was defective or damaged.
11. The Claimant states that on February 1, 2016, the Respondent issued him with a warning letter and indicating that he will be surcharged for the costs of the lost goods.
12. The Claimant states that he served the Respondent for a period of 13 years and 6 months, and was paid weekly for the entire period contrary to clauses 49a and 41b of the Collective Bargaining Agreement (CBA) and Section 37 of the [Employment Act](#).
13. The Claimant further states that according to CBA, he was a regular and permanent employee, but the Respondent denied him the right to enjoy permanent employment despite having contributed immensely in the 13 years of the employment relationship with the employer.
14. It is his case that the actions of the Respondent violated the provisions of the [Employment Act](#) and the CBA, hence unfair labour practices.
15. The Claimant prays that he be awarded the prayers listed in his statement of claim.

The Respondent's Case

16. The Respondent's case is that at all material time to this claim, the Claimant was their employee having been employed as a driver on or around February, 2003 to January 4, 2016. The Respondent states that the Claimant was a driver during the period of February, 2003 to January 4, 2016.
17. It is the Respondent's case that the Claimant was a Union Member (Bakery Confectionary Manufacturing and Allied Workers Union) from 2007 until his time of separation. The Respondent further states that at the time of separation, the Claimant's terms of service was governed by the Collective Bargaining Agreement signed between the Respondent and the said Union.
18. The Respondent states that the Claimant remained absent from his official duty station from December 5, 2015, only to resurface in January, 2016, and pleaded for reinstatement of his job. It is the Respondent's case that the Claimant's unauthorized absenteeism was pardoned, and he was reinstated back to work.



19. The Respondent states that immediately after the Claimant returned to work on January 4, 2016, he was instructed by the Respondent's Director not to ferry goods beyond Kisumu, and was instead supposed to do shunting.
20. The Respondent further states that in a strange twist of events, the Claimant even after being told that he would undergo shunting, went against the Director's directive and drove a vehicle outside Kisumu area, and on January 4, 2016, caused an accident along Eldoret-Nakuru highway at Msata area, which resulted in all the goods on board (156 bags of 40Kgs Bakers Flour) being stolen and the vehicle damaged.
21. The Respondent states that the accident had all the indications that it was pre-planned, and a clearly calculated move to disentitle the Respondent its goods worth Kshs 137,368.00.
22. It is the Respondent's case that a disciplinary hearing notice dated January 15, 2016, scheduling the hearing to January 16, 2016, was issued to the Claimant and which notice, he acknowledged.
23. The Respondent states that arising from the disciplinary hearing, and based on the Claimant's oral submission, he was issued with a warning letter on the allegation of insubordination and for the recovery of the lost goods during the accident.
24. It is the Respondent's case that immediately after issuance of the warning letter aforesaid, the Claimant absconded and never reported back to work. The Respondent further states that the Claimant without any reasonable cause, deserted duty immediately he was issued with a warning letter, and only resurfaced on August 24, 2016, with hospital documents purportedly indicating that he was suffering from Meningitis Malaria.
25. The Respondent states that the alleged accident the Claimant purported to have been involved in on January 4, 2016, at around 10:30pm, was self-inflicted as certified by the Certificate of Examination and Test of Vehicle clearly shows self-involvement.
26. The Respondent denies that the Claimant was terminated on September 15, 2016. It the Respondent's case that the Claimant actually deserted duty immediately after the accident on January 4, 2016, and which is shown evidently by the attendance register where his name is missing out and showing that he was absent
27. The Respondent further states that the Claimant's absence from work corresponds to his NSSF statement which shows that he left employment on January 4, 2016. His NSSF statement indicates that the last payment was made in January, 2016, his member account was not being updated due to his absence from duty
28. The Respondent states that it learnt about the Claimant's sickness from November 30, 2015 to December 18, 2015, vide this suit and further that the Claimant never gave any notification of his sickness.
29. The Respondent further states that the Claimant was not involved in any occupational illness as to entitle him to reimbursement of the cost of treatment. It is the Respondent's further case that such a claim in any event, would fall outside the jurisdiction of this Honourable Court. The Respondent states that the Claimant became sick after absconding duty.
30. The Respondent states that the Claimant violated Clause 19(1) of the CBA and Section 44(4) of the [Employment Act](#), for being absent from duty without leave or other lawful cause.



31. The Respondent states that at no time did it terminate the services of the Claimant unfairly, unlawfully or at all.
32. The Respondent prays that this suit be dismissed with costs.

