



**Kenya Union of Commercial Food and Allied Workers v Amus Motors Limited
(Cause 1721 of 2017) [2023] KEELRC 860 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 860 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1721 OF 2017**

**SC RUTTO, J
APRIL 14, 2023**

BETWEEN

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

AND

AMUS MOTORS LIMITED RESPONDENT

JUDGMENT

1. The suit was instituted by the claimant on behalf of the grievant, Mr Francis Vusakha Shahaga. It is averred that the grievant who was a paid-up member of the claimant union, was employed by the respondent as a mechanic with effect from April, 1990. That on February 18, 2016, the grievant was abruptly ordered to take off his overall and leave with immediate effect without being offered any reason for such a drastic action. That he was ordered to report back on February 20, 2016 but on the said date, he was locked out and to date he has no idea why he was locked out. The claimant has attributed this to the grievant’s union membership. It is against this background that the claimant has sought on behalf of the grievant the sum of Kshs 611, 693.00 being notice pay, 20 days worked, leave days for one year and compensatory damages.
2. The claim was opposed through the respondent’s Memorandum of Response dated March 26, 2018. Through the response, the respondent denies recognizing the claimant union and averred that the grievant deserted duty on February 1, 2016 and reported to the office on February 18, 2016, demanding his dues. That he did not explain his absence for the two weeks he was away. That the grievant was then asked to report back on February 20, 2016 when he was fully paid all his salaries. The respondent further denied locking the grievant out of his employment. It is for this reasons that the respondent has asked the Court to dismiss the claim with costs.
3. The matter came up for hearing on November 1, 2021 and the respondent was absent from Court. Being satisfied with the return of service and being guided by Rule 22 of this Court’s Rules, the Court



directed that the matter proceeds, the respondent's absence notwithstanding. On July 6, 2022, both parties informed Court that they had consented to reopen the case and have the respondent cross examine the grievant and to be allowed to present its defence. Subsequently, on November 3, 2022, the matter proceeded for further hearing whereupon trial closed.

Claimant's case

4. At the outset, the grievant sought to rely on his Supporting Affidavit sworn on August 24, 2017, to constitute his evidence in chief. He further produced the documents filed together with his Claim as exhibits before Court.
5. He testified that all through his employment, he did not have any negative reports in his file hence he had a clean record. That sometimes in February, 2011, together with other employees, he enrolled as a member of the claimant union. That upon the claimant forwarding the names as they appeared in the check off form, the respondent through Mr Bharat Shah forced all the workers to sign an already prepared consent withdrawing membership from the claimant union. That from June, 2010 upto February 20, 2016, he was a paid up member of the claimant union hence is entitled to its representation.
6. That on February 18, 2016, Mr Bharat Shah, the Director of the respondent went to the garage where he was working and ordered him to take off his overall and leave with immediate effect and report back on February 20, 2016. That on February 20, 2016, he reported to work as usual, dressed in his overall, to begin the day. That when Mr Bharat saw him, he ordered him to take off his overall and leave. That Mr Bharat did not accuse him of any wrongdoing and he does not know why he was dismissed from employment. That further, he was not paid his dues.
7. That subsequently, he had no option but to report the issue to his union who took up the issue with the respondent. That the claimant union reported a trade dispute resulting in conciliatory meetings being scheduled, but the respondent failed to attend the said meetings hence the conciliator issued a referral certificate dated June 16, 2017.

Respondent's case

8. The respondent called oral evidence through Mr Bharat Shah who testified as RW1. He identified himself as the Chief Executive Officer (CEO) of the respondent. Similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
9. RW1 denied the grievant's assertions that he was forced to write a letter withdrawing from the claimant union. That further, the respondent never wrote any letter on behalf of its employees to the claimant union.
10. That there was no separation between the respondent and the grievant save that he deserted duty without informing the respondent of his absence for two weeks. That it appeared that he had gotten a job elsewhere and the respondent filled the grievant's position with another employee. That the grievant only turned up to claim his benefits. That he requested the grievant to report on February 20, 2016 to collect his dues. That the grievant reported back and he was paid all his dues and he took off.
11. It was RW1's further evidence that the grievant was not wrongfully dismissed as he deserted duty hence his Claim is malicious and misplaced.



