



Loko v Ouma (Cause 212 of 2018) [2023] KEELRC 905 (KLR) (19 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 905 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 212 OF 2018

JK GAKERI, J

APRIL 19, 2023

BETWEEN

ELIZABETH MUTAVA LOKO CLAIMANT

AND

CATHERINE OUMA RESPONDENT

JUDGMENT

1. The claimant commenced this case by a statement of claim alleging unlawful/wrongful termination of employment claiming, pay in lieu of notice, overtime, service pay and costs.
2. The Respondent employed the Claimant on September 29, 2013 as a house help or domestic worker at a salary of Kshs 10,000/= per month and by March 2014 it had risen to Kshs 12,000/= and by 2016 it stood Kshs 17,000/=.
3. It was the Claimant's testimony that she had a good relationship with the employer and served her faithfully and diligently.
4. It is the Claimant's case that she travelled upcountry for the Easter Holiday due to return on April 17, 2017, a Monday but did not and her phone went off as it had no charge and there was no power.
5. That the Respondent called her on April 18, 2017 at 2 pm when the phone was charging at the Nunguni hospital where her son was recuperating.
6. That she later on called the Respondent who was very annoyed and she reported on the same day but the Respondent refused to pick her calls and she had to spend the night at the Respondent's gate who demanded the keys to the Servant's Quarter on the morning of April 19, 2014 and handed over a handwritten termination notice of even date.
7. It is the Claimant's case that the termination of employment was without notice, she could not communicate as her phone had no charge and reported to work late as she was attending to her ailing parents.



8. She denied having absconded duty.
9. That the employer begrudged her for having reported the misdeeds of her children to her.
10. The Claimant prays for;
 - i. Pay *in lieu* of notice Kshs 19,000/=
 - ii. Leave for 3 years at 21 days per year Kshs 39,000/=
 - iii. Service pay Kshs 28,500/=.
 - iv. Costs of this suit and interest.
 - v. Any other relief the court may deem just and expedient to grant.

Respondent's case

11. In its Memorandum of Reply filed on March 29, 2018, the Respondent admits that the Claimant was her employee from September 29, 2013 to April 19, 2017.
12. That she provided the Claimant with fully furnished separate residence, 21 days leave, shopping voucher of Kshs 5,000/= and cash of Kshs 4,000/= each year, loan of Kshs 15,000/= and Kshs 10,000/=.
13. That the Claimant had a habit of absconding duty and refused to respond to calls and failed to report to work as expected on 17th April, 2017 and was summarily dismissed on 19th April, 2017.
14. The Respondent avers that after the conciliation process, she paid the Claimant Kshs 21,500/= in full and final settlement of her dues and issued a certificate of service on May 10, 2017.
15. That the sum of Kshs 21,500/= was paid in full settlement of the claim against the Respondent and the Claimant was by filing this suit abusing the court process.
16. It is the Respondent's case that the Claimant had one off-day on Saturday from 5 pm to Sunday at 7 pm.
17. The Respondent prayed for dismissal of the Claimant's suit with costs.

Evidence

18. The Claimant admitted that she did not return to work on April 17, 2017 as envisaged and did not notify the Respondent.
19. She confirmed that her telephone number was 0720 344537. She admitted having seen the missed calls from the Respondent on April 18, 2017.
20. It was her testimony that she used to travel from 19th December and return on 2nd January each year as leave.
21. The witness admitted that she reported to work late on April 19, 2017, was paid for the month of April 2017 as well as Kshs 21,500/= at the Labour Office but contested the 34 days leave paid.
22. According to the Respondent, the Claimant was not registered under the NSSF Act.
23. That the Claimant did not report to work on April 18, 2017 and the Respondent was unaware that she was at the gate.



24. The witness corroborated the Claimant's testimony that she demanded the keys to the servant's quarter which were in the Claimant's possession.
25. That she paid other dues other than notice, service pay and unfair termination.