The Claimant's Submissions

33. The Claimant submits that having worked for a period longer than a month, his terms of employment were converted by operation of law from casual service to regular employment as provided for under the *Employment Act*. He sought to rely in *Silas Mutwirivus Haggai Multi Cargo Handling Services Limited* [2013] eKLR, in support of this position.
34. It is submitted that the Claimant herein was not given a fair hearing and therefore was unfairly terminated from employment. It is his submission that the right to a fair hearing is an integral part of the fair termination procedure. The Claimant had reliance in *Zaphenia O Nyabane & Another vs Nakuru Water & Sanitation* ELRC 13 of 2013 eKLR, for the holding that an employer has an obligation to avail an employee sufficient opportunity and facility to prepare for disciplinary hearing.
35. The Claimant further submits that he was never issued with a notice to show cause and that RW-1 on cross examination, admitted to this fact.
36. The Claimant submits that his medical condition has been within the Respondent's knowledge as both parties have produced a letter from Sagam Hospital dated January 17, 2017, and a discharge form from Busia District Hospital and a letter dated August 15, 2016, addressed to Human Resource Officer at United Miller. The Claimant further submits that he was not paid during this time which entitles him to claim.
37. It is the Claimant's submission that the C B A at page 3(2)(i) states that the employer shall pay an employee 15 days for each year of services completed. He submits that he is entitled to this pay as he had worked for thirteen years and six months.

The Respondent's Submissions.

38. The Respondent submits that at all material times to these proceedings, the instrument of engagement that set out the terms and conditions of engagement was the Collective Bargaining Agreement, and that the Claimant did not deny that he was a member of the Union.
39. The Respondent submits that it never terminated the services of the Claimant fairly, unlawfully or at all, and that he was unable to demonstrate that in court.
40. The Respondent submits that to demonstrate that the Claimant left employment on January 4, 2016, his NSSF statement indicates that the last payment was made in January, 2016, his member account was not being updated due to his absence from duty.
41. The Respondent further submits that the Claimant was not suffer any occupational illness to entitle him to reimbursement of the cost of treatment, and that in any event, such claim would fall outside the jurisdiction of this Honourable Court, to wit the Work Injuries Benefit Act, 2007. It is the Respondents submission that he became sick after absconding duty.
42. The Respondent submits that the narrative in this claim remains a fabrication of unfair termination that does not stand the stipulations of the law and the Collective Bargaining Agreement.



43. The Respondent submits that the Claimant's claim of three months' notice is frivolous because he is the one who absconded duty, and should instead be the one to pay the Respondent the 3 months' salary in lieu of notice.
44. The Respondent further submits that the Claimant is not entitled to gratuity as he was not terminated, and that he never proved by way of demonstrating and exhibiting a letter of termination as proof to his claim of unfair termination.
45. The Respondent submits that the claim herein does not disclose any or reasonable cause of action and ought to be dismissed with costs.

Analysis and Determination

46. I have considered the pleadings, the witnesses' oral testimonies and the parties' submissions. The issues for determination are:
 - i. Was the Claimant terminated or did he abscond duty? And If he was terminated was the termination fair?
 - ii. Is he entitled to the remedies sought?

Was the Claimant terminated or did he abscond duty? And If he was terminated was the termination fair?
47. The Claimant herein, claims to have been unfairly terminated from the service of the Respondent. The Respondent on its part, denies that the Claimant was terminated on September 15, 2016 or at all, but argues that the Claimant actually deserted duty immediately after the accident that occurred on January 4, 2016.
48. The Respondent's contention is that the Claimant absconded duty and never resurfaced until August, 2016. The question is whether this period of absence would amount to a termination. Firstly, the Respondent confirmed through their witness, RW1 that the Claimant's salary was stopped or not paid from February, 2016. This is further confirmed by the NSSF statement produced in evidence by the Respondent.
49. The Respondent confirmed having taken the Claimant through a disciplinary process after the accident that resulted in stealing of the Respondent's property. The Claimant admitted attending the disciplinary hearing despite not being issued with a show cause letter.
50. The Claimant was after the disciplinary hearing issued with a warning letter, and which was exhibited in Court. The disciplinary process did not result in the Claimant's termination, and hence the issue in this matter is whether the Claimant absconded duty.
51. The Claimant admitted not reporting to work between December 15, 2015 to January 3, 2016. He attributed his absence from duty to an ailment that led to his hospitalization. This period however, was not in dispute in the matter, as the Respondent allowed the Claimant to resume duty when he was discharged from hospital, and he indeed reported to work on January 4, 2016.
52. The evidence before Court shows that the Claimant was admitted at Sagam Hospital between November 30, 2015 to December 18, 2015, and was again admitted on February 20, 2016 and transferred to Busia Hospital on February 22, 2016.