Submissions

12. The claimant submitted that the grievant was terminated verbally and the respondent failed to give him reasons or a chance to be heard or make his representation as required under Section 41 of the *Employment Act*. That the respondent has not produced evidence to show that they followed procedure before terminating the employment of the grievant. Placing reliance on the cases of *Felistas Achella Ikatwa v Charles Peter Otieno* (2018) eKLR, *Joseph Nzioka v Smart Coatings Limited* (2017) eKLR and *Simon Mbiti Mbane v Inter Security Services Limited* (2018) eKLR, it was submitted by the claimant that the mere assertion that an employee deserted duty without any proof of an attempt to reach or contact the employee falls below the standards set out by the Court.
13. On its part, the respondent submitted that the grievant was not terminated at all. That he absconded duty for weeks without any notification whatsoever or any justifiable reasons and only surfaced claiming his dues. That upon resurfacing, the respondent gave him a chance to give his reasons for absconding duty which he declined to do and on further enquiry, he appeared to have gotten a job elsewhere.
14. Citing the case of *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR, the respondent submitted that he who asserts must prove. That Section 47(5) of the *Employment Act* binds the claimant at the onset to bring out the case of unlawful termination of employment. That the claimant has failed to satiate the burden of proof of unlawful termination as provided under Section 47(5) of the *Employment Act*. That he has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability.
15. It was further submitted by the respondent that the grievant could not be reached and only resurfaced after weeks. That the respondent made an effort to inquire on the issue of absenteeism but was not ready or interested to spill his reasons. In support of its position, the respondent cited the case of *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* (2021) eKLR.

Analysis and determination

16. From the pleadings on record as well as the evidentiary material placed before the Court, the following issues stand for determination: -
 - a. Whether the grievant deserted duty or was terminated from employment.
 - b. If terminated, was the grievant's termination fair and lawful?
 - c. Is the grievant entitled to the reliefs sought?

Desertion or termination from employment?

17. It is the claimant's case that the grievant was asked by RW1 to take off his overall and leave his work premises on two occasions being, February 18, 2016 and February 20, 2016. This assertion was disputed by the respondent, maintaining that the grievant absconded duty with effect from 1st February, 2016 and only appeared on February 18, 2016 to demand for his dues.
18. The *Employment Act, 2007*, has placed the heaviest responsibility on an employer to prove the reasons for an employee's termination, the procedure applied in effecting such termination and maintenance of employment records. In this regard, the respondent had the onus to provide the attendance records between February 1, 2016 upto February 18, 2016 to indeed prove that the grievant was out of his work station without permission.



19. Having averred in its defence that the grievant was absent from work from February 1, 2016, it was upon the respondent to prove the same. After all, it is the custodian of employee records. Any absence of an employee is a fact that it could easily prove. In this case, the respondent did not tender any proof of desertion by the grievant.
20. Above and beyond, the respondent did not indicate, let alone suggest that upon noting that the grievant had deserted duty, it made attempts to establish his whereabouts. It is expected that where an employee deserts duty, an employer would take reasonable steps to ascertain his or her whereabouts. After all, anything could have befallen the employee. It may not be a case of desertion, in all circumstances.
21. On this issue, I draw guidance from the case of *Mary Mumbi Kariuki v Director, Pamoja Women Development Programme* [2015] eKLR, where the Court determined that: -

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”
22. In this case, the respondent stated that it had no means of ascertaining the grievant’s whereabouts. This cannot be. The parties had been in an employment relationship for close to 26 years hence had established channels of communication.
23. Accordingly, and if at all acting prudently, the respondent ought to have employed the established means of communication and invited the grievant to explain his whereabouts for the two weeks he was allegedly away.
24. In absence of evidence that the grievant was absent from duty without permission and the respondent having failed to prove that it attempted to establish his whereabouts, I am led to conclude that the claimant’s version of events that he was terminated from employment, is more probable.