Claimant's submissions

26. The Claimant's counsel addressed two issues touching on termination and the reliefs sought.
27. As regards termination, counsel faulted the Respondent for backdating the termination from 19th April to April 17, 2017.
28. Counsel submitted that the Claimant reported to work on April 18, 2017 as agreed.
29. The decision in *Josephat Otieno Kongo V Riley Services Ltd* (2022) eKLR was relied upon on backdating of termination of employment.
30. Reliance was made on the provisions of Section 49(1)(c) of the *Employment Act, 2007* to urge that the Claimant was entitled to compensation for unfair termination of employment.
31. That the Respondent neither gave the Claimant a termination notice nor take her through a hearing.
32. Counsel urged the court to award 12 months compensation.
33. As regards NSSF contributions, counsel relied on the decision in *Koech v Kipkales & another t/a Kale Maina & Bundotich Advocates* (2022) eKLR where the court awarded service pay for 2 years.
34. The Claimant prayed for Kshs 28,500/=.
35. Finally, counsel relied on the decision in *Jasbir Singh Rai & 3 another v Tarlochan Singh Rai & 4 others* (2014) eKLR to urge that costs follow the event.

Respondent's submissions

36. By March 21, 2023 when the court retired to prepare this judgement, the Respondent's counsel had not filed submissions.
37. A hard copy dated March 23, 2023 was delivered on March 28, 2023.

Determination

38. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair or she absconded duty.
 - ii. Whether the Claimant is entitled to the reliefs sought.
 - iii. Whether the certificate of payment dated May 10, 2017 discharged the Respondent against other claims by the Claimant.
39. As to whether the Claimant deserted duty or her employment was unfairly terminated, parties adopted opposing positions with the Claimant denying that she absconded duty in that she was away from April 14, 2017 and returned on the evening of April 18, 2017 but was not allowed into the Respondent's compound until the morning of April 19, 2017, having spent the night outside in the cold. This



evidence appears credible to the extent that when the Respondent called her in the morning, she reported for duty.

40. The Respondent on the other hand relied on call log and phone messages to urge that the Claimant deserted the work place. It is true that the Respondent called the Claimant on April 18, 2017 but could not reach her and the Claimant testified that she saw the calls after charging the phone and the two talked later.
41. It is not in dispute that the Claimant was not at the work place on April 18, 2017.
42. According to *Black's Law Dictionary*, 10th Edition, desertion means;

“The wilful and unjustified abandonment of a person’s duties or obligations.”
43. The often cited South African case of *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court stated;

“... 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.”
44. From the evidence on record, it is clear that the Respondent took reasonable steps to ascertain why the Claimant was not at her place of work and the two communicated and the Claimant agreed to resume duty but was not seen by the Respondent until the morning of April 19, 2017 when her employment was summarily dismissed.
45. See *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR, see also *Judith Atieno Owuor v Sameer Agriculture and Livestock Ltd* (2020) eKLR.
46. The fact that the Claimant reported to the place of work one day late clearly shows that she had no intention to desert duty.
47. For the above stated reasons, it is the finding of the court that the Respondent has failed to demonstrate that the Claimant deserted duty.
48. Having so found, I will now proceed to determine whether termination of the Claimant’s employment was unfair.
49. Both the provisions of the *Employment Act, 2007* and judicial authority are consistent that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as follows;

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
50. The court is in agreement with these sentiments.
51. In the instant case, the reason for termination was that the Claimant did not notify the Respondent that she was not in a position to report to work as agreed and the letter was unambiguous that the Respondent had made the same very clear previously.



52. Regrettably, the Claimant did not call the Respondent even after her phone was charged.
53. It cannot be belaboured that it was the Claimant's duty to inform the Respondent that she could not make it on that day and did not bother.
54. The Claimant's failure to notify the Respondent that she would report late, in the court view amounted to neglect of duty on her part. Even if her phone had no charge, she ought to have endeavoured to make the employer aware that she would not report to work. She had a contractual engagement, the hospital visitation notwithstanding.
55. Evidence on record reveals that the Claimant was a diligent employee and the Respondent treated her well with a fully furnished living quarter and salary increments and annual shopping vouchers.
56. The court is satisfied that a reasonable employee in the circumstances of the Respondent would have terminated the Claimant's employment as she did having not been the first time.
57. However, even if the Respondent may have had a reason to terminate the Claimant's employment, she did not guarantee her procedural fairness.
58. The court is guided by the sentiments of Onyango J. in *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd* as follows;

“Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act, 2007*. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it accorded the claimant a fair hearing prior to her termination.”