53. The Claimant was at work on January 4, 2016, being the date, he was involved in the accident. He was issued a warning letter dated February 1, 2016, pursuant to a disciplinary process mounted after the accident. The Claimant is then said not to have reported to work thereafter.
54. The Respondent's position is that it was aware of the Claimant's ailment in December, 2015, but was not informed of the hospitalization thereafter.
55. To start with, it is clear that the Claimant's salary was stopped effective February, 2016. The Court record confirms that the Claimant's salary was last paid in February, 2016.
56. In cases where an employer alleges that an employee absconded duty, the employer is tasked to show that it made effort to trace the Claimant/employee before declaring them dismissed. RW1 on cross-examination, confirmed that the Respondent did not make any effort to look for the Claimant when he absented himself from duty.
57. In *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, the Court held:
"It is not enough for an employer to say an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee. It is therefore not enough for an employer to simply state that an employee has deserted duty."
58. Further, Abuodha J. in *Simon Mbiti Mbane v Inter Security Services Ltd* [2018] eKLR stated: -
"An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate the efforts were made to contact such an employee without success."
59. In my view, and going by the documents produced in evidence, the Claimant did not account for his whereabouts in the period between February 1, 2016 to February 21, 2016 and March 2, 2016 to August, 2016. He was evidently readmitted to hospital on February 22, 2016 and discharged on March 1, 2016, only to resurfaced at work in August, 2016.
60. As much as an employer has the responsibility to make an effort to trace an absent employee, the employee in my view, equally has an obligation to inform the employer why he is unable to attend duty. The period between February 1, to August, 2016, is a long time, and the employee cannot just disappear and reappear at will.
61. In *Harrison vs George Wimpey & Co Ltd* (1972) 7 ITR 188, NIRC the Court stated thus;
"Where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract, the contract is then terminated."
62. Further, in *Rodgers Titus Wasike v General Motors E.A Limited* [2017] eKLR, Mbaru J had this to say on abscondment of duty: -
"I find the Claimant was the maker of his own dismissal by his conduct and failure to attend work as required and also by failure to communicate to the employer about his circumstances if indeed he was sick. The Respondent was therefore justified to dismiss the Claimant in this case."



63. It is not disputed that the Claimant was a member of the Bakery Confectionary Manufacturing and Allied Workers Union and that the terms of his employment were regulated by the Collective bargaining agreement (CBA).
64. Clause 42 of the CBA between the Claimant's union and the Respondent, provides that an employee who absents himself from duty without prior permission or lawful cause for more than 14 consecutive days and without notifying the Company, shall be regarded as having left employment, and his services shall be terminated as if he/she had left employment without due and proper notice.
65. Consequently, I find that the Claimant was not terminated, but he instead, absconded duty.

Whether the Claimant is entitled to the Remedies Sought

66. The Claimant's claim is for payment of 3 months' salary in lieu of termination notice, refund of medical expenses, full salary for 30 days and half salary for 20 days when he was admitted in hospital and terminal benefits per CBA.
3 Months' Salary in Lieu of Termination Notice, full salary for 30 days and half salary for 20 days
67. The Claimant's position is that he was entitled to three months' salary in lieu of termination notice.
68. Premised on the finding that the Claimant absconded duty, I find the claim for pay in lieu of termination notice untenable. The claim is dismissed.

Refund of Medical Expenses

69. The Respondent did not dispute being aware of the Claimant's ailment and hospitalization in December, 2015, as it would otherwise not have allowed him to continue working when he returned to work in January, 2016.
70. The Claimant is thus entitled to pay on account of sick leave, and I award him one month salary for the month of December, 2015.
71. The claim for refund of medical expenses was not sufficiently proved. It fails and is dismissed.

Terminal Benefits

72. The CBA provides thus on terminal dues:
"Any employee who is terminated by the company or who resigns by giving proper notice shall be paid terminal dues and benefits."
73. Terminal dues as listed in the CBA include days worked and not paid, house allowance for days worked and not paid, overtime pay, acting allowance if any, safari/meal allowance, tool allowance, shift allowance, disturbance allowance, transfer allowance, accrued leave, leave travel allowance and provident fund contribution.
74. The CBA entitles the Claimant to 15 days pay for every concluded year of service. The Claimant undisputedly completed 13 years of service with the Respondent. I thus deem his claim on this account merited.
75. The Respondent did not disclose how much the Claimant's salary was and no pay slips were produced before this court. The Claimant told the Court that he was paid a daily wage of Kshs 500/-, and which



amount was later increased to Kshs 1259/-, and which amount was his pay as at the time he left the service of the Respondent.

76. It then follows that 15 days pay for every year of service for thirteen years, amounts to Kshs 245,505, and which is hereby awarded.

77. In whole, the Court makes orders as follows:

- i. A declaration that the Claimant was not terminated, absconded duty.
- ii. That the Respondent to pay the Claimant Service pay at Kshs 245,505/-
- iii. Salary for December, 2015 at Kshs 37,770/=
- iv. Half the costs of the suit.

78. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 20TH DAY OF APRIL, 2023.

CHRISTINE N BAARI

JUDGE

Appearance:

N/A for the Claimant

Mr Ouma present for the Respondent

Christine Omolo- C/A