Was the grievant’s termination fair and lawful?

25. Section 43(1) of the *Employment Act*, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination unfair. In addition, Section 45 (2) of the *Employment Act*, renders a termination of employment unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee’s conduct, capacity or compatibility; or based on its operational requirements.
26. As stated herein, it was the respondent’s case that the grievant deserted duty from February 1, 2016 upto February 18, 2016. Despite this assertion, the respondent has not adduced any evidence to back up the same. As stated herein, the respondent did not produce the relevant work attendance records for the period it alleges the grievant was absent.
27. Subsequently, it failed to discharge its evidential burden under Section 43(1) of the *Employment Act* by proving the alleged desertion on the part of the grievant.
28. In any event, absence from work without permission constitutes one of the grounds for dismissal under Section 44(4)(a) of the *Employment Act*, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted



- duty. The employer alleging desertion ought to demonstrate the steps undertaken in ascertaining the whereabouts of such an employee and putting him or her on notice that it is considering termination of employment on account of the said desertion.
29. Hence, if indeed, the grievant was absent from work without permission, why didn't the respondent exercise this option under the [Employment Act](#) and put him on notice that his employment was bound to be terminated if he failed to show cause why he deserted work?
 30. Further, in the event the grievant deserted duty, then the respondent being the employer was required by law to subject him to due process. As per the provisions of Section 41 of the [Employment Act](#), the respondent ought to have notified the grievant of the reasons for which it was considering terminating his employment. This would have been followed by a hearing in which the grievant would have been given an opportunity to present his defence and explain his desertion.
 31. As a matter of fact, the respondent stated that the grievant resurfaced on February 18, 2016, why wasn't he required at that juncture to explain his absence? Indeed, RW1 testified under cross examination that he did not issue the grievant with a notice to show cause or subjected him to a disciplinary hearing when he resurfaced.
 32. In this case, if at all the grievant was absent from work without permission as alleged, the respondent had all the right as an employer to subject him to a disciplinary process in line with the requirements of Section 41 of the [Employment Act](#).
 33. In absence of any proof of compliance with the mandatory provisions of Section 41 of the [Employment Act](#), I cannot help but find that the respondent is at fault.
 34. The total sum of the foregoing is that the reasons for the grievant's termination have not been proved and there is no evidence that he was given an opportunity to present his explanation or defence prior to termination.
 35. In the end the Court finds that the grievant was unfairly and unlawfully terminated from employment contrary to Sections 43(1) and 45(2) of the [Employment Act](#).

Reliefs

36. Having found that the grievant's termination was unfair and unlawful, I will award him compensatory damages equivalent to eight (8) months of his gross salary. This award has been informed by the length of the employment relationship which spanned close to 26 years and the fact that the respondent did not prove that there was justifiable cause to terminate the employment of the grievant and that in so doing, applied a fair process.
37. As the Court has found that the grievant's termination was unlawful, he is awarded one (1) month's salary *in lieu of* notice.
38. The grievant is further awarded leave days for one year as the respondent did not produce his leave records in line with its obligation under Section 74 (1) (f) of the [Employment Act](#) to prove his outstanding leave days, if any.

Orders

39. To this end, Judgment is entered in favour of the claimant against the respondent and the grievant is awarded: -



- a. Compensatory damages in the sum of Kshs 184,000.00 which sum is equivalent to eight (8) months of his gross salary.
- b. One (1) month's salary in lieu of notice being Kshs 23,000.00.
- c. Leave days in the sum of Kshs 16,100.00.
- d. The total award is Kshs 223,100.00.
- e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
- f. The claimant shall also have the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of April, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr Macharia

For the Respondent Dr. Nyaberi

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

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