59. These sentiments apply on all fours to the facts of the instant case.
60. The Claimant was dismissed on the morning of April 19, 2017 without notice or hearing and thus in contravention of the provisions of the *Employment Act, 2007* on procedural fairness.
61. For the foregoing reasons, it is the finding of the court that the Respondent has failed on a balance of probabilities to demonstrate that termination of the Claimant's employment was procedurally fair.
62. Finally, as to whether the certificate of payment executed by the parties on May 10, 2017 waived the Claimant's right to pursue further claims against the Respondent, the court proceeds as follows;
63. While the Respondent pleaded and testified on this issue, the Claimant neither acknowledged its existence nor submitted on it.
64. The principles governing the implications of a discharge voucher or settlement agreement between parties are well settled.
65. In *Coastal Bottlers Co. Ltd v Kimathi Mithika* (2018) eKLR, the Court of Appeal faced with a similar issue stated as follows;

“Firstly, the competency of the suit was attacked on the basis of the settlement agreement which the appellant believed took away the Respondent's right to make further claims. While considering the said agreement, we bear in mind that employment contracts are governed by the general law of contracts. This much was restated by this court in *Krystalline Salt Ltd V Kwekwe Mwakele & 67 others* (2017) eKLR . . .”



66. Further;

“Whether or not, a settlement agreement or discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”

67. From the foregoing, it is clear that whether or not a discharge voucher or settlement agreement discharges the Respondent from further claims or liability depends on the facts of the case.

68. Evidently, the court must be satisfied that the agreement or voucher was freely and willingly executed and the employee was well seized of all the relevant information and knowledge as held in Thomas De La Rue V David Opondo Omutelema (2013) eKLR.

69. Needless to emphasize, a discharge voucher or settlement agreement is a binding agreement between the parties thereto. (See Trinity Prime Investment Ltd V Lion of Kenya Insurance Co. Ltd (2015) eKLR).

70. In the instant case, it is not in dispute that the parties executed a settlement agreement styled as certificate of payment on May 10, 2017 in the presence of the County Labour Officer, Nairobi, one Ms. Shiphira Kingori and all signed the certificate which stated *inter alia*

Date: 10/5/2017

Certificate Of Payment

Madam Catherine Ouma

Vs

Elizabeth Mutava Loko

This is to certify that Elizabeth Loko Holder of ID/Card No. 21852250 has been paid his/her terminal benefits/salary/leave amounting to Kshs 21,500/=.

Breakdown as follows:-

1.
2.
3.
4.
5.
6. ...Leave pay for 34 days.....

Total Kshs 21,500/=

Net payment Kshs 21,500/=.

This is in full and final settlement of the case and that the employee will not have any other claims against the employer after this payment.

Employee Elizabeth Loko



Employer Catherine Ouma

Witnessed by

Ms. Shiphira Kingori

For, County Labour Officer

NAIROBI

71. The court is persuaded that Claimant and the Respondent agreed in the presence of a Government Officer that the sum of Kshs 21,500/= paid for 34 days leave waived the Claimant's right to pursue further claims against the Respondent.
72. Although the Claimant averred that she did not expect fair administrative action from the Labour Officer and the same was biased against her, and was not heard since the Respondent had allegedly telephoned the department beforehand, the Claimant did not adduce any evidence to puncture the settlement agreement on recorded. She tendered no evidence on the alleged bias or telephone call by the Respondent. The averments were unsupported by evidence.
73. Relatedly, the Claimant neither pleaded misrepresentation, duress, undue influence or mistake which would have been a vitiating element of the agreement.
74. Significantly, being the person who had approached the Labour Office, the Claimant was at liberty to withdraw the complaint at any time before a settlement was reached or express displeasure with the outcome. She did not.
75. There is no evidence to show that she did not read or did not understand the import of the document. She voluntarily executed the agreement and gladly received the amount of Kshs 20,000/= via Mpesa and Kshs 1,500/= in cash on the same day from the Respondent and filed the instant suit 9 months later.
76. This court, in the circumstance is obligated to give effect to the intentions of the parties discernible from the settlement agreement as held by the Court of Appeal in *Damodar Jhabhai & Co. Ltd & another V Eustace Sisal Estates Ltd (1967) EA 153*.
77. Having found that the parties executed the settlement agreement freely and voluntarily while aware of its implications, it is the finding of the court that the Claimant waived her rights to make other claims against the Respondent in relation to the employment relationship.
78. In conclusion, the suit herein is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH 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.

